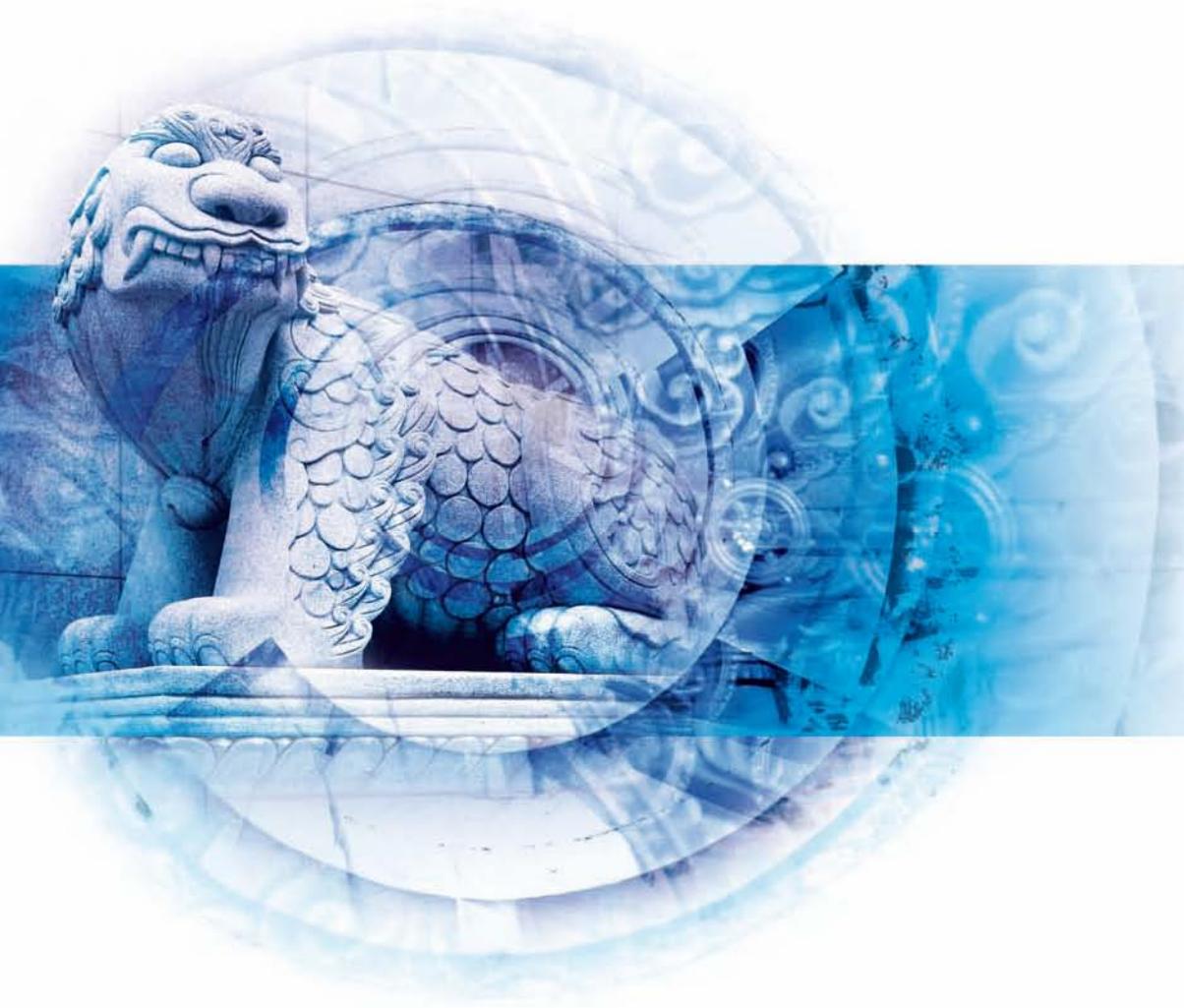




# LITIGATION IN KOREA

Edited by Kuk Cho



ELGAR KOREAN LAW

# Litigation in Korea

## ELGAR KOREAN LAW

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# Litigation in Korea

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*Edited by*

**Kuk Cho**

*School of Law, Seoul National University, Korea*

ELGAR KOREAN LAW

**Edward Elgar**

Cheltenham, UK • Northampton, MA, USA

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Published by  
Edward Elgar Publishing Limited  
The Lypiatts  
15 Lansdown Road  
Cheltenham  
Glos GL50 2JA  
UK

Edward Elgar Publishing, Inc.  
William Pratt House  
9 Dewey Court  
Northampton  
Massachusetts 01060  
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2009938400



ISBN 978 1 84844 339 6

Typeset by Cambrian Typesetters, Camberley, Surrey  
Printed and bound by MPG Books Group, UK

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# Preface

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The nationwide ‘June Struggle’ of 1987 led to the collapse of Korea’s authoritarian-military regime and opened a road toward democratization. Korea has achieved political democracy following rapid economic growth. These changes were accompanied by the change of law and legal system.

Since 1987, the rule of law has rapidly replaced the rule of man and the procedural democracy has been taken seriously in Korea. Throughout the democratization process of the nation, litigation has played a crucial role as an instrument to solve most challenging civic and social conflicts with much greater and multifaceted ramifications in the nation’s political, constitutional, societal and cultural domains.

The legal structure and the adjudicatory institutions surrounding litigation have been also reconstructed. For example, Korea’s Code of Civil Procedure has been revised and its focus has shifted from the written dossiers to the oral elements of the litigation including oral testimony in a concentrated, continuous and uninterrupted trial that is open to the public as a matter of principle, for further openness and transparency. The Code of Criminal Procedure has been substantially reshuffled particularly in the field of procedural rights and evidence law. A jury system was recently introduced for the first time in the nation’s legal history in serious felony cases in 2008. The Constitutional Court, which was established by the 1987 Constitution, has vigorously reviewed the constitutionality of legislation by the nation’s legislative body, the National Assembly. The Administrative Court, which was newly established in 1994, has actively checked administrative discretions for possible abuses thereof.

There has been a longstanding demand both domestically and overseas for a publication on this subject in the English language, from scholars and students, governments and lawyers. This book is the first publication in the English language that provides a comprehensive picture of litigation in Korea and the relevant laws, institutional designs, judicial institutions and some of the important court decisions. The authors of this book are selected from among promising legal scholars and judges in Korea who have gained their legal education in the Anglo-American traditions. I am grateful to them for their unfailing cooperation. I should like to express my particular thanks to Professor In Seop Chung of the School of Law, Seoul National University. When he was a director of the Law Research Institute, Seoul National

University, he first suggested the publication of this book and has been supportive and encouraging. The *Journal of Korean Law*, which is published by the School of Law, Seoul National University, has kindly allowed me to include the authors' articles in this book.

Kuk Cho  
July 2009



# 1. Litigating in Korea: a general overview of Korean civil procedure

**Youngjoon Kwon**

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## I. INTRODUCTION

In the aftermath of the Korean War that literally devastated the whole nation a half century ago, the Republic of Korea miraculously grew up from one of the poorest nations into the 13th economy in GDP as of 2007. Along with an established industrial economy, Korea has also changed dramatically during the last few decades in the political environment, broadening and deepening its democracy. These political and economic infrastructures laid a solid cornerstone for the rule of law. Drawing on the experiences of other nations and creatively adapting these lessons in its own context, the Korean legal system has also been developing into a firm and sound one. Consequently, the Korean judiciary is gradually increasing its scope of influence in response to the enhanced demand of the people calling for a more reasonable and fair society.

With regard to dispute resolution, the rule of law seems to play an even more significant role. In the past, based on the Confucian heritage,<sup>1</sup> a great number of disputes were settled by *de facto*, informal mediators like elder members of the community or family without making their way to the court.<sup>2</sup> Yet, with western cultures and thoughts gradually gaining ground in Korean society and a modern legal system standing firm as a central mechanism of dispute resolution, more and more disputes are resolved by law, instead of informal reconciliation. Individuals are showing more willingness to bring their civil disputes to the court. This, in turn results in a tremendous increase in caseload.<sup>3</sup> Accordingly, the body of law governing civil dispute resolution

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<sup>1</sup> Nam Hyeon Kim, Jaes A. Wall, Jr, Dong-Won Sohn and Jay. S. Kim (1993), *Community and Industrial Mediation in South Korea*, 37 *J. Conflict Resol.* 361.

<sup>2</sup> Lisa Blomgren Bingham, Sun Woo Lee and Won Kyung Chang (2007), *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 *Pac. McGeorge Global Bus. and Dev. L.J.* 375, 381–2.

<sup>3</sup> The total number of civil cases filed in 2002 was 1,015,894. It increased to 1,288,987 in 2006. See [www.scourt.go.kr/scourt\\_en/jdc\\_info](http://www.scourt.go.kr/scourt_en/jdc_info) for more information.

is becoming even more significant. Arguably, the Korean Civil Procedure Act is the most fundamental and essential field of law in the realm of dispute resolution.

However, it is quite shocking to realize the rarity of the relevant legal literatures in English that offer a general explanation on how Korean civil procedure functions.<sup>4</sup> Therefore, it is pertinent that Korean civil procedure be introduced and analyzed in the language people outside the nation can understand. As one might predict at this point, this chapter intends to be an initial point of reference for foreigners embarking on study or research of Korean civil procedure law, by providing a general overview. Therefore, this chapter will rather focus on giving readers a general picture of civil litigation based on Korean civil procedure, rather than delving into specific and sophisticated legal issues. Besides outlining the general proceedings of litigation and clarifying their theoretical basis, this chapter also provides some observations as to the practical aspects of civil procedure in order to give readers some sense of how litigations in Korea are performed in practice.

With this in mind, this chapter is structured as follows. Part II describes the basic features of the Korean Civil Procedure Act, including its history, guiding principles, and structure. Part III explains the critical concepts and relevant issues regarding the initial stage of litigation, such as a complaint, parties, jurisdictions and legal costs. Parts IV and V deal with pre-trial and trial proceedings. Important issues concerning pleading and evidence will be elaborated on. Part VI outlines the final stage of litigation as well as other issues to be followed afterwards. It illustrates how judgments are rendered, what effects they take, and how one can challenge them. Part VII deals with issues of settlement, enforcement and the recognition of a foreign judgment. Finally, Part VIII concludes the chapter with a summary, and adds a short prediction on how Korean civil procedure will in the near future serve the ideals it declares.

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<sup>4</sup> *Korean Law in the Global Economy* (1996), edited by Song, Sanghyun, a former professor at the college of law, Seoul National University, and currently judge of International Criminal Court, is by far the most comprehensive literature to feature Korean law for English readers. In this book, several articles are devoted to civil procedure related subjects, such as a small claims act, or a commercial arbitration. However, it is not easy to find out an English text that provides a comprehensive, bird's-eye view of Korean civil procedure.

## II. BASIC FEATURES OF THE KOREAN CIVIL PROCEDURE ACT

### 1. History

#### A. Pre-modern era

Korean history dates back to B.C. 2333, when the first state, Kojoseon, was established. The judicial tradition of Korea is as old as this, for Kojoseon had its own statutory law.<sup>5</sup> Ever since, Korea has developed its own judicial system. During the Chosun dynasty that lasted until 1910, it was governmental officials who were in charge of adjudicating civil law suits. The distinction between civil and criminal procedure was not clear-cut. Appeals were allowed, and the case could go as high as to the King. There were no full-time judges, not to mention a separate judicial branch. It was not until 1894 that the first modern system separating the judiciary from other branches of the state was initially introduced, when King Kojong introduced the 14 Articles of Hongbum. Based on this, the first court in a modern context was established in Seoul in 1895.

#### B. Japanese colonization period

In the wake of imperialism's grip over the world, Japan forcefully annexed Korea in 1910. This colonization period lasted until 1945, the year the Second World War was put to an end. During this period, Japanese laws were in force according to a Japanese government decree. Since the Japanese legal system was strongly rooted in the continental civil law system, Korea was also influenced by this tradition. Thus, the Korean civil procedure is said to be based on the continental law system as well.

Civil procedure law was no exception to this. From the perspective of comparative law, the Japanese civil procedure code was influenced by the German civil procedure Act of 1877. This inevitably left indelible footprints on the Korean civil procedure law. It is no wonder that a substantial portion of legal academia on civil procedure still consults German literature when handling domestic issues.

#### C. The enactment of the Korean Civil Procedure Act

After regaining independence from Japan in 1945, the law of the former occupying country needed to be replaced with a new one. The Constitution of the

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<sup>5</sup> This law consists of eight articles. Only three articles are available at present. They are about capital punishment for murder, compensation with grains for personal injury, and the enslavement of thieves.

Republic of Korea was promulgated on 17 July 1948. Shortly after, a newly formed commission began to work on drafting various Acts including a civil procedure Act. After many twists and turns, the Korean Civil Procedure Act (hereinafter ‘the KCPA’) was first enacted as of 1 July 1960. Japanese civil procedure law had to remain tentatively in force until the enactment of the new code. Since the enactment of the KCPA, it has been amended 14 times. The most dramatic reform in the civil procedure was made in the year 2002, emphasizing the pre-trial phase and the concentration of the trial for the sake of efficiency as well as separating the civil execution part from the code.

The KCPA is the most significant body of law that primarily governs the civil procedure in Korea.<sup>6</sup> The Rules of Civil Procedure (hereinafter ‘the RCP’) has been promulgated by the Supreme Court of Korea, and serves as supplemental rules to the KCPA. As mentioned above, the Civil Execution Act has been enacted as of 2002 to govern the area of enforcement. Procedures regarding family litigation are regulated by the Family Litigation Act. Likewise, bankruptcy and restructuring proceedings are governed by the Bankruptcy and Rehabilitation Act.

## **2. Guiding Principles**

As Article 1 of the KCPA puts it, the court should strive to enhance fairness, swiftness and efficiency in civil proceedings. This summarizes the guiding principles that permeate the whole process.

### **A. Fairness**

Fairness is the essence of civil procedure. To find out the truth in a just way is the ultimate purpose of the procedure. It is no exaggeration to say that nearly every provision incorporated in the KCPA is directed at attaining fairness.

Substantive fairness – finding out the truth and drawing a just conclusion – is the first type of fairness to be achieved in the civil procedure. To make this goal feasible, parties are allowed to submit every possible argument and evidence to clarify the facts. Moreover, the law obliges the court to acquire information from parties firsthand (Article 204).<sup>7</sup> Whenever it is necessary to clarify facts or the point of pleading, a presiding judge may take suitable measures such as asking questions or urging parties to clarify obscure things (Article 136). Appeals are another means by which true fact-finding and a just conclusion can be secured.

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<sup>6</sup> The full text of the KCPA in English can be found on the official website of the Korea Legislation Research Institute at [www.klri.re.kr](http://www.klri.re.kr).

<sup>7</sup> Unless otherwise stated, the article numbers refer to those in the KCPA.

Procedural fairness – observing neutrality and treating parties equally – is another type of fairness to be considered. The principal objective of procedure law is to give parties an equal and fair opportunity to present their cases to a non-prejudiced tribunal. In this context, Korean civil procedure is based on an adversarial model, as opposed to an inquisitorial model. The parties play a primary role in the process, while the judge plays only a passive role. The court should stay neutral and is not allowed to step in and side with one of the parties. It is also a procedural reflection of self-determination. It is the party who determines the beginning, subject-matter, and the termination of the proceedings. It is also the party who presents facts and submits relevant evidence. Parties should be given the same degree of protection and access to the process.

There is delicacy between these two notions of fairness. Tipping toward procedural fairness might harm the goal of finding out truth, especially when a party is not capable enough to perform procedural acts properly by himself. Tipping toward substantial fairness might be helpful in drawing a right conclusion, but might endanger procedural fairness when the court aggressively intervenes in the proceedings to reach what it considers a right conclusion. The KCPA Article 136, the clause that provides a basis for the intervention of the court to clarify pleadings by parties as well as setting forth its limitation, is a sort of an equilibrium balancing these two values.

## **B. Swift and efficiency**

Justice delayed is justice denied. Article 27 of the Constitution of Korea clearly declares that citizens shall have the right to a speedy trial. This idea is implemented throughout civil procedure. Parties bear responsibility of timely presentation of pleadings (Article 146). Failure to make pleadings or appear on the date of pleadings may result in disadvantageous treatments (Articles 146, 150, 268). The KCPA also prescribes a certain period for the rendering of the judgment (Article 199).<sup>8</sup>

Efficiency is another value to be pursued. Although efficiency sometimes needs to be balanced against fairness, reducing the administrative cost of adjudication is arguably one of the most significant ideals to be pursued. The most notable feature of Korean civil procedure in the context of efficiency is the Small Claims Trial Act, which features an expeditious and convenient process.<sup>9</sup> This process was first introduced in 1973, mainly to remove the

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<sup>8</sup> It provides that judgment shall be rendered within five months from the date of the file. However, this is construed as a recommendatory provision.

<sup>9</sup> Small claims cases are cases in which the plaintiff claims payment of money, fungibles, or securities not exceeding 20 million Korean won (equivalent to approximately 19,800 U.S. dollars, as of 15 July 2008).

delays, complexities and costliness of regular trials by providing people with an accessible, simple, speedy and inexpensive mechanism for minor dispute resolutions.<sup>10</sup> In a small claims trial, the plaintiff can institute an action by making an oral statement to the court clerk instead of filing a written petition to the court. Once it is filed, the court may first render a decision recommending the defendant to perform her obligation based on the complaint, without waiting for the response of the defendant. If the defendant does not want to accept the recommendation as it is, she may raise an objection to the decision. Practically speaking, a great portion of small claims cases are resolved at the stage of recommendation. A restriction on the legal representative is eased, allowing persons in certain family relations with the party to represent her without the permission of the court. Evidence rules are less stringent. Although the judge must give a written judgment at the end of a hearing, she is not required to state the reasons in writing. The grounds for final appeal are strictly limited. Also worth noting are the amendments of the KCPA in 2002, focusing on streamlining the whole process. The new case management model which has been introduced by the amendment focuses on enhancing efficiency by requiring timely measures by the party at each phase of the proceedings and minimizing the number of hearing dates supported by substantial pre-trial pleadings.

### 3. Judicial System

Indispensable to an understanding of a civil procedure is familiarity with the judicial system in which the civil procedure fits. Below are the basic features of the Korean judicial system, focusing on a court system and judges.<sup>11</sup>

#### A. Court system

According to Article 101 of the Constitution of Korea, courts are endowed with power to adjudicate all legal disputes.<sup>12</sup> To perform this mission, the

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<sup>10</sup> See Ogon Kwon (1996), *Small Claims Courts in Korea and the U.S.; A Comparative Analysis*, in Sanghyun Song (ed.), *Korean Law in the Global Economy*, p. 451.

<sup>11</sup> Comprehensive information on the Korean judicial system can be found at [www.scourt.go.kr](http://www.scourt.go.kr), the official website of the Supreme Court of Korea, as well as [www.ccourt.go.kr](http://www.ccourt.go.kr), the official website of the Constitutional Court of Korea. Also see Young-Hee Kim (2002), Introduction to Korean Legal Materials, 2 *Journal of Korean Law* 1, 125, for more information on research sources of Korean law in English.

<sup>12</sup> However, there are some exceptions as well. The power and authority to adjudicate on the constitutional issues lie with the Constitutional Court. The Constitutional Court deals with cases concerning the constitutionality of a law, impeachment, dissolution of a political party, competence disputes between state agencies, between state

Court Organization Act of Korea sets forth the basic structure of the court system. According to this Act, the courts operate in a three-tier system.

At the root level is the district court. Currently, there are 13 district courts nationwide, each of which represents their respective geographical area. Branch courts, family branch courts, and municipal courts are established under the district courts upon necessity. Family courts and administrative courts are also on the level of District Courts. District courts are the courts of first instance, exercising general original jurisdiction. In principle, a single judge presides over a case. However, a panel of three judges is in charge of cases when the sums in dispute exceed 100 million Korean won<sup>13</sup> or if the money involved is incalculable.

At the appellate level is the High Court. The high court serves as the court of appeal. Five high courts are located in major cities of Korea – Seoul, Busan, Daegu, Gwangju and Daejeon.<sup>14</sup> However, it should be noted that high courts are not the only appellate courts in the Korean system. The High Courts hear all the appeals from judgments by a panel of three judges, and the appeals from judgments by a single judge when the amount in dispute exceeds 50 million Korean won. Yet appeals from other judgments that have been rendered by a single judge will be heard by an appellate panel in district courts. In this sense, appellate jurisdiction in civil cases is divided among high courts and district courts.

At the highest level is the Supreme Court. It serves as the court of last resort. The Supreme Court is comprised of 13 Justices, including the Chief Justice. This court hears appeals from the High Courts and the Patent Court. It also hears appeals from District Courts or Family Courts when they adjudicate as courts of appeals. The grounds for appeal to the Supreme Court are limited by the law.<sup>15</sup> If the appeal does not contain the cause enumerated by law, the

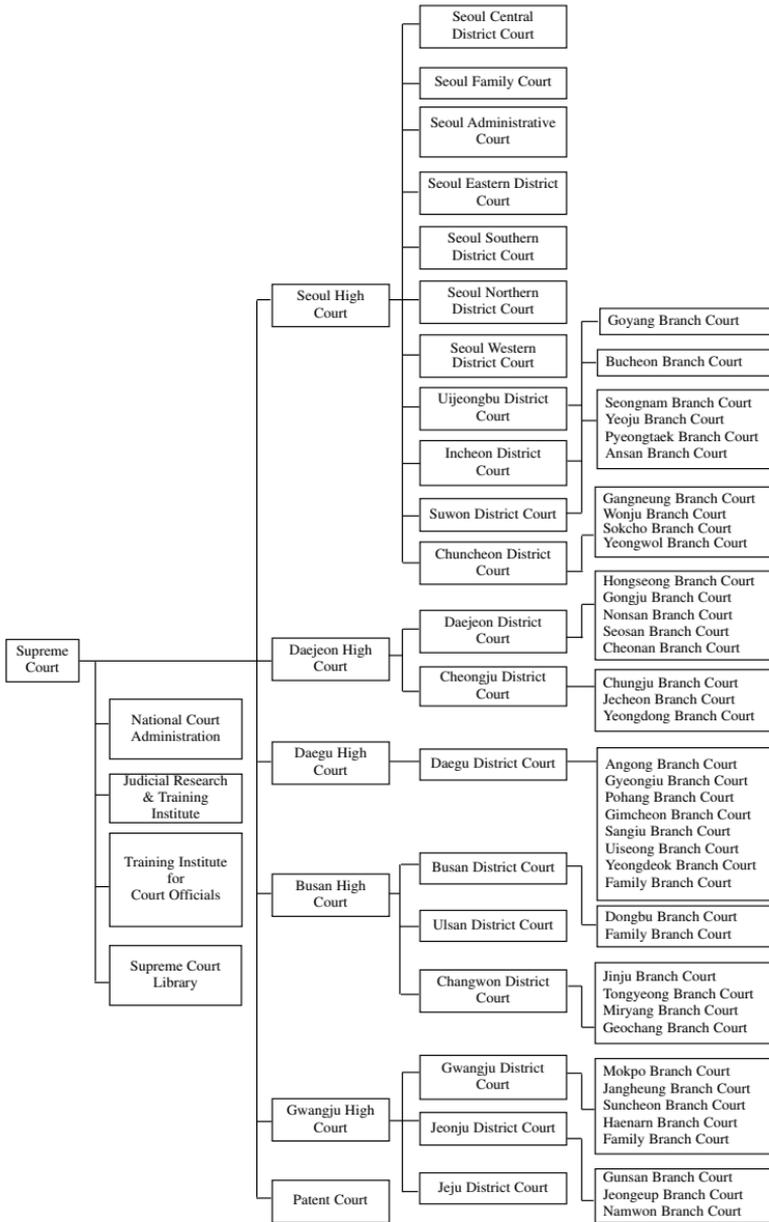
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agencies and local governments, and between local governments; and constitutional complaints. For details, refer to the official constitutional court website at [www.court.go.kr](http://www.court.go.kr). Another exception can be found in article 64, which vests the power to examine the qualification and/or to take disciplinary measures against lawmakers in the national assembly.

<sup>13</sup> This equals approximately 99,010 U.S. dollars as of 15 July 2008. There is an exception to this rule as well. Cases involving claims for payment of checks or bills, or the claim for repayment of loans by financial institutions will be presided over by a single judge regardless of the amount in dispute.

<sup>14</sup> The Patent Court was newly established on 1 March 1998. The major function of this court is to deal with appeals against the decision of Korean Intellectual Property Office (KIPO) with regard to the intellectual property related cases (patent, utility model, design or trademark. Copyright is not handled by KIPO). It's position is on the level of a high court. Currently, it is located in Daejeon.

<sup>15</sup> According to the KCPA Article 423, violation of the Constitution, Acts, administrative decrees, or regulations are grounds for appeal to the Supreme Court.



Source: This image is available on the official website of the Supreme Court of Korea at <http://eng.scourt.go.kr/eng/judiciary/introduction.jsp#03>

Figure 1.1 Court organization chart (as of July 2008)

court dismisses the appeal without further examining the case. Generally, a case is assigned to a petty bench composed of four Justices. A case is decided by the Petty Bench unless it falls within one of the following categories; (i) the Justices fail to reach a consensus on the case, or (ii) any order, rule, or regulation is in violation of the Constitution or Statutes, or (iii) it is deemed necessary to change the former opinion of the Supreme Court regarding the interpretation and implementation of the Constitution, laws, orders, rules, or regulations, or, (iv) when it is deemed that adjudication by a Petty Bench is not appropriate.

Notably, Korean courts do not have the common-law concept of *stare decisis*. In reality, however, the Supreme Court decisions tend to strongly influence decisions by lower courts in similar cases.

## B. Judge

At the delegation of the Constitution, the Court Organization Act provides for the judiciary's qualifications. According to Article 42 of the Act, persons who have passed the National Judicial Examination and have completed the two-year training program at the Judicial Research Training Institute or those who have obtained qualifications as lawyers are eligible to become judges. In practice, the common pool of newly appointed judges was the group of elites among the trainees at the Judicial Research Training Institute. Some judges were selected from the pool of practitioners. However, the number of the second group was relatively small compared to the first group. This method of selection is likely to change in the near future due to the newly introduced law-school system. According to the new system, the U.S. style law school will be established by 2009 and the National Judicial Examination will be replaced by a bar examination. Consequently, the current two-year training program by the Judicial Research Training Institute will be abolished. The most significant feature of the new system is that it is intended to allow most law school graduates to become lawyers after three years of intensive and practical training by a law school. It remains to be seen how the appointment of new judges will change in response to this radical change.

Judges are appointed by the Chief Justice with the consent of the Council of Supreme Court Justices. Judges have a ten-year service term and can be reappointed. In practice, most of the judges are reappointed upon the lapse of ten years. The retirement age is 63.<sup>16</sup> No judges shall be removed from office

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Furthermore, the KCPA Article 424 enumerates absolute grounds (meaning that these grounds are deemed justifiable), which includes participation of an ineligible judge in a trial or violation of an exclusive jurisdiction.

<sup>16</sup> The retirement age of judges is 63 according to the Court Organization Act. The retirement age of the Supreme Court Justice is 65, who is not categorized as 'judge' under the above act.

except by impeachment or a sentence of imprisonment without prison labor or heavier punishment. They are not subject to suspension from office, and subject to a reduction in remuneration or other unfavorable treatment except by disciplinary measures.

### III. COMMENCING THE LITIGATION

Having explained fundamental elements that are necessary in understanding civil procedure law, we now get into the illustration of each step of litigation. Filing litigation is the initial stage. Three basic elements of the litigation – a claim specified in a complaint, parties concerning the claim, and the court to adjudicate – are fixed at this phase. Each element along with related issues will be addressed in turn. Litigation costs also have much to do with access to the court, so this will also be addressed at this stage.

#### 1. Complaint

##### **A. The first step in litigation – filing a complaint**

A civil action begins when the plaintiff files a complaint with the court (Article 248). A Complaint is a written document in which the plaintiff alleges jurisdiction, sets forth facts that entitle the plaintiff to relief from the defendant, and demands relief. Filing a complaint is absolutely essential for litigation to start and proceed, since a court is merely a passive adjudicator of disputes and neither initiates nor encourages litigation. Moreover, the court is not allowed to render any judgment on matters which have not been claimed by the plaintiff. In this sense, the role of the parties is highly significant in the proceedings.

In principle, a complaint should be in writing. Filing a lawsuit without submitting a written form is allowed only in small-claim cases. Even in this exceptional case, a court clerk must write down what has been filed orally, and keep it in the form of a protocol. This may therefore be viewed as an altered form of a written complaint.

##### **B. Things to be stated in a complaint**

The following elements are to be stated in a complaint: the parties, the legal representative or counsel if any, the relief sought for which the action is instituted and cause of actions (Article 249).

The relief sought is the ultimate purpose of the litigation. To put it in a different way, it is a specific demand for the relief that the plaintiff wants to acquire from the court. This may include, for instance, a demand for the payment of a certain amount of money, or a demand for eviction from one's

real estate. The court is not permitted to grant recovery in excess of the relief sought in the complaint.

The cause of action refers to the fact patterns that provide the legal basis of the claim and shows that the pleader is entitled to relief. These facts should be concrete enough to contain a sufficiently definite motion. Although other fact patterns that are not necessary to specify the claim need not be included in the complaint, it is a widespread custom to include these facts if the plaintiff deems it necessary to make the claim clearer. The cause of action specified by the plaintiff cannot be changed by the court. In this sense, the plaintiff fully enjoys the right to constitute the claim without the intervention of the court. However, this may put the plaintiff in a more disadvantageous position, in particular when the plaintiff has neither sufficient amount of legal knowledge nor adequate legal support in forming legal claims for her case.

Evidence need not be included or attached in the complaint. However, plaintiffs tend to attach substantial evidence, such as a copy of the written contract in a contract-related case. This is also strongly recommended by the court, for this will facilitate the court and the defendant to clarify the claim as well as to be provided with sufficient information regarding the case.

### **C. Three types of actions**

With regard to the relief sought, there are three categories of actions.

The first category is the most common type; a performance claim. This is a claim to request the court to order the defendant to do something or to refrain from doing something. Some examples: the plaintiff asks for performance of a contractual obligation or claims damages for the breach of contract. The plaintiff demands the defendant to move out of her land or to refrain from trespassing on her property. When this type of claim is accepted by the court and becomes finalized, the plaintiff can enforce this judgment against the defendant.

The second category is a declaratory claim. This is to attain a judicial declaration of the existence or non-existence of the disputed legal relationship. Some examples: the plaintiff asks for a judicial declaration of her ownership over land. A liability insurance company demands for a declaration for the non-existence of its duty to pay insurance money to an alleged accident victim. A claim for a declaratory judgment is open to all persons who have a legitimate interest in the claim. However, it should be noted that this claim is subsidiary to performance claims. Since claims for declaratory judgment are not subject to enforcement, they are only permitted when the plaintiff has a special legitimate interest in obtaining the declaratory judgment. Therefore, this claim is not allowed if the plaintiff can file a performance claim. Thus, the plaintiff should file for a payment of debt against the defendant, instead of filing for a declaratory judgment on the existence of her credit.

The third and the last category is a formation claim. This is to create or modify a legal relationship by the order of the court. Considering that a legal relationship is primarily established by parties involved without intervention of the court, this claim is exceptional. A formation claim cannot be filed unless there are statutory provisions that specifically provide a legal ground for the claim. Typical examples include revocation of the resolution by a general shareholders' meeting, or demanding an increase or reduction of rent in a lease contract.

#### **D. Subsequent procedure**

When a complaint fails to state any of the matters required to be stated, or if stamps (as required under the provisions of Acts) are not affixed to a complaint, the presiding judge shall order the plaintiff to correct it within a designated period (Article 254(1)). Failure to comply with the order might result in either a re-order by the presiding judge or the dismissal of the complaint, at the discretion of the presiding judge (Article 254(2)).

If a complaint has met the necessary requirements, the court serves the defendant with a duplicate (Article 255(1)). It must be served on the defendant in time for the person to take actions in defense. The RCP Article 64(1) obliges the court to serve the complaint 'immediately' after it has been filed. Along with the copy of the complaint, other relevant documents such as the instruction to the civil procedure and the order for the submission of the written answer are enclosed and served together. The service is usually performed by registered mail. However, a designated court official or a marshal, upon the request of the court or the plaintiff, can serve these documents. If the service turns out unsuccessful due to the incorrectness of the address specified in the complaint, the presiding judge orders the plaintiff to correct it within a designated period. Failure to comply with this order might result in the dismissal of the complaint. If it becomes obvious that specifying the correct address is impossible without negligence of the plaintiff, the presiding judge orders a public notice as an alternative way of service (Article 194). This is done in the way of posting the above documents on the designated court's bulletin board or in other ways as prescribed by the Supreme Court Regulations (Article 195).

The plaintiff may dismiss the case voluntarily after the complaint has been filed. However, the plaintiff needs to get approval from the defendant to do so if dismissal is to take place after the defendant has made her pleading on the merit (Article 266(2)). If the defendant does not make objection to the dismissal by the plaintiff within two weeks, she is deemed to have consented to the dismissal (Article 266(6)). Voluntary dismissal is without prejudice unless it has been made after the rendition of judgment (Article 267).

## **2. Parties**

### **A. Capacity for being a party**

Anyone who files a written complaint with the court is called a plaintiff. The opposing party specified in the complaint is a defendant. In this sense, parties are specified by virtue of a complaint. However, it is one thing to specify a party, and another thing to determine whether or not that party has the capacity for being a party. In principle, the capacity for being a party is determined by the Civil Act and other relevant Acts. According to the Civil Act of Korea, a natural person and a juristic person hold this capacity. Hence, these two types of persons are eligible to become a party in the civil proceedings. Yet, the KCPA Article 52 adds another type to this list. An association or a foundation other than a juristic person may become a party to a lawsuit, as long as it has essential elements of a juristic person. Some core required elements are as follows: the existence of a decision-making body, a representative organ performing the acts by which the rights and duties of an organization are created, exercised, and fulfilled, and assets separate from individual property of its members. Generally, a partnership fails to meet the above requirements, thereby requiring individual partners to become parties to the litigation.

### **B. Plurality of a party**

There may be multiple parties in a single lawsuit. Therefore, in a case where the rights or liabilities forming the object of a lawsuit are common to many persons, or are generated by the same factual or legal causes, these persons may join in the lawsuit as co-litigants (Article 65). The same shall also apply in cases where the rights or liabilities forming the object of a lawsuit are of the same sort, or are generated by the same sort of factual or legal causes (Article 65).

The KCPA also allows a third party to join existing proceedings. However, the joining party should possess sufficient connection between her claim and the existing proceedings. Addition of the new party is allowed at any stage in the proceedings before the closing of the hearing.

### **C. Legal representative and counsel of a party**

Minors, quasi-incompetent persons, or incompetent persons, as stipulated in the Civil Act, do not possess litigation capacity. Consequently, they may conduct procedural acts only through legal representatives. Who gets to be a legal representative is determined by the Civil Act or other relevant laws.

Parties may have an attorney-at-law as her legal counsel. However, representation by a lawyer is not mandatory in proceedings. In principle, only lawyers admitted to the Korean bar are qualified to legally represent in civil

procedure. Thus, foreign lawyers are not permitted to act as counsel for a litigating party. Parties retain the power to discharge their lawyers at any time. There are some exceptions in the cases that are reviewed by a single judge. In the cases where the amount in dispute falls short of a specific amount, the court may permit certain persons other than lawyers to represent the party.<sup>17</sup>

### 3. Jurisdiction

A lawsuit should be filed with the court that has competent jurisdiction. Jurisdiction is the power or authority of a court to determine the merits of a dispute and to grant relief.

The District Courts, including their branch courts, hold original jurisdiction over civil cases. A single judge presides over a case unless the amount in dispute exceeds 50 million Korean won.<sup>18</sup> A three-judge panel will take cases in which the amount exceeds the above limit and cases which have been transferred from a single judge due to its difficulties and complexities. There are some special subject matters that are dealt with by a single judge even when the amount in dispute exceeds the limit mentioned above. These matters are enumerated in ‘The Regulation on the Subject Matter Jurisdiction in Civil and Family Litigations’, one of the Supreme Court regulations.

Having explained the basic subject matter jurisdiction in Korea, I proceed to give a general illustration on how territorial jurisdiction is established under the KCPA.

#### A. General and special venues

There are general venues and special venues by which territorial jurisdiction is decided.

As for a general venue, the court at the place of domicile of the defendant is competent to decide all claims (Article 2).<sup>19</sup> In case the defendant has no domicile or her domicile is unknown, the general forum will be determined by the place of residence. When even the residence is unfixed or unknown, the general forum will be decided pursuant to the last domicile.

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<sup>17</sup> These persons are those who keep a close living relation with the party and are in a kinship within a specific scope, or those who are in a specific relationship under an employment contract, etc, with the party, such as the handling of, or assistance in, the regular affairs concerning such cases (Article 88(1)).

<sup>18</sup> Equivalent to approximately 49,500 U.S. dollars, as of 15 July 2008.

<sup>19</sup> There are some special provisions for the general forums of an ambassador or a minister (Article 4: the place of the Supreme Court–Seoul), a juristic person (Article 5: the place of its principal office), or state (Article 6: the seat of the government agency representing the relevant litigation – the Ministry of Justice in Gwacheon, Gyunggi, or that of the Supreme Court – Seoul).

On the other hand, the KCPA provides numerous special venues in addition. Important among these special venues are: a workplace (Article 7); the place of performance of an obligation (Article 8); the location of the property (Article 10); the place where a tort was committed (Article 18); the place of registration (Article 21).

When there are plural venues establishing the jurisdiction, the plaintiff can bring a suit in one of those venues. In cases where several claims are joined in a single lawsuit, it may be brought to the court having jurisdiction over one of those claims (Article 25(1)).

### **B. Establishing jurisdiction by agreement and pleading**

An agreement between parties serves as another basis for establishing jurisdiction. If the parties have agreed in writing as to the competent court of first instance with respect to a lawsuit based on specific legal relationship, the specified court recognizes the legal effect of such an agreement unless the case is subject to the exclusive jurisdiction of another court.

Pleading can be a factor creating new jurisdiction under the KCPA. If a defendant pleads in the hearing or makes statements during the pre-trial proceedings as to the merits of a case in the court of first instance without filing any jurisdictional defense, the defendant is deemed to have consented to the jurisdiction of the said court (Article 30). Therefore, the said court shall have the jurisdiction and the defendant who has failed to raise a timely defense shall be estopped from challenging it.

### **C. Determining international jurisdiction**

The KCPA provides no explicit provision for international jurisdiction. However, courts and commentators have construed provisions of territorial jurisdiction to be the basis for establishing international jurisdiction. The premise for this is that both domestic and international jurisdictions share the same spirit of establishing a fair and efficient forum for a dispute resolution. Therefore, they believed that the KCPA provisions, in the absence of applicable provisions, can at least provide the basis for international jurisdiction by way of analogy. Yet, Korean courts also acknowledge that to merely mechanically apply domestic provisions to international circumstances without considering some notable differences between these two would be inadequate. For this reason, the Supreme Court of Korea added 'legal reasoning' as another basis for determining international jurisdiction.<sup>20</sup> To sum it up, Korean courts, in determining international jurisdiction, will first look at the territorial jurisdiction clauses in the KCPA and attempt to apply or modify, if necessary, the domestic doctrines in light of legal reasoning.

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<sup>20</sup> The Supreme Court, 2002Da59788, decided on 22 January 2005.

Recently, the Korean Private International Law has newly introduced the jurisdiction clause, stating that a Korean court shall have the international jurisdiction when a party or a case in dispute has substantial relationship with Korea.<sup>21</sup> It also states that the court is to comply with reasonable principles that are in accordance with the idea of allocation of international jurisdiction, when deciding on the substantiality.<sup>22</sup> Jurisdiction clauses in domestic law and the unique nature of international jurisdiction should be considered in determining international jurisdiction, according to the next clause.<sup>23</sup>

#### **D. Transfer due to lack of jurisdiction or by discretion**

If the court finds that it lacks jurisdiction, it shall transfer the case by its ruling to the competent court (Article 34(1)). Even when the case falls under its jurisdiction, the court may transfer the case to another competent court in order to avoid any significant damage or delay (Article 35).

### **IV. PRE-TRIAL PROCEEDINGS**

#### **1. Introduction**

The purpose of pre-trial proceedings is to clarify and narrow down the facts and the legal issues to be reviewed. It is designed to prepare an efficient and prompt trial. In this sense, this is a sort of preparatory stage.

#### **2. Pre-trial Pleadings**

Once a complaint is served, non-oral pleading takes place. At this stage, the parties of the litigation exchange pleadings and written evidence in documents. It is a preparatory stage for a trial.

##### **A. Written answer by the defendant**

A written answer is a responsive written document in which the defendant makes admission or denials, asserts legal defenses, and raises counterclaims. This should at least contain the answer to the claim. Although the detailed answer to the claims and facts in the complaint is not required by the law, a written answer usually contains specific pleading and defenses as well as substantial evidence to support them. The defendant is required to file a written answer within 30 days from the service of the complaint (Article 256(1)).

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<sup>21</sup> Private International Law Article 2(1).

<sup>22</sup> *Id.*

<sup>23</sup> Private International Law Article 2(2).

Broadly speaking, a claim by the plaintiff may be met with three different responses by the defendant. She may dispute or accept the assertion. She may also remain silent, neither rebutting nor acknowledging the claim.

If the defendant accepts the claim or admits all the facts, the court may proceed to a judgment without conducting a trial. No express contest to the complaint leads to the same result. If the defendant remains silent by failing to submit a written answer within the above period, the court may deem that the defendant has admitted the facts in the complaint and render a judgment without holding a hearing. The defendant, of course, may take recourse against this judgment by way of appeal. If the defendant submits a written answer, the pleading process will be initiated.

If the defendant disputes the claim by submitting a written answer, then the pre-trial pleadings will be initiated. However, the presiding judge retains discretion to skip this process and move on directly to a pre-trial conference or a trial, when appropriate. When the defense is based on procedural defenses, the presiding judge has several options. She may order the plaintiff to clarify or cure the alleged flaws, or dismiss the suit without further pleadings. She may also proceed to the pre-trial and trial stages to find out if the motion to dismiss has the proper ground.

## **B. Pleading process afterward**

After the filing of a written answer, parties will continue to exchange pleading and evidence in writing under the direction of a presiding judge, without appearing in court. Ordinarily, one or two exchanges of briefs are deemed sufficient. The presiding judge retains discretion on whether or not the case requires further pleadings. If so, she will allow the parties to submit further documents. If she thinks this will be enough to make the case ready, she will then summon parties to hold a pre-trial conference.

Before the new case management model was introduced in the wake of the 2002 amendment, this process was nearly neglected in practice. The court directly moved on to the hearing stage immediately after the complaint was filed. In this setting, hearings were rather sporadic than centralized. A series of isolated hearings took place, and the parties had to keep appearing in the court repeatedly. This incurred grave loss of time and efficiency in proceedings. Thereby, a pleading process was introduced to replace repeated hearings in order to eliminate inefficiency. Instead, hearings are to be held once or twice in principle, during which concentrated oral arguments and witness examinations take place.

In order to expedite the proceedings, the presiding judge usually sets a time-limit for each pleading. Basically, parties are supposed to present all the arguments and written evidence in support of their claims or defenses at this stage. Failure to abide by the time-limit can lead to a sanction of being barred

from submitting them in the trial stage. However, this restriction does not seem to be aggressively imposed in practice. It has been a long-standing, implicit belief among Korean judges that substantive justice is more important than procedural justice. This is part of the reason that judges have been too cautious in exercising this authority to block lately submitted claims or evidence. However, this seems to be changing gradually. More and more judges are recognizing that imposing this sanction is inevitable in order to promote the purpose of the pleading process.

One of the different features of this process in comparison with the U.S. civil procedure law is the absence of discovery. There is no general obligation of the parties to submit documents contrary to their interests. Instead, Korean law possesses an alternative procedure: an order by the court to submit a document. The court, upon the motion of the party, may order the holder of a document to submit it under certain circumstances (Article 344). The holder of a document shall not refuse the order. In cases of refusal by the party of the litigation (Article 349), the court may admit the claims of the other party in the document to be true. In cases of refusal by the third party, she will be sanctioned by fine (Articles 351, 318, 311(1)).

### **3. Pre-trial Conference**

A pre-trial conference is the last step in the pre-trial proceedings. After a thorough pleading process when issues have been made clear and substantial document evidence has been submitted, the presiding judge, or one of the associate judges commissioned by the presiding judge, then holds a pre-trial conference (Article 282(1)). During the conference, the judge discusses the issues of the case with the parties and their counsel. If necessary, they consider the simplification and sharpening of the issues.

During the conference, the judge and the parties also develop a plan for the upcoming procedures. For instance, setting the date of hearings and the limitation of the number of witnesses may be discussed and planned. Although this conference is in principle open to the public, it is usually held in a chamber specifically prepared for this purpose in a more casual setting, instead of in a court room.

The possibility of reaching a settlement can also be deliberated upon. In practice, the presiding judge frequently makes an attempt to conciliate the case at this stage. Most of the times, this is the stage when issues have been made clear both to the court and the parties, misunderstanding has been mitigated, and the parties have turned less combative. A separate settlement conference may be planned and conducted. Against this backdrop, a considerable number of cases are settled in the form of compromise or conciliation.

#### **4. Balancing the Role of the Judge and the Parties**

Before concluding the explanation on pre-trial proceedings, it is worthwhile to mention the issue of balancing the role of the judge and that of the parties.

Basically, parties are the main players in the field of civil litigation. They initiate the lawsuit, determine the claim and present facts. They are in charge of making allegations and presenting evidence to their advantage. They reserve the right to drop the suit or accept the claim, which will consequently lead to the termination of the litigation. This remains true in pre-trial proceedings. It is parties who build up this process.

However, it is truly the presiding judge who controls the effectiveness of the pre-trial proceedings. The presiding judge is the conductor of the process. She reserves the right to oversee the preparation of the case. She has the power to set periods of time for performance of procedural acts and to order any necessary procedural measures.

A controversial point is the extent to which the presiding judge can render guidance for the pleading. In connection with the role of the judge in civil procedure, this has been a much debated issue. The KCPA Article 136 provides that the presiding judge may ask the parties questions, and urge them to prove in order to clarify the legal relations on factual or legal matters. It further states that the court should give the parties an opportunity to state their opinions on legal matters which are deemed to have been evidently overlooked by them. What does this provision have to do with the neutrality and impartiality of the judge? It is not easy to draw a clear line between the active role of the presiding judge mentioned above and the impartiality of the judge from both parties. In particular, it becomes even more complicated when the lawsuit is between an individual with no support from legal counsel and a huge company with the support of a prestigious law firm. Given that the court is bound to the legal ground provided by the plaintiff, and that the court should render a judgment in favor of the firm even when the individual could have won the case only if she has chosen a pertinent cause of action or has submitted certain evidence, the court might be tempted to render some useful tips toward this individual. The Supreme Court proposes a guideline to limit this by using notions of passive and active elucidation. Thereby passive elucidation, which is intended to clarify what has been alleged, is allowed. But active elucidation, which is intended to attract or suggest a new assertion, is prohibited. The exception to this would be the duty of the court to indicate a legal point which the party has evidently missed.

## V. TRIAL PROCEEDINGS

### 1. Making Oral Arguments in a Hearing

After the pre-trial conference is over, the presiding judge designates the date for a trial. The trial proceedings are conducted at oral hearings. In principle, the hearing is held in public unless otherwise designated by the presiding judge.

There is no jury system for a civil procedure in Korea. Accordingly, every trial is conducted in the form of a bench trial. Therefore, jury-related issues such as jury selection, instruction, or judgment notwithstanding the verdict (JNOV), are not discussed with regard to the KCPA.

With the intensification of the pre-trial proceedings, the significance of the trial in terms of making oral arguments has diminished in practice. The arguments should have been made in a timely manner and issues should have been clarified in the pre-trial phase. However, these are meant to be only preparatory works for the trial. Therefore, the arguments that have been made during the pre-trial conference should be stated again in front of the court, though in a simple manner, on the first hearing date.

The parties state the outcome of the pre-trial pleadings on the first hearing date. The court should strive to close the whole pleading immediately after going through the first hearing date, unless the nature of the case precludes this. To make this possible, Korean courts ordinarily try to complete all the examinations of documentary evidence during pre-trial proceedings, carry out the examination of witnesses on the first hearing date, and then end the hearing.

### 2. Evidence

#### A. Overview

The facts alleged by the parties need to be proved by evidence. For this reason, evidence is collected and submitted by the parties. However, the facts admitted by the opposing party do not require any evidence. The admission binds both the court and the parties (Article 288). Furthermore, the evident facts or laws themselves do not require any attestation. The court is not allowed to consider evidence that has not been presented by either of the parties. Even in an extreme case where the judge clearly knows the existence of the evidence based on her personal knowledge, she has no choice but to judge otherwise if that has not been presented by the party in the proceedings.

Application to present evidence may be made either orally or in writing. In doing so, the applying party should identify the facts to be proved by evidence. The court has much discretion with respect to the admission of evidence. Consequently, the court may reject the application for examination of

evidence, unless it is the sole evidence for the party's alleged facts (Article 290). Likewise, assessing the relevance and the materiality of the evidence is fully at the discretion of the court. In practice, the admissibility of evidence is very loose and lenient. Virtually any type of evidence can be presented at trial, including hearsay evidence.

According to the KCPA, there are six types of evidence: examination of witnesses, examination of parties, expert testimony, documentary evidence, inspection, and other evidence (drawings, photographs, recording tapes, video tapes, magnetic discs for computers and other articles created to put the information therein). There is no clear-cut rule concerning the probative values of each type of evidence. In practice, there is a general tendency of placing higher trust on the documentary evidence than testimony by a witness. According to the Supreme Court decision,<sup>24</sup> the document by which the juristic act has been performed presumes the existence and the content of that juristic act. Therefore, these documents, such as written contracts or agreements, are usually considered the most powerful evidentiary sources.

Submitting documentary evidence and examining it are conducted during the pre-trial stage, whereas examination of witnesses is conducted during the trial stage.

## **B. Examination of witnesses**

Witness testimony is a very common and significant form of proof. It becomes particularly decisive when there is little relevant documentary evidence. This happens quite often in Korea since a lot of small transactions, especially between individuals, take place orally without producing any documents.

Anyone capable is eligible to be examined as a witness (Article 303). However, the litigating parties themselves are not qualified as witnesses. Upon the motion of the parties, the court decides whether or not to accept an application. The motioning party should submit copies of the interrogatories to be served on the opposing party so that she can prepare for the cross-examination in advance.

Once summoned, the witness has a duty to appear and to give testimony under oath (Article 319). If the summoned witness fails to appear on the date of examination without any proper reason, the court imposes a fine on the summoned witness, and orders her to bear any increased litigation costs incurred due to her non-appearance (Article 311(1)). If the witness fails again to appear without any proper reason after receiving a judgment of a fine, the court punishes the witness by a detention for not more than seven days (Article 311(2)).

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<sup>24</sup> The Supreme Court, 85Daka1760, decided on 28 April 1987.

A witness may refuse to testify or to take oath if she has justifiable reasons (Article 314, 315, 324). For instance, a witness may withdraw from testifying if she has been entrusted with confidential information by virtue of her profession or position, such as a lawyer, patent attorney, notary public, certified public accountant, medical experts, pharmacists, or a holder of a religious post, may refuse to testify (Article 315(1)).

A witness is examined first by the party who requested her to appear. This is called a direct examination. The opposing party cross-examines the witness after the direct examination is completed (Article 327(1)). Direct re-examination may be conducted upon the completion of the cross-examination. Further examination is allowed only with the permission of the presiding judge (RCP Article 93(3), Article 92(4), (5)). The presiding judge may question the witness after examinations by both parties. However, if necessary, the presiding judge may interpose questions during the direct or cross-examination (Article 327(3)). Leading questions are only permissible on cross-examination (RCP Article 91(2), Article 92(2)).

Testimonies by witnesses are recorded in documents. In the case of false testimony, the witness commits perjury.

### **3. Closing a Hearing**

The presiding judge has very broad discretion in conducting proceedings. When all the necessary pleadings and evidence have been made and heard and the case is ripe for the final adjudication, the court closes the oral proceedings and sets a date for the rendering of the judgment. In practice, decisions are delivered after two or three weeks from the closing of the proceedings unless the nature of the case requires a longer interval.

## **VI. JUDGMENT AND APPEAL**

### **1. Judgment**

#### **A. Deliberation**

After closing the trial, the court deliberates on the case. If the case was tried by a panel of three judges, each of them has the independent status as to the deliberation and the vote. The presiding judge does not have superior authority as far as the judicial decision is concerned. The judgment in this case is made by a majority. No record of the vote shall be open to the public, with the exception of Supreme Court rulings.

It is for the court to apply the law to the facts which come before it. With regard to this, whether or not the court is bound by the cause of action

presented by the party has been fiercely debated among civil procedure law scholars. There can be multiple legal grounds on which claims can be based, for a single dispute. Let us assume that a taxi driver got into a traffic accident due to negligent driving, causing a severe injury to the passenger. The victim can claim damages on either ground: breach of contract<sup>25</sup> or torts.<sup>26</sup> It is for the plaintiff to decide on which grounds her claim shall be based. Once the legal ground is fixed and submitted by the party, the court is bound to keep to that ground. In a case mentioned above, the court is not allowed to decide on a torts claim when the plaintiff has made her allegation based on the breach of contract.

Yet, it is still controversial among scholars whether or not this theory should be upheld. Frequently, parties are not capable of legal classification or categorization of facts particularly when they are devoid of legal advice from legal experts. It is also deemed inefficient and time-consuming to allow other lawsuits on the same incident to take place just because it is based on another cause of action. The Supreme Court decisions are strongly based on a traditional approach. However, there are some criticisms against this from civil procedure scholars.

## **B. Decision**

The KCPA recommends the court to render a decision within five months after the institution of the lawsuit (Article 199), and within two weeks (or four weeks if the case is sophisticated) after the hearing has been closed (Article 207(1)). Although such time-limits are deemed to have only recommendatory effects, a considerable number of civil cases are handled within the designated period. The judgment must be rendered by the judge(s) present at the final hearing of the case.

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<sup>25</sup> Although there is no written contract between a taxi driver and a passenger, a contract has been made in an implicit sense. The passenger's getting into the cab and directing a destination to the taxi driver constitutes an 'offer', whereas the driver beginning to head for the destination without any explicit refusal constitutes an 'acceptance', which will in turn create a valid contract between two parties. Korean civil law does not require a contract to be in a written form, unless otherwise specified in relevant provisions. This contract obliges a taxi driver to have a duty of care. Therefore, negligence which results in the failure of her obligation to bring a passenger to the designated place consequently gives rise to the breach of contract.

<sup>26</sup> According to the Article 750 of the Korean Civil Law, any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall make compensation for damages. In the above case, the taxi driver was negligent in driving, which is unlawful, and caused injury to the passenger. Therefore, there is a tort case.

The following elements should be included in the written judgment: parties and their legal representatives, conclusion, relief sought (and that of the appeal in appeals cases), cause of action, date on which the pleadings have been concluded, and the court (Article 208(1)). Yet, it does not specifically provide the detailed form of the judgment, in particular with regard to the main part where the court gives reasons for the conclusion. Consequently, the form of the written judgment may differ from case to case in details. However, judgments in Korea usually take a typical form in practice. First, the court illustrates the facts of the case, and then proceeds to summarize the parties' claims and their legal basis. Presenting issues out of this, the court then gives reasons for the conclusion. Decisions in Korea are generally shorter in length compared to those by the federal courts in the U.S.

Once the judgment is rendered, the court cannot retract or modify it. Only in case of mere miscalculation, mistype or other similar fallacies are the courts allowed to make corrections.

### **C. Bearing litigation costs**

A judgment should also contain a decision as to who bears the costs of the proceedings. Litigation costs include court fees, costs of document delivery, costs incurred in the process of evidence examination such as expense for witnesses, and attorney's fees. The attorney's fees are compensated within the limit prescribed by the Supreme Court Regulations. Due to this constraint, attorney's fees are not always fully recovered.

In principle, litigation costs are borne by the losing party (Article 98). As an exception to the principle, the court may impose the whole or part of costs on the prevailing party who conducted unnecessary acts for her own advantage or who caused delay in the litigation (Articles 99, 100). In cases of partial defeat, the court determines the parties to bear costs and their percentages (Article 101). Mostly, costs are borne by both parties with the ratio determined by the court. However, the court may have one party bear all costs depending on circumstances.

The judgment regarding litigation costs does not specify the amount of the costs. Therefore, the party who is eligible to retrieve costs from the other party should file another application with the court. Then, the court determines the specific amount of the costs. This decision containing the specific amount becomes the ground for the enforcement on the litigation costs.

## **2. Appeal and Final Appeal**

When a decision is rendered, a losing party is entitled to appeal to the court of next instance for reversal of the judgment. The appellant must have a legitimate interest in the appeal. To put it in another way, the appellant should have

been aggrieved by the judgment. An appeal must be lodged within 14 days from the date of service of the judgment on the party in question (Article 396(1)). Cross appeals may also be lodged by the respondent to an appeal or by any other party (Article 403). If the losing party does not appeal against the judgment within the designated time, it becomes final and conclusive.

Appellate proceedings in Korea are not substantially different from the original proceedings of the first instance in that parties are allowed to make arguments and submit evidence. New allegations or submissions are permitted so long as it does not infringe upon a time-bar limitation. Therefore, the appellate proceedings have the character of a continuation of the previous proceedings.

When the appeal is found correct, the appellate court vacates the judgment and renders its own decision. The appellate court is not allowed to grant more than the party has requested. On the other hand, when the appeals are found groundless, the court dismisses the appeal.

The judgment of the appellate court may be appealed again to the Supreme Court of Korea. No separate decision by the Supreme Court to hear an appeal from a lower court, such as a writ of *certiorari* in the U.S. Supreme Court, is required. For that reason, the number of final appeals to the Supreme Court is surprisingly high.<sup>27</sup> Although the cause for appeal is limited to the matter of law, the Supreme Court of Korea has been lenient enough to accept the appeal based on factual issues. This has been possible under the unique doctrine of ‘the violation of the rule regarding taking of evidence’, justifying the dispute of the facts at the highest level in the form of the matter of law.

The Supreme Court either dismisses the final appeal when it is groundless, or remands the case when it is found reasonable. The final decision of the Supreme Court has a binding effect on lower courts with respect to the specific case in issue. Unlike common law jurisdictions, the decision does not have a binding force on later cases of similar nature. However, Supreme Court decisions do seem to influence lower courts to a great extent in subsequent cases. In this regard, the Supreme Court decisions may be said to function as powerful precedents with *de facto* binding force.

### **3. The Effect of the Final and Conclusive Decision**

#### **A. Finalization**

When the decision is rendered and no appeal is lodged within a designated period, the decision becomes final and absolute. The decision is also made final when the appeal is withdrawn. As mentioned above, the decision by the

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<sup>27</sup> In 2006, the total number of final appeals to the Supreme Court was 8,859.

Supreme Court, the court of last resort, is also final unless the Supreme Court remands the case to the lower court. To sum it up, the decision becomes final when it is no longer subject to ordinary forms of review. It is at this stage of the procedure that the judgment becomes eligible for enforcement.<sup>28</sup>

### **B. The effect of final judgment: *res judicata***

When the judgment is made final, it has an effect called *res judicata*. This refers to the binding effect that a final adjudication on the merits of a claim has in preventing the same parties from litigating the same claim again and binds the court to the same conclusion. This effect operates with total disregard for what the truth is. Without this effect, constant relitigations would take place and overburden the court. Persons will not be able to rely on the original decision and plan for the future. Thus, *res judicata* is a tool with which legal stability is achieved.

There are three interesting effects of the principle. The first aspect concerns the scope of the claim (Article 216). *Res judicata* is only binding on the claim of the case, not the facts or grounds supporting that claim. The second aspect concerns the parties (Article 218). This ruling is binding on the parties, successors of the parties subsequent to a closure of pleadings, or persons possessing the object of claims on their behalf. Thus, persons outside the above category are free to bring the same lawsuit without contradicting this effect. The third and final effect concerns timing. There can be no relitigation after the final hearing date even though there may be some important issues or evidence that were never introduced or considered in the first action.

### **C. Re-trial**

As mentioned above, a final judgment is not subject to any modification or cancellation. The only way to make this possible is through a motion for a re-trial. However, in order to maintain public peace and legal certainty, this motion is allowed only under very strict conditions. These conditions are enumerated in the KCPA Article 451, including: an ineligible judge participating in the judgment; a defect in granting representative power to legal representative; forgery or alteration of a document or any other article used as evidence for the judgment; false statement by a witness, an expert witness or an interpreter; or a contradiction to the final and conclusive judgment which has been previously declared.

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<sup>28</sup> However, there is an exception to this rule. If the court pronounces the provisional execution at the time of the decision, the plaintiff can enforce the judgment even before it becomes final.

## VII. OTHER ISSUES

### 1. Settlement during the Proceedings

Because of an increase in the number of cases being litigated, Korean courts are actively encouraging non-litigation means for disposing cases. In this regard, court-annexed settlement programs are frequently used.<sup>29</sup> A case can be settled by way of compromise before the judge (Article 220), or it can be settled by way of conciliation proceeding. At every stage, the judge may refer the case to a conciliation proceeding if it is deemed appropriate.<sup>30</sup>

The KCPA Article 225, a provision introduced in 2002, plays a significant role in the realm of court-led alternative dispute resolution. This provides the court with the authority to render a ruling recommending parties to settle the case. The parties may object to this ruling in writing within two weeks from the date of service, which in consequence will bring the parties back to the litigation. In the absence of objection within a given period, the ruling takes the same effect as a final and conclusive decision, and enforcement ensues.

There may be some different opinions as to the appropriateness of the court aggressively stepping in for the purpose of settlement. It might be proper to suggest a settlement once the issues of the case are revealed. However, there is a possibility of parties being coerced into the settlement, especially when the court suggesting the settlement is the same court adjudicating the case. This is sometimes the case in Korea. Basically, the conciliating judge or conciliating committee will be in charge of conciliation. However, it is still possible for the adjudicating court to conciliate the case itself. In reality, this is what mostly happens. When the court fails to lead parties to a settlement, the very court which was involved in the settlement process will be making a final decision. The party who has not accepted the suggestion of the court to settle the case may fear being disadvantaged by the court in the proceedings to come and in the judgment of the case. Although Korean courts are striving to tread a careful line between coercing the parties and helping them to reach the settlement, some reforms in the court-driven settlement system may be required.

### 2. Enforcement

Enforcement of civil judgments is governed by the Civil Execution Act, which became effective as of 1 July 2002. Previously, this Act was only a part of the

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<sup>29</sup> Arbitration is another form of ADR. This is done without the intervention of the court. Regarding the Korean Arbitration Act, see Kwang-Rok Kim (2002), *How Do You Settle Disputes with Koreans?: The Advent of a New Amendment to the Korean Arbitration Act*, 15 *Transnat'l Law*, 227.

<sup>30</sup> See Civil Conciliation Act, Article 6.

KCPA. A final judgment is eligible for enforcement. Also provisional enforcement orders by the court, or foreign judgments recognized by the Korean court are eligible for enforcement.

It is only a performance claim that is qualified for enforcement. A monetary claim is enforced by seizing and selling the debtor's nonexempt property in a public auction. Other types of claim are enforced differently. A claim for delivery of movables or immovables is executed by a court-appointed marshal. A claim for performance other than giving something is executed by either substitutional execution,<sup>31</sup> when it can be performed by a third party, or indirect compulsory performance,<sup>32</sup> when it should be performed by a debtor herself.

### 3. Recognition and Enforcement of Foreign Judgments

Judgments rendered by a foreign court should be recognized in order to be enforceable in Korea.<sup>33</sup> The following requirements are to be met for the recognition (Article 217).

In the first place, a foreign judgment needs to be final and conclusive in order to be recognized and enforced by Korean courts. It is final when there is no possibility of further appeal within civil procedure. Whether or not this requirement of finality has been met is determined on the basis of the foreign law by which the decision was rendered.

Secondly, the international jurisdiction of the foreign court is required. This is determined in light of the Acts and subordinate statutes of Korea, or of the treaties. According to the spirit of the Article 2 of the Private International Act, the substantial relationship between the case and the forum is the major standard by which an international jurisdiction is measured. In considering the substantiality of the relationship, the court should consider not only private interests such as fairness, convenience, and predictability of the litigating parties, but also public interests such as adequacy, swiftness, efficiency of the trial as well as the efficacy of the judgment.<sup>34</sup>

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<sup>31</sup> A substitutional execution is a means of execution by the third party. The debtor, however, is subject to all the costs incurred in the above process. See Civil Execution Act, Article 260.

<sup>32</sup> Indirect compulsory performance is performance enforced by ruling where the court clarifies an obligation to perform the debt and an appropriate period for performance, with the order to pay a specific amount in proportion to the defaulted period. See Civil Execution Act Article 261.

<sup>33</sup> For general explanation on recognition and enforcement of foreign judgments, see Sung Hoon Lee (2006), Foreign Judgment Recognition and Enforcement System of Korea, 6 *Journal of Korean Law* 1, 110.

<sup>34</sup> The Supreme Court, 2002Da59788, decided on 27 January 2005.

Thirdly, lawful service of a summons or a document is needed. A defeated party should have received, pursuant to a lawful method, a service of a summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend himself (excluding the case pursuant to a service by public notice or similar service). If he responded to the lawsuit even without this having been served, this requirement is deemed to have been satisfied.

Fourthly, the foreign judgment should not violate good morals and other social orders. This is to prevent a foreign judgment from being recognized and enforced in contravention of the public policy in Korea. What constitutes violation of good morals and other social orders is left to the discretion of the competent court. There was an interesting lower court decision that dealt with the acceptability of the punitive damages award by a U.S. court.<sup>35</sup> According to this decision, the court stated that the punitive damage award with its function of criminal sanction might violate good moral and social orders in Korea where only compensatory damage for torts is allowed. Subsequently, the court recognized only half the amount of the award.

Finally, there is a requirement of reciprocity. The foreign judgment will be recognized and enforced when the Korean judgments are recognized and enforced under the same or more lenient conditions in the concerned nation. However, this reciprocity requirement is construed rather generously so that the foreign judgment will be recognized by a Korean court as long as requirements are substantially similar on the whole.<sup>36</sup>

## VIII. CONCLUSION

In this chapter, I have attempted to give an explanation of various issues regarding Korean civil procedure. Basic features of the Korean civil procedure, such as its history, guiding principles as well as the court system were illustrated. Then, the main features of civil procedure were explained in sequence, from the commencing of the litigation through pre-trial and trial stages, and finally to the judgment and appeals. Korean civil procedure shares certain general features and elements prevalent among civil law jurisdictions.

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<sup>35</sup> The East Branch of Seoul District Court, 93Gahap19069, decided on 10 February 1995. This case was appealed and re-appealed afterward. However, the Seoul High Court (95Na14840, decided on 18 September 1996) and the Supreme Court (96Da47517, decided on 9 September 1997) upheld the decision by the court of first instance, without touching on the issue of the acceptability of the punitive damage award in the context of Korean tort law.

<sup>36</sup> The Supreme Court, 2002Da74213, decided on 28 October 2004.

In concluding the chapter, I would like to add a few possible changes that are likely to take place in the near future.

The first would be an emphasis on oral communication between a judge and parties. Recent efforts that have been made by the Supreme Court in fostering an 'oral proceeding' are part of this. In the past, documents were at the center of the procedure. Judges were more focused on reviewing documents to understand the case, instead of heeding oral arguments. However, courts are endeavoring to do away with this practice. They are growing more supportive of the oral proceeding, and to enhancing communication with the parties. In doing so, the Supreme Court even encouraged all the judges to film their own trials and review them, with the help of communication experts if necessary, in order to improve their communication skills.

The second would be the shift of the focus from a judge to counsel in the procedure. In practice, especially when there are parties without any legal counsel, the court tended to step deep into the process in its efforts to find out the substantive truth and come up with a just outcome. In some sense, cultural and historical features may explain this. The history of the Korean judiciary reveals that the judge, mostly local government authorities, was regarded as almost omnipotent in adjudicating the case. Furthermore, the Confucianism filtered into the minds of people so intensely that it was taken for granted to obey and follow what the government authorities performed on behalf of the King. Although this is not always the case nowadays, this long-standing tradition might have implicitly influenced the position and the role of the Korean judge even in modern days. However, this is changing. There are more and more lawyers participating as counsel in civil litigation. In addition, the new law school system is about to be implemented from the year 2009. This will perhaps result in a much higher number of lawyers. More people will have access to legal services to support litigation. With this change, a judge will be less required to step into the procedure of behalf of parties. Instead, the true spirit of the adversary system will be fully realized.

These changes reflect what is going on in a modern Korean society, namely a power shift from the public to the private. What this huge trend will bring to the Korean civil procedure scheme in the future remains to be seen.

## 2. Why do we pursue ‘oral proceedings’ in our legal system?

**Hyun Seok Kim**

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### I. INTRODUCTION

#### 1. Background to Raising the Issue of ‘Oral Proceedings’

For the past year and a half, the Korean judiciary has been at the center of debate on whether to implement oral proceedings regularly into our judicial system. What caused oral proceedings to become one of the most controversial issues in the Korean judiciary?

The judiciary should be accountable to the public. However, due to rapid social changes in Korea, including growth of the public’s aspirations for their rights, it is unlikely that the public would be satisfied with the services provided by the judiciary. Thus, the public will end up distrusting the judiciary.<sup>1</sup> We looked into oral proceedings because we feared that the basis of our judicial system would collapse if the judiciary were to adhere to conventional court practices and not take measures to adjust to the desires of the public. The question then becomes, what do we expect from oral proceedings in judicial processes as one of the crucial means to reconstruct our judicial system? Would a switch to oral proceedings build up the public trust of the judiciary?

This chapter examines the background to proposals to implement oral proceedings, the process of discussion, and feasible methods of using oral proceedings in the litigation process as well as ongoing prospects and tasks.

#### 2. Oral Proceedings as a Principle in Civil Procedure

As a counterpart of the principle of written proceedings, the principle of oral proceedings<sup>2</sup> refers to a ‘speech-centered’ legal process. In a ‘speech-centered’

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<sup>1</sup> Park, Byungdae, ‘The theory and present situation of civil procedure structure reform’, The 21st thesis and prospect (in Korean), at 603.

<sup>2</sup> Kang, Hyunjoong, Civil Procedure (in Korean), at 427 (5th ed. 2002); Oh, Seeyoung, Civil Procedure (in Korean), at 393 (2004).

legal process, parties should communicate with judges through speech when parties offer their arguments, testimonies, and evidence from discoveries for hearings. A judge should admit and consider only spoken arguments for his decision under the principle of oral proceedings, which provides a tool to effectuate the norm requiring the court to execute oral proceedings.

The Civil Procedure Act conveys the principle of oral proceeding in its promulgation of specific rules for arguments,<sup>3</sup> examination of evidence<sup>4</sup> and judgments.<sup>5</sup> In addition, the judge who takes part in oral proceedings should ultimately make judgment on the case at issue.<sup>6</sup>

### 3. Goal and Efficiency of the Principle of Oral Proceedings

As a role model for Korean civil procedure, German civil procedure has set its current oral proceedings as a substitute for its prior written proceeding tradition. The prior procedure of old German law before the 19th century, which was referred to as a typical form of writing-oriented legal proceedings, is well-described in the following sentence: ‘Things which are not in records do not exist in this world (*quod non est in actis, non est in mundo*).’

However, in 1877, the German legal community adopted the principle of oral proceeding in its code of civil procedure and began liberal oral arguments in courtrooms in order to seek quick and fair trials. This movement was based on the belief of the legal profession that they should respond to the demands of liberal political activism that requested independence of the judiciary and opening of court proceedings to the public. Following the changing trends of

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<sup>3</sup> Civil Procedure Act, Article 134 (Necessity of Pleadings), (1) the parties shall conduct pleadings orally in the court in regard to the litigation: provided, with respect to the case to be concluded by a ruling, the court shall determine whether or not any pleadings are to be held.

<sup>4</sup> Civil Procedure Act, Article 303 (Duty of Witness), Except as otherwise prescribed, a court may examine any person as a witness. Article 333 (Application *Mutatis Mutandis* of Provisions relating to Examination on Witnesses).

The provisions of Section 2 shall apply *mutatis mutandis* to expert testimony, Article 339 (Method of Stating Expert Testimony), (1) the presiding judge may have expert witnesses state their opinions either in writing or orally. Article 367 (Examination of Parties), a court may, either *ex officio* or upon request of the parties, examine the parties themselves. In this case, the court shall have the parties take an oath.

<sup>5</sup> Civil Procedure Act, Article 206 (Method of Pronouncement), the presiding judge shall pronounce a judgment by reading the text thereof pursuant to the original of judgment, and if deemed necessary, he may briefly explain the grounds therefore.

<sup>6</sup> Civil Procedure Act Article 204 (Principle of Directness), (1) judgment shall be made by the judges who have taken part in the pleadings forming a foundation thereof.

Germany, Japan also adopted the principle of oral proceeding, although it has been criticized for not having fully realized this system until their recent reformation of civil procedure.<sup>7</sup>

Historically, two major justifications are usually advanced by those who assert the value of oral proceedings: enhancing transparency and fairness of the judiciary, and actually providing the public access to open court procedures. However, what makes our judiciary take notice of this procedure is that oral argument helps communications between parties and judges, eventually leading to harmonious settlement of disputes and enhancing appropriate decision-making.

## II. FINDING PROBLEMS AND SEEKING SOLUTIONS

### 1. How Were Our Court Proceedings in the Past?

Due to problems inherent in the prior dominant mode of litigation in the Korean court system, we are quite willing to address and correct problems as they arise. Thus, we began to pay attention to the values of oral proceedings and lay emphasis on it in practice. In accordance with judges' customary working patterns, individual judges only enter the courtroom once a week to preside over dozens of cases and spend the other days of his or her week writing judgment-opinions for the overload of cases, articulating the reasons for decisions based on the written briefs and other records from case files in his or her chamber. Adherence to such work patterns has been treated as a golden rule, which the Korean judiciary has identified as a key to success in handling the overload of cases quickly. However, the Korean judiciary has no choice but to change this system following changes in Korean society, to fulfill public aspirations for better judicial services and curb antipathy toward the judiciary.

#### A. Weight of the case documents – about the thesis of 'all solutions are in the case documents'

Korean court proceedings have mainly been operated in accordance with two principles. The first is that many trial dates are to be scheduled every three or four weeks (dispersed trials for one case) and the other is that many cases are to be heard on the same designated trial date (parallel hearings for many cases).

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<sup>7</sup> See Article in detail about the history of oral proceeding in Germany and its present situation in Japan, Takesitamirio, Importance and necessity of oral argument (in Japanese), 5 *Jurist* 220 (1998.7).

Therefore, the court has put more emphasis on written briefs than on oral arguments and has regarded written briefs as a more appropriate resolution method for the purposes of overcoming time constraints and heavy caseloads. In this court environment, the custom of written proceeding, which is not anticipated by the law, has taken root in our court system, and the prevailing conception is that things which are not in records do not exist in this world, meaning that judges find it difficult to consider orally-made arguments. Repetitious reviewing of case documents has become standard work for judges when reaching decisions.

**B. Way of operating trials in courtroom – about the thesis that ‘court proceedings should proceed concisely without any delay or hindrance’**

In the past, actual details of cases were not commented on in courtrooms since oral arguments were replaced by quotation of the written briefs if the judge did not specifically order otherwise. This kind of litigation practice was said to be unavoidable due to time constraints and was grounded on the belief that it is unnecessary to reiterate the contents of the written documents offered to the judge. Most of the work of judges was concentrated on reviewing the written documents and writing decisions. Those practices were based on a consensus that court proceedings should reduce unnecessary components.

**C. Function and role of written opinion – about the thesis of ‘judges speak only through their decision’**

In our court proceedings, judges’ written opinions contain abridgments of complete records of the parties’ testimony and arguments, the outcome of examination of evidence, undisputed fact statements, and legal analysis. They are so well constructed that anyone could gain a clear picture of the case in a single glance. When writing his opinion, a judge can check scrupulously for any possible flaw in his legal analysis based on the parties’ arguments and evidence. Also, his judgment writing could function as an answer given to the parties and enhance the likelihood of parties’ acceptance.

However, we do not always compliment the merits of our court proceedings when we consider the fact that judges are spending most of their time writing opinions in detail. This is the time for us to reconsider what losses are incurred when we make judges invest enormous time and efforts into performing their job in writing.

**2. What Kinds of Problems Were Caused by Prior Court Proceeding?**

Previously, a courtroom could not function as a place for communication due to the lack of oral arguments. Parties faced limits when making counter-

arguments and had to submit case briefs under the stressful knowledge that the deciding judge would read their written works several weeks later.

This manner of court proceedings led the judge to be uninterested in oral proceeding; he tended not to listen very eagerly to parties' arguments and even witnesses' testimonies; he believed that he could reach the right conclusion by isolated readings of case documents. The custom of court proceedings, rather than individual choices made by the judge, prevented him from propelling implementation of oral proceeding.

As for parties, they had suspicions about whether the judge on the bench understood their assertions properly or even the facts of the case. They were unable to figure out in which direction the case was going and what points had to be focused on when making arguments. To them, the court proceedings were so rigid and authoritative that they would not dare raise objections throughout the course of proceedings. Consequently, it was not so unusual that the judge on the bench did not have a chance to listen to oral arguments themselves, which was certainly far from showing his deep concern over the parties' predicaments.

Due to the lack of common understanding of the merits of the case, parties were unable to predict the results of cases. To the parties, the judiciary seemed to be unconcerned with them and only interested in formally handling the case. Also, the chances of reconciliation between the parties were low.

As a result of the lack of communications between the judge and the parties in terms of assertions and evidence in the court proceeding, parties did not understand the reasoning of court decisions. Moreover, judges' written opinions supporting decisions were not sufficient to resolve parties' questions. The rates of appeal against such decisions were high, and the public's need for good judicial service could not be satisfied even in the appellate courts.

On some occasions, parties had doubts about the fairness of the court proceedings, as the process seemed to be indifferent to the needs of the those seeking court services. The court's indifference had damaged the public's faith in the judiciary. Eventually, the judicial system could not play an appropriate role in solving disputes in society.

### **3. How Shall We Resolve These Problems?**

As I mentioned above, the crisis in our judiciary requires us to find a new solution for the problems stemming from courtroom procedure. What first came across my mind is that we should look back on our judicial system from the parties' point of view.

As judges, we should consider the parties' needs in the court proceeding rather than our own capability in handling cases since a decision would not be regarded as fair unless the parties also believe that it is fair. The Korean judiciary

has started reconsidering its system; whether it has not 'watched the moon at which the parties have pointed' but has 'watched the hands with which the parties pointed at the moon', meaning that it cannot read the between the lines; whether it has done the best to serve what the parties wanted in trials; whether it has tried to find out the most favorable proceedings and adequate resolution to them; whether it helped the parties reach ultimate resolution of the disputes; and lastly whether the court has presented the right answers to the assertions from the parties.

We reached the conclusion that the court proceeding should be adjusted so that it would meet the needs of parties rather than those of judges. Through listening to what the parties hope for and what they want to assert by communicating with an open mind, the judiciary can regain the public faith.

Recent advocacy for oral arguments in the judicial system is one of the judiciary's efforts to recreate itself as 'the judiciary accountable to the public.' Oral proceedings provide judges and parties the opportunity to engage in active communications in courtrooms by allowing for the making of arguments and counter-arguments in real ways.

Implementing oral argument can be a great stress to those engaged in the legal profession as most of them are accustomed to the writing-centered tradition. Nevertheless, our society requires a fresh change in the court system, and I believe that oral proceeding would play an important role to achieve that goal, catalyzing a fundamental cognitive change to legal professions.

Emphasis on oral proceeding does not imply that the writing-centered tradition is totally wrong or that it should be discarded. I do not ignore the efforts of the judges who try to make high-quality decisions under the time constraints they are presented with given strained working conditions and heavy caseloads. Rather, I point out that it is necessary for us to pay attention to the things that our tradition has overlooked.

Oral proceeding is one of the principles our procedural law had enshrined. It is necessary for the Korean judiciary to operate the court system by balancing both procedural principles: writing-centered proceedings and oral proceedings. In so doing we will be able to benefit from the advantages of both types.

### III. SUMMARY: ADVOCATE FOR THE PROGRESS AND PROCEDURE OF ORAL PROCEEDINGS

#### 1. Operation of Concentrated Proceedings and a New Model in Civil Procedure

In 1989, an effort to improve the case management system in civil cases was started by establishing an exemplary bench in the Seoul Central District Court.

For ten years since, the effort has been continued as the number of exemplary benches for civil cases increased, until the judiciary executed the 'brand-new model for civil case management' (so-called 'New model'), effective since 1 March 2001. This New model drastically changed Korean civil procedure.

The underlying principle and representative motto of the 'New model' is 'the enhancement of public faith in the judiciary through the substantive court proceedings'. In other words, the purpose of the 'New model' is to increase the likelihood that parties will accept courts' decisions, as a result of satisfaction in the court proceedings. The proceedings under the 'New model' are as follows. In order to avoid the previously sporadic and dispersed court proceedings, parties' exchanges and rebuttals via written-documents ('pleading') is required to take place before such proceedings. Then, all the points at issue and the demonstrations of proof should be prepared before the first scheduled court date when concentrated examination of evidence is completed. All these proceedings are newly developed to transform the previous traditional court proceedings (which requires lots of scheduled court dates and had almost no substantive oral argument) into a new system (which requires the parties to exchange pre-trial documents for an open confrontation through actual oral arguments).

## 2. Operation Plan for Oral Proceedings

Although there has been noticeable achievement in pre-trial confrontation through the well-prepared written argument, oral argument proceedings have not been effectuated successfully. Therefore, in 2006, every court in our country simultaneously executed the 'operation plan for oral proceedings' stressing *pro se* parties' active participation in proceedings and communications among all the people involved in the case.

On 2 December 2005, the National Chief Judges Conference identified the need to make efforts to change court proceedings toward reinforcement of oral proceedings. Accordingly, courts around the country began to drive forward ways to strengthen oral proceedings. In 2006, the following official conferences were sponsored by the judiciary: the national conference of vice chief judges;<sup>8</sup> the national conference of civil presiding judges;<sup>9</sup> an informal gathering for discussion between the Supreme Court and the Korean Bar

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<sup>8</sup> 6 March 2006. Oral proceeding implementation is adopted as the conference agenda and discussed.

<sup>9</sup> 17 April 2006. Courts in every level presented the process of oral proceedings/the implementation plans in turn and all attendants agreed that the Supreme Court needs to develop an ideal model for oral proceeding.

Association;<sup>10</sup> an informal gathering for discussion in courts around the country held by the Court Administration;<sup>11</sup> nationwide court workshops for oral proceedings;<sup>12</sup> and a seminar for reforming civil court proceedings in the Judicial Research and Training Institute.<sup>13</sup> All these conferences and gatherings were integrated into the bench book 'Manual of the oral proceeding' published at the end of 2006. This book presents a standardized model for oral court proceedings. Workshops and seminars have been held throughout 2007 by courts around the country.

Many papers,<sup>14</sup> articles<sup>15</sup> and columns<sup>16</sup> discussing oral court proceedings have been published through newspaper and other publications. Workshop materials and trial audience reports have also been published.<sup>17</sup>

<sup>10</sup> 24 April 2006. Representatives of Prosecutor-General's Office, Korean Bar Association and Seoul Bar Association attended to discuss the legal community's interest, help and difficulties in strengthening oral proceedings.

<sup>11</sup> From 3 May 2006 to 26 May 2006. The judge from Office of Court Administration, who is in charge of oral proceeding planning, held an informal gathering to discuss and collect the opinions from all local courts.

<sup>12</sup> From 12 June 2006 to 11 September 2006. All courts nationwide established oral proceeding workshops and discussed action plans to promote oral proceeding.

<sup>13</sup> From 23 October 2006 to 25 October 2006. In this seminar, an ideal model for oral proceeding in its unified form was mainly discussed.

<sup>14</sup> The judicial research and training institute, 'The structure of civil procedure and the skill of oral argument' (in Korean); Kim, Hongyub, 'The study of application and its limit of oral proceeding' (in Korean) etc.

<sup>15</sup> Kim, Younghun, 'Is oral argument inefficient?' (in Korean) *The Law Times* 24 July 2006; Kim, Younghun, 'Retrospect and thesis of oral argument' (in Korean), *The Law Times* 12 December etc.

<sup>16</sup> The editorial of the *Law Times*, 'We hope that oral proceeding takes root as soon as possible' (in Korean), 'The present situation and thesis of oral proceeding' (in Korean); The article of the *Law Times*, (1) Light and dark side of oral proceeding, (2) Persuasion in courtroom and ruling concise, (3) No survival of lawyer without competitiveness (in Korean); Special Gathering for discussion on 56th anniversary of foundation of the *Law Times* (in Korean) etc.

<sup>17</sup> Essays of 33rd seminar by The Society of Study of Comparative Law are (1) Lee, Wooyoung 'Legal System and practice of oral argument in U.S.' (in Korean), (2) Oh, Junghoo, 'The principle of oral proceeding in German civil procedure' (in Korean) and (3) Choi, Kunho, 'The practice of oral proceeding in Japan' (in Korean); Those of 36th seminar are (1) Lee, Wooyoung, 'Case Management of Federal Civil Procedure in U.S.' (in Korean), (2) Shim, Hwalsub 'The practice of oral proceeding in Japan' (in Korean) and (3) Chung, Jaeho, 'Oral proceeding and ruling in Germany' (in Korean); The Study Group that comprises the judges who are interested in foreign legal system published the book 'Study of foreign legal system (2)' (in Korean) which contained the details of oral argument in U.S., U.K., France, Germany, Japan, China.

## IV. CASE MANAGEMENT FOR THE COURT ORAL PROCEEDINGS

### 1. Summary of Case Classification and Proceedings Operation

The presiding judge shall decide on the case classification and the method of handling cases depending on whether the pleadings from the defendant have been submitted as well as the contents of the pleadings. A short track of court proceedings, called a 'fast dispute resolution,' can be employed by rendering court judgment without any hearings if the defendant fails to file a written pleading within a limited number of days or if the submitted pleading contains full admission of the plaintiff's claim. If the defendant submits a written pleading within that time limitation, the presiding judge classifies the case as one of three categories: preparatory (pre-trial) proceeding, a scheduled oral argument (trial), or an alternative dispute resolution proceeding. This classification is supposed to expedite 'fair resolution' through efficient clarification of disputed issues and a concentrated examination of evidence and by reaching an 'amicable resolution' by mediation and reconciliation.

In principle, a case with disputed issues should be brought to preparatory pleadings where the disputed issues and facts will be sorted out.<sup>18</sup> The written argument proceeding precedes<sup>19</sup> this, and if necessary, the presiding judge may open a court date for preparatory pleadings (pre-trial hearings).<sup>20</sup> It is possible for the court to directly designate a date for an oral argument in trial. However, the 'New model' suggests that the court should designate a preparatory hearing date in principle.<sup>21</sup>

From the standpoint of case management, a summary on strengthening the oral proceedings is as follows.

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<sup>18</sup> Civil Procedure Act, Article 258 (Procedures for Preparing Pleadings), (1) the presiding judge shall bring the case straight to the procedures for preparatory pleadings, except for the case where a judgment is rendered without holding any pleadings under Article 257 (1) and (2): Provided, That the same shall not apply to the case where it is not needed to separately take the procedure for preparatory pleadings.

<sup>19</sup> Civil Procedure Act, Article 280 (Progress of Preparatory Proceedings for Pleadings), (1) preparatory proceedings for pleadings shall progress, with fixing a period, by means of making the parties submit the briefs and other documents or exchange them between themselves, or letting them apply for examination of evidence to prove the alleged facts.

<sup>20</sup> Civil Procedure Act, Article 282 (Date for Preparatory Pleading), (1) the presiding judge, etc. may open a date for preparatory pleading and have the parties attend there, if deemed necessary for arranging the allegations and evidences during the progress of the preparatory proceedings for pleadings.

<sup>21</sup> The Court Administrative Office, 'The practice of oral proceeding' (in Korean) in Benchbook at 129.

## **2. Written Argument Proceedings**

According to the 'New model,' given two written argument (pleadings) proceedings, the parties have the opportunity to supplement written arguments for their assertions, contentions, and evidence. However, this may bring out problems like hindrance of case processing, lodgings of meritless disputes, or piling of court documents.

To cope with these problems, it is necessary to adjust the time restriction of written argument proceedings depending on the parties' preparation and the nature of the case. The presiding judge has discretion to set a date for pre-trial hearing with no more written argument proceedings if he concludes that written pleadings already provide sufficient detail, describing the facts in issue and assertions so that no raising of additional contentions or factual issues is necessary.

## **3. Sufficient Time-Allocation for Oral Argument Proceedings**

In order to promote oral argument proceedings, sufficient time should be reserved for each case. The 'New model' does not suggest a standard time-limit, leaving the courts and divisions of courts to exercise discretion in allocating appropriate time for oral argument proceedings.

Strengthening oral proceedings has great influence on judges' working patterns. Judges are supposed to spend more time in the open courtroom or in the pre-trial hearing room for handling cases than in their chambers reviewing the court documents or writing opinions. This shows that stressing the oral proceeding is directly related to the increase in the amount of time spent in the open courtroom proceeding, from once a week to more than twice a week.

Stressing oral proceedings also requires the scheduling of court dates in different times for individual cases, since reserving sufficient time is crucial for oral proceedings. That is, each case needs its own scheduled court hours, which the judges are required to arrange reasonably. It requires sensible estimates of the hours that will be spent on each case in order to allocate enough time for oral proceedings without congestion.

## **4. Instruction of Oral Proceedings**

Until oral proceedings take deep root in our litigation practice, courts need to emphasize the underlying intent of introducing oral proceeding to the parties, for them to prepare their case in advance before the notified court date. The notice should include explanation of the detailed procedures of oral proceedings. It should be differentiated depending on whether the hearing being held

is a pre-trial hearing date or an oral argument date in trial process. In some cases, the court may serve a court order for the list of preparation items via phone call or e-mail.

## V. PRESIDING COURT DATE TO REINFORCE ORAL PROCEEDINGS

### 1. Essential Components of Oral Proceedings

#### A. Substantive argument about the merits of the case at issue should be made on the court date

Rather than restarting the submitted pleading documents, arguments over the substantive merits of the case at issue should be made. The argument should include clear contentions and sound reasoning. The parties should be managed with consideration.

#### B. Interactive communications should be achieved

Oral proceeding, as a speech-centered process, pursues sincere, productive communication in order to clarify the core issues and resolve disputes through interactive communication. A proceeding in which the parties present their respective assertions throughout every single point of the trial is undesirable. Likewise, a case where the presiding judge identifies the substantive merits of the case only after he acknowledges them is objectionable. Regardless of who initiates it, there should be interactive communication between the judges and the parties or even between the parties themselves to reach a shared understanding.

By adopting this 'New model,' we can identify the substantial merits of cases more easily, increase the chances for harmonious settlement and better predict the outcome of cases.

#### C. We should secure *pro se* party's active procedural participation

As end-users of the court's services, *pro se* parties should have opportunities to assert their points of view directly to a presiding judge. This is not regarded as forcing the parties to state anything disadvantageous to them nor is it viewed as infringing the lawyer's right of representation. The court should be considerate of the parties' needs to present their contentions, arguments, and the grounds for their feelings to be verified through the court proceedings.

The court recommends the attendance of the party himself, being present next to his attorney, and urges him to exercise his chances of testimony as his procedural rights.

#### **D. The court proceedings should be open to the parties**

Oral proceedings follow the principle of public trial where the assertions, contentions, and pieces of evidence are presented before the parties' eyes so that the course of the case can be accurately predicted and so that parties are able to make prompt responses and adequately manage case dealings. Throughout the process, we will be able to preserve the transparency and fairness while eradicating public distrust and misunderstanding of the judiciary.

### **2. Summary of the Court Oral Proceedings**

#### **A. Types of oral proceedings**

Forms of oral proceedings are classified into three types: the parties can make one-sided statements (reporting type); the parties can communicate interactively (interactive type); or the parties can argue over the justifications of their contentions in front of the presiding judge (argumentative type). In practice, it is necessary to use the three types to integrate their respective use, depending on: the phase of oral proceeding, the case contents, and the parties' willingness.

Also, with regard to the leading person, we can classify oral proceedings into two types: party-dominant type and judge-dominant type. The latter is appropriate in cases where the parties are not well prepared or lack argument capability, and the former is appropriate where the parties are willing or are required to take part in the proceeding vigorously. In practice, depending on case types and the individual situation of parties, the above proceeding types can be used selectively and are interchangeable.

#### **B. Summary of scheduling of court dates**

The oral proceeding operation model suggests a planning method for court dates for which the 'New model' developed two categories: 'court dates for examination of core issues' and 'court dates for examination of evidence.'

The chart below indicates each of the procedural steps for the proceedings (sectional type). The steps are designed to activate oral arguments while preventing the parties from leaving out core issues in dispute. On the other hand, we can skip over some steps depending on the nature of the cases and present tentative core-points in dispute by comparing the parties' contentions and admissibility of evidence which are to be confirmed in those cases (integrated type).

### **3. Operation of Court Dates for Examination of Core Issues**

Overall proceedings are held in the following order. First, respective assertions from the parties are presented and evidentiary documents that have been submitted are examined. Then, the presiding judge draws out and defines

issues in dispute. He or she can let the parties make arguments if necessary. At this point, the judge should aggressively attempt to seek a legitimate resolution. When the need arises for a witness examination, the court should plan for it following the request of the parties.

### **A. Presenting contentions**

There are two operation types for the proceedings: 'party-led proceeding,' which is proper for a case in which a party is represented by an attorney, and 'judge-led proceeding,' which is proper for a *pro se* case. In practice, the operation is actually a mixture of these two because both aim to activate oral proceedings.

The 'party-leading type' presumes pre-review of the filed documents by the judge so that the actual proceeding can concentrate on the parties' statements of core assertions. The presiding judge calls for this step to confirm the core points and necessary evidence by cross-examining to reveal actual causes as well as the differences of parties' contentions.

As for a 'judge-led proceeding,' the presiding judge summarizes the case and the disputed points before he or she questions the parties' opinions. Even in this case, the judge should lead the case by urging each party to be aggressive in making his or her arguments about sorted points at issue. The judge should be considerate enough to provide parties with opportunities to make active statements of the relevant facts.

### **B. Examining documentary evidence**

In previous court proceedings, judges admitted documents attached to preliminary pleadings or briefs as unequivocal evidence and cursorily completed examination and weighing of evidence. The parties used to present statements mentioning that they were to submit documentary evidence. In other words, the parties did not present arguments but quoted written briefs that were previously submitted.

However, as an issue of proof, documentary evidence can be a disputed point in many cases and plays a very important role, especially in civil cases. Examining submitted documentary evidence requires thorough oral proceeding, since it is a serious and heavy decision for judges to make.

Examination of documentary evidence should unfold in this order: 1) submission of documentary evidence; 2) examination of the authenticity of the documentary evidence; 3) ruling on the evidence; 4) examination of contents of documents. If proof by evidence is requested, the judge should require the submitting party to present the object of the proof presented through documentary evidence and allow the submitting party to make an oral argument if necessary. The other party should have an opportunity to contest the authenticity of the other party's documentary evidence.

At this stage, the judge should urge parties to make a statement of relevant facts and material issues, such as contesting evidentiary authenticity, in detail rather than allowing parties to make conclusory remarks like 'unawareness' or 'denial.' Unnecessary documentary evidence should be withdrawn. If the party objects to such withdrawal, he should be given a chance for sufficient argument before the court's refusal to accept it as evidence. While in civil cases examination of documentary evidence can be completed merely by reading the documentary evidence, in criminal cases it should be done by making oral statements presenting the documentary evidence or making oral statements of its relevancy. The judge will direct the presenting party to state the contents of the evidence and the counter-party will be given an opportunity to contest. During the process, more material and significant parts should be identified and focused on, and parties' contesting of the substantive merits of the case or the evidentiary value of the documents should take place.

### **C. Identifying points in dispute and parties' arguments**

After hearing the arguments and examining evidence, a judge discerns the factual and legal points that are relevant to the case. The judge refuses to consider arguments proven to be false or ungrounded. Such facts are uncovered through questioning of parties and will allow the parties to share a common understanding over the core factual and legal points at issue. It should be the judge who presents the points in dispute. Then, the judge may redefine the points based on the parties' comments on them.

Parties' oral arguments can proceed either before or after the judge defines the points in dispute. Even when the former helps to clear certain points, the latter can help flesh out arguments that are more persuasive as well as evidence that correctly supports the arguments.

### **D. Presenting judges' decision-making process**

Oral proceedings are meant to be an interactive communication between the judge and the parties so that the parties directly or indirectly observe the whole decision-making process undertaken by the judge. Through the proceedings, the parties and the judge can share common understanding over the material facts and legal issues in dispute and avoid unnecessary contentions. Such procedures will encourage resolutions other than judgment and allow the parties some foresight into the ultimate disposition of the case, thus causing the court to become more accountable to the public. Most importantly, the judge should be cautious and refrain from doing anything to contribute to the negative image of the court (for example, allowing prejudice to interfere with his decision-making).

**E. Seeking alternative dispute resolution**

Our oral proceeding model focuses on alternative dispute resolutions like reconciliation or mediation since strengthening oral proceeding in 'the court dates for examination of core issues' can create modes appropriate for such alternative dispute resolution.

It is desirable that we attempt to accomplish an alternative dispute resolution at a stage prior to the planning of examination of evidence other than submitted documents. If it fails or if the fate of a case is foreseeable only after further examination of such evidence, the court can try reconciliation or mediation again in the closing-argument phase without giving notice of the delivery date of judgment.

Pleading	Only case summaries and points at issue can be described and additional details could be presented in a later stage when identifying issues or adversary arguments.
Examination of evidence	Parties can apply for the examination of documentary evidence. Relevance and necessity of the examination should be presented by the requesting party and the counter-party can rebut it.
Identifying issues/ adversary argument	Discerning which facts are in dispute and which are not in dispute, the judge presents alleged points at issue and defines them reflecting the parties' contentions. Adversary oral arguments can be done either prior to or after identifying issues.
Alternative Resolution Seeking	If an atmosphere of reconciliation is matured through interactive communications between judges and the parties, an alternative dispute resolution will be pursued.
Plan for examining evidence	The court adopts feasible witnesses and arranges a schedule that spares appropriate hours for witness examination.
Parties Making Statement	Opportunity to make statements should be given to the parties at the last phase of the court dates for core-issues examination. Though, if necessary, judges should allow the parties to make statements even during the proceeding.

Figure 2.1 Operation of the court dates for examination of core issues (pre-trial hearings)

Presenting Points at Issue	Judges present summary of the case in dispute, points at issue and the result of evidence examinations at the pre-trial hearings and remaining methods of evidence (witnesses).
Witness Examination	Witness examination process should take place protecting the parties' procedural right and should be appropriate for finding factual truth.
Parties' Evidence-Proving Contentions	After the witness examination, the parties should be given a chance to make respective contentions about the result of evidence examinations.
Pursuing Dispute Resolution	As a result of witness examination, the fate of the case becomes foreseeable and a renewed attempt at dispute resolution is recommended.
Closing Statement	At the last phase of trial, judges should give the parties opportunities to make final arguments (closing statement).

*Figure 2.2 Operation of court dates for concentrating examination of evidence (trials)*

If a judge proposes a settlement plan for the parties, he should explain the reasons or grounds for his plan. Furthermore, if he is going to make a 'settlement proposal of mediation,' which can have the same effect as final judgment if the parties fail to raise an objection within 14 days of delivery, he must see to it that the proposal does not differ much from the prospective judgment.

#### **4. Operation of Court Dates for Concentrating Examination of Evidence**

The overall process is as follows. First, previous proceedings for examination of core issues are summarized and presented so that judges and the parties share a common understanding of the core issues in dispute in order to make witness examination efficient. Second, witness examinations take place. Finally, the judge gives the parties a chance to make overall contentions. At this point, the judge should be aggressive in attempting to reach reconciliation or mediation, since the merits of the case have been fully revealed to the parties at this stage. The judge should provide the parties with opportunities

for closing statements, which are supposed to encompass all aspects of the case.

The following is a detailed explanation of the necessary proceedings.

**A. Presentation of the outcome of the date for preparatory pleadings (pre-trial hearings)**

Examination of core issues takes place in the procedure of preparatory pleadings (pre-trial hearings), even though the judge has the option to arrange it at trial. If the examination of core issues takes place in the preparatory pleadings (pre-trial hearings), the outcome of that procedure must be presented at trial, for the procedure can be presided over by a commissioned judge without other panel members' participation and is usually not held in public.<sup>22</sup>

This process should proceed by actual oral argument. In the past, however, it was substituted with a formal statement, indicating that presentation of the result was already made.

This presentation process varies between 'parties' statement' and 'statement about the outcome of evidence examination' in the preparatory pleadings (pre-trial hearings). In some cases, the court can help parties gain foresight into the result of the trial just by indicating the substantive facts that are necessary to prove unexpectedly strong testimony from crucial witnesses.

**B. Witness examination proceedings**

Witness examination should be performed in a way that protects parties' procedural rights as well as secures the finding of factual truth. Most importantly, examination should focus on crucial points and should not be substituted by certified documentary statements. Cross-examination should be made in a manner in which material facts can be argued in detail. The main agenda should be to reveal the relevant circumstances with which the judge can determine the credibility of witnesses' testimony. Cross-examination should not be directed to extract a confession of false testimony.

Confrontation of the witnesses, examination of parties' testimony, and parties' direct participation in witness impeachment should be considered positively along the course of the proceedings. Also, the judge is to convey to the parties that he is fully aware of the contents of the testimony and the attitudes of the witnesses.

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<sup>22</sup> Civil Procedure Act, Article 287 (Pleadings after Conclusion of Preparatory Procedures for Pleadings), (2) the parties shall state the outcomes of the date for preparatory pleadings at the date for pleading after a conclusion of the date for preparatory pleadings.

### C. Delivering opinions on the result of evidence examination

After completing the examination of witness testimony, the judge provides the parties with the opportunity to deliver their opinions on all the evidence submitted thus far. This proceeding should not be omitted, for it has a significant influence on the judge's decision making.

The judge should instruct the parties or the witnesses to ask and give only factual testimony, not to quarrel on meritless issues, and then give the parties an opportunity to make sufficient arguments.

### D. Closing argument for summing up the case

Just before the completion of argument proceedings, judges give each party the chance to make closing arguments in order to sum up their case. At this stage, judges can proceed in the same manner as a criminal trial. The parties need to do their best to make impressive closing arguments, putting together all the evidence and information from previous proceedings.

## 5. *Pro Se* Cases

### A. Summary

*Pro se* cases represent a great number of cases and are related to the public trust of the judiciary since ordinary individuals' experience with the judicial system comes from court proceedings. In particular, to enhance the public trust and understanding of the judiciary, it should be emphasized that *pro se* procedures can satisfy individuals only when the parties are given sufficient opportunities to argue and testify. The party himself or herself, plaintiff or defendant, is the appropriate person to give oral argument in that he or she, as a party concerned, knows more about the substance of the case than anyone else.

Table 2.1 2005 statistics

	Both parties represented by counsel		Only one party represented by counsel		Neither party represented by counsel	
	Cases	Rates %	Cases	Rates %	Cases	Rates %
Collegiate panel case	19 209	45.1	13 822	32.5	9 531	22.4
Single judge case	25 023	11.8	56 394	26.7	129 835	61.5
Small claim case	1 754	0.2	85 085	9.7	789 756	90.1

## **B. Considerations according to the characteristics of *pro se* cases**

(1) *Writing of pleadings by third hand* In many instances, individuals in *pro se* cases tend not to write pleadings themselves. Therefore, the court should induce the parties to vigorously participate in giving their own opinions orally and attempt to figure out underlying intents of their claim or defense.

(2) *Lack of legal knowledge* Everyday language and expressions should be used in the court proceeding, and judges should explain relevant legal principles using proper examples to the parties. This is because they might have difficulty in understanding legal issues properly due to lack of legal knowledge.

(3) *Argument patterns in pro se cases* The parties tend to end up exchanging verbal assaults and personal attacks clinging to trivial circumstantial facts. In this case, the judge should take appropriate measures taking the following into consideration: the judge can call their attentions to other material legal points to change issues; or the judge can demand parties to follow his instruction of oral argument proceeding to make it orderly.

(4) *Expectation and concerns about fairness* As more and more emphasis is put on oral proceedings, the parties will become keen to see procedural fairness in court proceedings. All the while, a judge must deliberate seriously in giving fair opportunities to make arguments, showing respectful attitudes in listening, minimizing the risk of misunderstanding of the judge's comments, and peacefully managing the proceedings.

## **C. Court proceeding preparations**

The judge should discourage repetitive and meritless submission of documentary arguments and make an effort to read between the lines of pleadings even when they are fallacious. The judge should develop guidelines that are easy for parties to understand and that lay out the disputed issues and legal points.

## **D. Court date operations**

Although judges lead the court proceedings, the parties themselves should actively take part. There may be two methods of operating the court proceedings: 1) the judge can deliver the case summary based on his or her previous review of the court files and then ask the parties their opinions; 2) the judge can start the oral argument process by letting the parties present their own cases. Meanwhile, the judge should be actively involved in the argument by clarifying the points in dispute.

If either one of the parties is not represented by an attorney, a judge should be careful that the *pro se* party is not unnecessarily distrustful and should

proceed with the case on an adjusted level which each party is capable of understanding. In *pro se* cases, judges make use of the civil legal services and should be careful not to go too far in operating oral proceedings, considering that he or she may be entitled to proceed in *forma pauperis*. Using everyday language and expressions helps ordinary people to understand what judges say; explaining the legal issues using common sense or common wisdom is more comprehensible.

In a case without any direct evidence, the judge is supposed to re-examine the reasonableness of arguments presented through sufficient communication about the circumstantial facts of the case rather than urging them to prove evidence in a businesslike manner.

## VI. ORAL PROCEEDING: PRESENT SITUATIONS AND ISSUES

### 1. Oral Proceedings: Current Climate and Future Goals

#### A. Changes in judges' work pattern

In the past, a judge's main job was to review the case files and write his decision in the form of an opinion, as well as to preside in open court proceedings once a week. Currently, however, they are making efforts to increase courtroom hours for oral proceedings to more than twice a week.

In order to have more courtroom oral proceedings, these measures should be taken at the same time: reducing unnecessary documentary evidence files and simplifying written opinions to focus on points in disputes. Judges can use the model forms of simple written opinions that are posted in the judicial intranet.

#### B. Changes in courtroom

Court date scheduling in different timelines has been stressed and the hours consumed for each case have been significantly increased. We can see more cases where the judge gives parties more opportunities for oral argument than we see where judges merely recommend parties to submit written pleadings. There have been more changes in attorneys' attitude toward oral argument from the beginning. Some attorneys are still passive in oral arguments.<sup>23</sup>

#### C. Changes in court proceedings

Several positive effects, such as parties' satisfaction with the court proceeding

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<sup>23</sup> See Exhibit (Survey Result) Questionnaire 3 or 5.

and the recovery of the parties' trust in the judicial system, can be found. When I look into my recent six-month experience<sup>24</sup> in court proceedings and the outcomes of local courts' seminars on oral proceeding,<sup>25</sup> the interactive communications between parties and judges have been substantially improved compared to those of the past.

Still, we cannot yet discern significant changes in statistics, as it has been only about one year since we began emphasizing the importance of oral argument proceedings. The court statistics from 2006 to 2007 are as shown in the appendix: 1) overall, the case handling has been improved and 2) the number of appeal cases have continued to decrease.<sup>26</sup>

The effects of oral proceeding on the court's decision-making could be a controversial issue, though we all agree that oral proceedings are helpful in understanding the cases themselves. Until now, we have not had a statistical report or evidence demonstrating any results. However, we will evaluate the effects as the oral proceedings gradually begin to take root in our court system.

## 2. Merits of Oral Proceedings

As mentioned above, the advantages of oral proceedings are as follows: 1) the judge can acquire more accurate information when deciding cases;<sup>27</sup> 2) for the parties, more opportunities to make arguments and offer testimony, and the results of trials are more easily predicted. As a result, more alternative dispute resolutions are likely to surface and there might follow an increase in people's trust in the judiciary.

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<sup>24</sup> See Exhibit (Survey Result).

<sup>25</sup> See Supreme Court homepages, [courtnet/resources/civil case/new model](http://courtnet/resources/civil%20case/new%20model): oral proceedings examples.

<sup>26</sup> See Table 2.4 'Exhibit court cases nationwide'.

<sup>27</sup> These advantages of oral arguments are indicated in articles about oral arguments in appellate court proceedings in U.S.; Robert J. Martineau, 'The value of appellate oral argument: A challenge to the conventional wisdom', 72. *Iowa L. Rev* 1 (1986) (Martineau criticizes current oral arguments practice in appellate court proceedings in U.S. He insists as follows: The oral arguments are to become helpful to judges in deciding judgment; Judges should be able to ask questions of counsel whenever they need to; The parties' counsel should be able to answer immediately; Even judges should be able to discuss with counsel if they want); Myron H. Bright, 'The power of the spoken word: In defense of oral argument', 72. *Iowa L. Rev* 35 (1986) (Bright emphasized the importance of the oral arguments especially in judges' judgment decision. He provides some research projects results showing that the judges changed their case decisions, which were made only from reviewing the case documents, after having the oral argument proceeding).

## **BOX 2.1 SPECIFIC MERITS OF ORAL PROCEEDINGS**

### **Maximizing court communication**

Through oral argument proceedings, court communication among the people concerned, judges and parties, can be maximized. Interactive communication can be accomplished by oral argument proceedings, since the proceedings give the judges and the parties (attorneys) a chance to raise direct questions about ambiguous or doubtful assertions and testimony on the spot, through which they can even unearth underlying causes, motives or other unrevealed circumstances in dispute.

### **Accurate understanding of complex litigation**

Through oral proceeding, a judge or panel can comprehend even the most complex litigation that involves highly technical terminology that would otherwise be incomprehensible (just reading briefs, for example), but by oral explanation from parties and other people concerned it is understandable.

### **Helping the judge to make the correct decision**

Oral proceedings help a judge make accurate decisions. Because the judge is able to assess the overall intentions of the parties, he or she can appropriately evaluate witnesses' testimonies and appreciate the parties' and witnesses' demeanour through the oral proceedings.

### **Providing sufficient opportunities to make a statement – court as listener**

In pursuing 'Court as a Listener', oral proceedings provide a place where the parties can persuade judges by making persuasive arguments and presenting compelling evidence, where the parties can reveal their real intentions and situations. A judge should create an atmosphere where active contentions and arguments, rather than plain statements, can be made. A judge should be a serious listener also.

### **Helping parties to understand court procedure – court as explainer**

During the oral proceedings, the court can present and explain its opinion and reasoning to the parties so that the parties can directly work out in which direction the court procedure is going.

'Court as an explainer', which is one of the core aspects of the oral proceeding, can enhance public trust in the judiciary.

### **Fostering parties' alternative dispute resolution**

Oral proceeding, through its functioning as 'court as a listener' and as 'court as an explainer,' heightens the likelihood of reaching alternative dispute resolutions. The oral proceeding itself can be the most effective tool to find a way to resolve disputes in ways that the parties exactly want, since a reasonable alternative dispute resolution can be reached not by simply waiting for the parties' reconciliation but by exploring common understanding through oral proceedings.

### **Improving foreseeability of case outcomes**

Although an alternative dispute resolution may not be successful, judges would make their decisions relying on the findings from oral proceedings and the parties would be able to predict the result of the trial. This means that distrust of the courts' decisions could be minimized, since the parties will not argue that they were not given sufficient opportunities to make contentions or that they were unable to foresee the reasons when they lose their cases.

### **Enhancing effectiveness of case management**

Oral proceedings help the judge to do his work more easily and effectively since they can remove meritless contentions from consideration and concentrate solely on the remaining substantive factors so it becomes much easier to comprehend the case in detail and to set up reasoning to make a decision. Oral proceedings could make the judge's work tougher due to increased courtroom hours and requirements for serious pre-examination of court files. However, in the long term, oral proceeding will lighten the judges' workload because of effective case management and fewer appeals arising from the parties' acceptance of results (decisions) of trials.

### **Implementing public disclosure**

Oral proceeding is the only way to accomplish 'public disclosure'. By way of revealing the issues in dispute in an open courtroom, oral proceeding can help the audience understand the case better and judges will recognize the merits of the case thoroughly. Judges can manage oral proceedings with the principle of equity and by adhering to courtroom courtesies.

### 3. Criticism and Measures

These are the criticisms of oral proceeding initiatives: 1) the parties' statements over the case summary in oral proceedings are not so helpful in examining the case, since the judges review the parties' written pleadings before the oral proceedings; 2) Oral proceeding is not helpful for parties who are not competent enough to make arguments.<sup>28</sup> A survey of judges shows the following: 1) with the present case backlog, judges cannot manage the oral proceedings effectively; 2) oral proceedings themselves may add further burdens on judges, if the parties are non-cooperative.<sup>29</sup>

Oral proceedings are a method of hearing a case where judges try to learn something besides what is written in the pleadings. What we are trying to seek through oral proceedings is similar to what a student strives for when being present at a professor's lecture compared to what he can achieve by reading from a book.<sup>30</sup> Therefore, oral proceedings should be focused on communications, which means that it is unnecessary to repeat the submitted pleadings. In *pro se* cases, judges can run the process by giving access to parties and finding out what each party wants and by allowing parties to participate in the proceedings actively.

I do not agree with the suggestion that the court should run oral proceedings only for selected cases. Oral proceedings are one of the most basic procedural principles, one that should not be left to our own discretion whether to impose or discard. The only thing we can do is to adjust the level when operating oral proceedings considering case details, the parties' preparations, and the depth of the proceeding.

In order to effectuate oral proceeding principles in our judicial system, we need to do the following: curtail the caseload, take measures for easy grasping of case-files, simplify the court decision making proceeding, and secure court facilities.

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<sup>28</sup> Seoul, Seung Moon 'Arrogance and Modesty: a Thought of Open-Court Oriented Court Proceedings and Oral Proceeding', (in Korean), Human Rights and Justice at 221 (September 2006).

<sup>29</sup> Park, Hong Woo 'Oral Proceeding Initiatives : Current Situations and Action Plan', (in Korean), Essay presented at the seminar of oral proceeding in Seoul High Court (May 2007).

<sup>30</sup> Gwack, Kyung Gic 'Ideal Court Proceedings: What should be done', (in Korean), *The Lawtimes*, 30 October 2006. The oral argument cannot be replaced by the brief; the brief cannot be replaced by the oral argument. We need both.

Table 2.2 Exhibit – survey result

Questionnaire	Answer point range (from 1 to 7)		Average point
1 Did the court prepare the trial well?	1 point = Yes	7 points = No	1.32
2 Was the oral proceeding in the argument preparation court-date run well?	1 point = Yes	7 points = No	1.75
3 Do you think that the oral proceeding is helpful?	1 point = Yes	7 points = No	3.00
4 Did the oral proceeding influence the case decision?	1 point = Yes	7 points = No	3.38
5 Did the oral proceeding help judges to understand cases much better?	1 point = Yes	7 points = No	3.00
6 Did the judge ask the parties to explain or allow the court proceeding to deviate from the substance of the case?	1 point = I guess no	7 points = I guess yes	1.48
7 Are you satisfied with the judge's running of the court proceeding?	1 point = Yes	7 points = No	1.52
8 How was the judge's attitude?	1 point = Sincere	7 points = Businesslike	1.16
9 Who do you think leads the oral proceedings?	1 point = Presiding Judge	7 points = Counsel	3.21

Table 2.3 Survey result – parties, witnesses

Questionnaire	Answer point range (from 1 to 7)		Average point
1 Were the judges sincere in running the proceeding?	1 point = Sincere	7 points = Businesslike	1.66
2 How was the judge's attitude?	1 point = Respectful	7 points = Disrespectful	1.21
3 Did the judges understand the case well?	1 point = Yes	7 points = No	1.65
4 Did the judges listen to the parties seriously?	1 point = Yes	7 points = No	1.59
5 Was it easy to understand the judge's instructions/ words?	1 point = Hard	7 points = Easy	1.43
6 Did you say all you wanted to say?	1 point = Yes	7 points = No	1.94
7 Did you feel the court proceedings were fair enough?	1 point = Yes	7 points = No	1.59
8 Are you satisfied with the court proceedings?	1 point = Yes	7 points = No	1.82

*Notes:*

Cases for Survey: Cases from the District Court in Pusan/Civil Case 10th Division.

Survey Period: March 2007 – July 2007.

Survey Personnel: 31 counsel, 35 parties/witnesses.

Survey Method: We asked counsel and parties/witnesses to answer questionnaire with points from 1 to 7 according to their tendency toward answer point range. Average points were calculated with answered points.

Table 2.4 Exhibit court cases nationwide

Court	Disposition (%)		Dispute Resolution (%)		Appeal (%)	
	2006	2007	2006	2007	2006	2007
High Court	94.4	102.3	24.2	28.0	32.8	31.5
Appellate Division in District Court	89.3	96.6	29.1	28.1	25.4	23.3
Collegiate panel in District Court	91.8	86.6	20.7	20.5	41.5	40.4
Single Judge in District Court	80.9	95.1	33.7	31.8	22.2	23.2

Notes:

Statistics Period

– 2006 Statistics : 2006. 1. 1. - 6. 30.

– 2007 Statistics : 2007. 1. 1. - 6. 30.

Case classification: according to value of lawsuit.

– Over 100 million won claim: trial in collegiate panel in District Court, Appeal to the High Court.

– Below 100 million won claim: trial in single judge in District Court, Appeal to Appellate Division in District Court.

## VII. CONCLUSION

This article examines the backgrounds of oral proceeding initiatives in the Korean judiciary, the road-map of their progress to reach stated goals, and their detailed strategies and plans. Oral proceedings initiatives seem to constitute a motto that urges us to follow one of the legal principles. However, it is also an effort to recover the public trust in the judiciary through the reform of court proceedings. It has been about a year and a half since we started to implement oral proceedings in our court system. At this point, belief that we are in need of a stronger oral proceedings system has been widespread among members of the legal community. Yet we are still in need of more guidelines, a detailed manual, and the development of supporting programs and facilities.

From now on, we have to develop action plans to implement oral proceedings in actual situations rather than reiterate principles of oral proceeding or develop abstract civil procedure models.

### 3. The reformed criminal procedure of post-democratization South Korea

**Kuk Cho**

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#### I. INTRODUCTION

The nationwide June Struggle of 1987 led to the collapse of Korea's authoritarian regime and opened a road toward democratization.<sup>1</sup> Under the authoritarian regime, the 'crime control' value had dominated over the 'due process' value in regard to criminal procedure.<sup>2</sup> The Constitution's Bill of Rights was merely nominal, and criminal law and procedure were no more than instruments for maintaining the regime and suppressing dissidents. It was not a coincidence that the June Struggle was sparked by the death of a dissident student tortured during police interrogation.<sup>3</sup>

The new 1987 Constitution brought a significant change in the theory and practice of the Korean criminal procedure. Explicitly stipulating the idea of due process in criminal procedure,<sup>4</sup> the Bill of Rights in the Constitution has become a living document.<sup>5</sup> The 1988, 1995 and 2007 revisions to the Criminal Procedure Code<sup>6</sup> (CPC) have also strengthened the procedural rights of criminal suspects and defendants and have reconstructed the entirety of criminal procedure. Further, the newly established Constitutional Court and the Supreme Court have made important decisions.

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<sup>1</sup> For information regarding the June Struggle, see James M. West and Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, in *Human Rights in Korea: Historical and Policy Perspectives* 221 (1991).

<sup>2</sup> For information regarding these two competing values in criminal process, see Herbert L. Packer, *The Limits of the Criminal Sanction* 151 (1968).

<sup>3</sup> See Carter J. Eckert et al., *Korea Old and New: A History* 381–2 (1990).

<sup>4</sup> See The Constitution of the Republic of Korea (*heonbeop*) Art. 12(1), (3), available at <http://www.assembly.go.kr/english/laws/constitution/constitution2.html> [www.assembly.go.kr/english/laws/constitution/constitution2.htm](http://www.assembly.go.kr/english/laws/constitution/constitution2.htm) (last visited August 2009) (Korean Constitution).

<sup>5</sup> See Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. Ill. U. L.J. 71, 73–5 (1997).

<sup>6</sup> See generally The Korean Criminal Procedure Code (*hyeongsa sosongbeop*). (Law No. 341, Sept. 23, 1954, last revised Dec. 21, 2007 as Law No. 8730) (CPC).

This chapter examines the reformed system of Korean criminal procedure after democratization. It starts with a brief review of the implication of the shift brought by the 1987 Constitution. Then, it outlines the new system of Korean criminal procedure, focusing on important issues and analyzing landmark judicial decisions.

## II. OUTSET OF THE 'CONSTITUTIONALIZATION OF CRIMINAL PROCEDURE' AFTER THE 1987 CONSTITUTION

Under the authoritarian regime established after the May 16th military coup in 1961, democracy in South Korea was nominal, and the Korean Constitution was akin to the 'Emperor's new clothes.' Illegal police practices including torture, illegal arrest and detention were widespread in the criminal process. Beating, threatening, and torture by water or electricity were routinely applied to political dissidents.

Let us turn to some highly profiled cases of the 1980s (although there are many other similar cases under the regime). Supporters of President Kim Dae-Jung, a political dissident at that time, were severely tortured when arrested for their alleged conspiracy to overthrow the state in 1980.<sup>7</sup> In particular, those who violated the National Security Law were brutally tortured, and accused of being 'pro-enemy leftists.'<sup>8</sup> For instance, former Presidential Secretary Lee Tae-Bok and former Congressman Kim Geun-Tae, who were then leaders of the democratization movement, were brutally tortured when arrested for the violation of the National Security Law in 1980 and in 1983 respectively.<sup>9</sup> In 1987, Professor Kwon In-Sook, then a labor movement activist, was sexually abused by a policeman when arrested, and Park Jong-Chul, a dissident student, was suffocated to death in the bathtub during police torture.<sup>10</sup> Besides political

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<sup>7</sup> Henry Scott Stokes, *Seoul's Censors and Press Distort Dispatches From U.S.*, N.Y. Times, 4 September 1980, at A9.

<sup>8</sup> *Torture Claimed in Dissident Case*, Facts on File World News Digest, 7 May 1982, at 332 B3; Henry Scott Stokes, *Ex-General Becomes a Key Figure in Seoul Politics*, N.Y. Times, 1 May 1982, Article 1, at 4.

<sup>9</sup> See Stokes, *supra* note 7. See also, Jun Kwan-Woo, *S. Korean 'Torturer' Gives Himself Up After 11 Years On the Run*, Agence France-Presse, 29 October 1999; John Larkin, *Found: Torturer Who Hid In a Toilet*, Sydney Morning Herald, 6 November 1999, at 19.

<sup>10</sup> *Former Policemen Arrested on Sexual Harassment Charges*, United Press Int'l, 9 April 1988e; *Court Sentences Former Police Officer For Sexual Harassment*, United Press Int'l, 23 July 1988; AFP-AP-Seoul, *Seoul Student Water Tortured Police Admit*, Toronto Star, 19 January 1987, at A5; AP-Seoul, *2 S. Korean Policeman Charged with Murder in Student Death*, L. A. Times, 19 January 1987, at 12.

dissidents, ordinary people also had to go through the cruel investigation process. Illegally-obtained confessions and physical evidence were usually admitted by the court to prove a defendant's guilt.<sup>11</sup> From the standpoint of human rights, it was no more than a 'Dark Age,' when the procedural rights of criminal suspects and defendants were nothing but meaningless rhetoric.

The June Struggle of 1987 opened a new era of democracy and gave birth to the 1987 Constitution. The Constitution established a blueprint for the 'constitutionalization of criminal procedure' in Korea and created the Constitutional Court as a watchtower to monitor unconstitutional laws and police practices.

First, Article 12(1) and (3) of the Constitution have explicitly incorporated the principle of due process in criminal procedure. According to the Constitutional Court, the principle is 'to guarantee not only the legality of the procedure but also the legitimacy of the procedure.'<sup>12</sup> The Court made sure that the principle of due process was a core value to penetrate and control all stages of criminal procedure, stating:

The principle of due process requires that both the formal procedure described by the law and the substantial content of the law be reasonable and just .... In particular, it declares that the whole criminal procedure should be controlled from the standpoint of guaranteeing the constitutional basic rights.<sup>13</sup>

Secondly, the Bill of Rights in the 1987 Constitution provides very detailed provisions regarding criminal procedural rights, including strict requirements for obtaining judicial warrants for compulsory measures,<sup>14</sup> the right not to be tortured,<sup>15</sup> privilege against self-incrimination,<sup>16</sup> right to counsel,<sup>17</sup> right to be informed of the reason of arrest or detention,<sup>18</sup> right to request judicial hearing for arrest or detention,<sup>19</sup> exclusionary rule of illegally obtained confession,<sup>20</sup> protection against double jeopardy,<sup>21</sup> right to fair trial,<sup>22</sup> right to speedy

<sup>11</sup> See, e.g. Decision of 9 November 1988, 88 Ko Hap 548 (Pusan District Court); Decision of 13 October 1981, 81 Do 2160 (Korean Supreme Court); Decision of 13 March 1984, 84 Do 36 (Korean Supreme Court).

<sup>12</sup> See Decision of 24 December 1992, 92 *Heon Ka* 8 (Korean Constitutional Court); Decision of 29 July 1993, 90 *Heon Ba* 35 (Korean Constitutional Court).

<sup>13</sup> Decision of 26 December 1996, 94 *Heon Ba* 1 (Korean Constitutional Court).

<sup>14</sup> Korean Constitution (*heonbeop*), *supra* note 4, arts. 12(3), 16.

<sup>15</sup> *Id.* Art. 12(2).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Art. 12(4).

<sup>18</sup> *Id.* Art. 12(5).

<sup>19</sup> *Id.* Art. 12(6).

<sup>20</sup> *Id.* Art. 12(7).

<sup>21</sup> *Id.* Art. 13(1).

<sup>22</sup> *Id.* Art. 27(1).

and open trial,<sup>23</sup> presumption of innocence,<sup>24</sup> and right to compensation for the suspect and defendant found innocent.<sup>25</sup> These rights incorporated in the Constitution reflect the Korean people's desire to guarantee their human rights which had been nominal under the authoritarian regime.

Besides these changes, it is noteworthy that in 1995, two former presidents, Chun Doo-Hwan and Roh Tae-Woo, were prosecuted and found guilty for leading the December 12th coup of 1979, and for killing many civilians in Kwangju in 1980. The case was symbolic of the change in Korean society.<sup>26</sup>

In brief, the new Constitution has required that criminal procedure be under the control of the Constitution and has provided the detailed Bill of Rights to guarantee the procedural rights of criminal suspects and defendants. In this context, the 'constitutionalization of criminal procedure' had begun.

### III. THE REFORMED CRIMINAL PROCEDURE AFTER DEMOCRATIZATION

Following the constitutional request, the CPC was revised in 1988 and 1995. Many more calls for guaranteeing procedural rights and enhancing efficiency

<sup>23</sup> Id Art. 27(3).

<sup>24</sup> Id Art. 27(4).

<sup>25</sup> Id Art. 28.

<sup>26</sup> In 1995, two retroactive laws were passed to overcome the statute of limitations which prevented the prosecution of them. The first is the Act on the Non-Applicability of the Statutory Limitations to Crimes Destructive of the Constitutional Order (*heuncheongchilseo pakoepomchoe eui kongsosihyo e kwanhan teukrye peop*), Law No. 5028, 21 December 1995. It excludes the application of the statutory limitations to crimes of insurrection, rebellion, and benefiting the enemy. The second is the Special Act on the May 18 Democratic Movement (*5.18 minchuhwa wundong deung e kwanhan teukboel peop*), Law No. 5029, 21 December 1995. It allows prosecution of the leaders of the 1979 *coup* and the Kwangju massacre by the military junta in 1980. Although the constitutionality of the second Act was challenged in the Korean Constitutional Court, the Court ruled that the laws were constitutional since *lex praevia* pertains to punishability, not prosecution. In addition, the law was held to be in the public interest since it punishes anti-democratic criminal behavior and restores justice. See Decision of 16 February 1996, 96 *Heon Ka 2* (Korean Constitutional Court). The Seoul District Court sentenced Chun to death while Roh received 22½ year imprisonment. On appeal to the Seoul High Court, Chun's sentence was reduced to life imprisonment and Roh's prison sentence was reduced to 17 years. After the election of Kim Dae-Jung in 1997, President Kim Young-Sam pardoned Chun and Roh just before leaving office. See David Holley, *Jailed South Korean Ex-Presidents to Get Pardons, Politics: Kim Young Sam and His Elected Successor Agree to Release Chun Doo Hwan and Roh Tae Woo in Bid for 'National Harmony'*, *L. A. Times*, December 20, 1997, at A10.

in criminal procedure have been made since the Roh Moo-Hyun government was established on 25 February 2003. Following the agreement between President and Chief Justice on the issue of judicial reform, the Judicial Reform Committee (*Sabeopkaehyeok wiweonhoe* – JRC) was organized under the Supreme Court on 28 October 2003,<sup>27</sup> which submitted final recommendations for the revision of CPC on the last day of 2004. On 15 December 2004, the Presidential Committee on the Judicial Reform (*Sabeopchedokaehyeok chujinwiweonhoe* – PCJR) was established to implement the 2004 recommendation of JRC, and submitted a bill for the revision of CPC after a period of heated discussions and debates. On 21 December 2007 the bill passed in the National Assembly.

Section III reviews the focal points of the revised Korean criminal procedure and important court decisions.

### 1. The Investigative Authorities

The investigative authorities are composed of two bodies: public prosecutor and police. First, prosecutors are called ‘supervisor of investigation.’ Article 196 of the CPC provides ‘police officers shall investigate crimes with direction of prosecutors,’ and Article 53 of the Supreme Prosecutors’ Office Act also provides ‘police officers shall obey the orders issued by prosecutors.’ Prosecutors can not only request police officers to supplement the investigation after the police investigation is completed, but also intervene in the police investigation and stop it to transfer it to them even before it is finished by the police.

Prosecutors retain full authority for both investigation and prosecution in Korea,<sup>28</sup> under a ‘principle of monopoly’ (*Anklagemonopol*). They are also assumed to be semi-judicial agents (*Justizbehörde*) in Korea.<sup>29</sup> Although democratization after 1987 led to the weakening of police and the intelligence agency’s powers, the power of prosecutors has not been damaged under the Kim Young-Sam and Kim Dae-Jung governments.<sup>30</sup> This is probably because, like the authoritarian government, the two civilian governments were not free of the temptation to use the prosecution for their political purposes.

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<sup>27</sup> Judicial Reform Committee Home Page, [http://www.scourt.go.kr/information/jud\\_rfrm\\_comm/mtng\\_status/index.html](http://www.scourt.go.kr/information/jud_rfrm_comm/mtng_status/index.html).

<sup>28</sup> See Prosecutors’ Office Act (*keomchalcheongbop*), Law No. 3882, 31 December 1986, last revised by Law No. 8717, 21 December 2007, Art. 4(1).

<sup>29</sup> See Ahn, *supra* note 5, at 112 (describing the Korean system in which prosecutors share the same position as judges, and that the same rules apply to both prosecutors and judges in promotions, transfers and salary).

<sup>30</sup> See In Sup Han, *A Dilemma of Public Prosecution of Political Corruption*, in *Recent Transformation of Korean Society and Law 369* (Yoon Dae-Kyu ed., Seoul National University Press, 2000).

Prosecutors work under an organizational principle called the ‘principle of the uniformity of prosecutors’ (*Einheit und Unteilbarkeit der Staatsanwaltschaft*), which guarantees uniformity and fairness of the investigative and prosecutorial authority. A problem occurs because according to the principle, ‘prosecutors shall obey the prosecutors in higher office in prosecutorial affairs.’<sup>31</sup> In cases involving powerful politicians or high-ranking government officials, prosecutors in charge had to unwillingly quit their investigation, often facing pressure or persuasion from prosecutors in higher office, and through the Supreme Prosecutor’s Office, the ruling political party has kept a substantial influence on the prosecutors in charge of the cases.<sup>32</sup> Consequently, public distrust of the prosecution has increased.

Many academics and civic organizations such as ‘People’s Solidarity for Participatory Democracy’ (PSPD or *Chamyeyoedae*)<sup>33</sup> have strongly requested the principle to be revised, and the request was partly accepted by the Ministry of Justice. In 2004, the Prosecutor’s Office Act was revised to guarantee the protest right of inferior prosecutors against an improper order of the prosecutor in a superior position.<sup>34</sup>

On the other hand, the ‘special prosecutor’ system, which is independent of the public prosecutor system, has been introduced several times by the National Assembly for checking politically motivated concealment, distortion, and curtailment of prosecutorial investigations and reinforcing the political neutrality of the prosecutorial authority. It is an example that an American legal invention, which is not welcomed in its home country,<sup>35</sup> is implanted in Korea across the Pacific.

In addition, the shocking incident that a murder suspect was tortured to death by investigative officers with acquiescence of a prosecutor in the Seoul District Branch of the Supreme Prosecutors’ Office in 2002 also casts doubt on the integrity of prosecutors.

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<sup>31</sup> Prosecutors’ Office Act, *supra* note 29, Art. 7(1).

<sup>32</sup> See Han, *supra* note 30, at 369.

<sup>33</sup> See generally, <http://www.peoplepower21.org> (stating that the PSPD, founded in 1994, has served as a watchdog against abuses of power and has led the movement towards prosecutorial reform in Korea).

<sup>34</sup> See Prosecutors’ Office Act (*keomchalcheongbop*), Law No. 3882, 31 December 1986, revised by Law No. 7078, 20 January 2004, Art. 7(2).

<sup>35</sup> See *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting); Julie R. O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463 (1996); Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 Geo. L.J. 2299 (1998); Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 Geo. L. J. 2119 (1998).

Police are a subsidiary organ of the prosecution, lacking independent powers of investigation. They conduct investigations under the direction and supervision of prosecutors.<sup>36</sup> All the cases investigated by police officers should be concluded by prosecutors except some minor offenses which are punishable by fines of not more than 200,000 won (currently equivalent to about U.S. \$190) or detention for less than 30 days. Only these minor cases may be concluded by the chief of police and brought before the court without a formal prosecution.<sup>37</sup>

The police have attempted to gain more autonomy, but have failed both because prosecutors, who were reluctant to share investigative powers, strongly opposed the change. Although in 2004 the Roh Moo-Hyun government established a joint committee of the Supreme Prosecutors' Office and the National Police Agency to reallocate the investigative power between prosecutors and police officers, the committee failed to reach a compromise.<sup>38</sup>

## 2. Arrest and Detention

### A. Reshaped judicial warrant system for custody

The 2007 revision of the CPC adds 'the principle of investigation without custody,' providing: 'A suspect should be investigated without custody in principle.'<sup>39</sup> It is to give a warning regarding the abuse of the custody of suspects. The CPC provides two types of warrant systems for the custody of persons: arrest warrant and detention warrant.

First, the 'arrest warrant' was introduced by the 1995 revision of the CPC. If there is 'probable cause' to believe that a suspect has committed a crime and will not cooperate with the investigative authorities' request to come to the police station, the authorities can arrest the suspect with a warrant issued by a judge.<sup>40</sup> Three exceptions to the warrant requirement are: (i) emergency

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<sup>36</sup> CPC, *supra* note 6, Art. 196(1).

<sup>37</sup> See Speedy Trial Procedure Act (*cheukkyeolsimpan cheolchabeop*), Law No. 4131, 16 June 1989, Arts. 14(2), (3) (according to Art. 14(1), the defendant is entitled to request a regular trial if the defendant is not satisfied with the judgment in the 'Speedy Trial').

<sup>38</sup> See Kuk Cho, *The Ongoing Reconstruction of Korean Criminal Justice System*, Santa Clara Journal of International Law, vol. 5, Issue 1 (2006).

<sup>39</sup> CPC, *supra* note 6, Art. 198(1).

<sup>40</sup> Id Art. 200–2(1) (providing that only the prosecutor may request the issuance of a warrant, police officers can submit the request for issuance of a detention warrant to the prosecutor, not directly to a judge).

arrests exceptions,<sup>41</sup> (ii) flagrant offenders exceptions,<sup>42</sup> and (iii) semi-flagrant offenders exceptions.<sup>43</sup>

If suspects have been arrested without a warrant, 'without delay' a prosecutor should request the issuance of a detention warrant to a judge and a police officer should submit the request for the issuance of the warrant to a prosecutor.<sup>44</sup> A detention warrant should be filed within 48 hours or, if not, the suspect must be released immediately.<sup>45</sup>

In particular, the emergency arrest has been problematic for the CPC requires that the detention warrant, not the arrest warrant, be filed. In the case of an emergency arrest, therefore, the warrantless arrest without any judicial control is legitimized for 48 hours. As a result, the police tend not to pursue the arrest on the warrant, but depend on the emergency arrest because it is free of any warrant requirement and gives them much time to interrogate the suspect without any judicial control.

The 2007 revision of the CPC includes a new provision to prevent the abuse of emergency arrest. If prosecutors, without requesting of the issuance of a detention warrant, have released the suspect who was arrested without an arrest warrant, they should report the identity of the suspect, the date and place of the arrest and the reason for the arrest to a court.<sup>46</sup> Similarly, if police officers, without requesting the issuance of a detention warrant to a prosecutor, have released the suspect who was arrested without an arrest warrant, they should report this release to a prosecutor.<sup>47</sup>

Secondly, the CPC provides the conventional 'detention warrant' for suspects, which has stricter requirements and longer periods of duration than an arrest warrant. Upon the request of prosecutors,<sup>48</sup> judges will issue a detention warrant if the suspect or the defendant has no domicile or if there is

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<sup>41</sup> Korean Constitution, *supra* note 4, Art. 12(3); CPC, *supra* note 6, Art. 200-3(1). This exception is available if there is 'probable cause' to believe that the suspect may destroy evidence or attempt to escape.

<sup>42</sup> Korean Constitution, *supra* note 4, Art. 12(3); CPC, *supra* note 6, Art. 212.

<sup>43</sup> CPC, *supra* note 6, Art. 211(2), which covers:

(i) persons being pursued as an offender with hue and cry; (ii) persons carrying criminally acquired goods, weapons, or other objects which apparently appear to have been used for the offense; (iii) persons who are bearing on their bodies or clothing conspicuous traces of the offense; and (iv) persons who flee when challenged.

<sup>44</sup> CPC, *supra* note 6, Art. 200-4(1).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* 200-4(4).

<sup>47</sup> *Id.* 200-4(6).

<sup>48</sup> *Id.* Arts. 202, 203 (providing, as does the arrest system, that only the public prosecutor may request the issuance of a detention warrant).

'probable cause' to believe that the suspect or defendant may destroy evidence or attempt to escape.<sup>49</sup>

A detained suspect must be released by the police if he or she is not transferred to the prosecutor within ten days.<sup>50</sup> At the end of the ten days of detention, the prosecutor may request an additional ten days to a judge before he or she must either prosecute or release the suspect.<sup>51</sup> In brief, including the 48 hours in case of the warrantless arrest, the investigative authorities have up to 32 days to detain a suspect before filing prosecution.<sup>52</sup>

## **B. Mandatory judicial hearing before issuing a detention warrant**

To remove the abuse of detention, the 1995 revision of the CPC newly introduced the preliminary hearing system for issuing a detention warrant. Before 1995, there was no hearing system. Rather, the judge issued the detention warrant after reviewing only the documents referred by the prosecutor.

The 1995 revision provided that before issuing a detention warrant, a judge, upon his or her own initiative, can schedule a hearing for a 'substantial review' of the necessity of the detention of the suspect, arrested or not.<sup>53</sup> Because of strong resistance from the investigative authorities, the 1995 hearing system was revised in 1997 to work only upon the request of the suspect or his or her lawyer.<sup>54</sup> The 1997 revision was criticized as being against Article 9(3) of the International Covenant on Civil and Political Rights,<sup>55</sup> which the Korean government ratified in April 1990. The Article 9(3) requires a mandatory and immediate preliminary hearing, stipulating that 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge.'<sup>56</sup>

The 2007 revision of CPC makes this judicial hearing mandatory.<sup>57</sup> The

<sup>49</sup> Id Arts. 70, 201(3).

<sup>50</sup> Id Art. 202.

<sup>51</sup> Id Arts. 202, 203, 205.

<sup>52</sup> See National Security Law, No. 3318 (1980) (S. Korea) (NSL). Korea's National Security Law adds 20 days to the periods listed in the CPC. Article 19 of the NSL allows the judges to give permission of extension of the period to the police one more time, and to the prosecutor two more times. Such extensions have been almost automatic in NSL cases, commonly leaving the suspects detained for a total of 50 days before prosecution begins. The Constitutional Court held Article 19 unconstitutional if it applies to the crimes of Arts. 7 and 10 of the NSL. See Decision of 14 April 1992, 90 *Heon Ma* 82, at 5 *Da* (Korean Constitution Court).

<sup>53</sup> CPC, *supra* note 6, Art. 201(3).

<sup>54</sup> CPC, *supra* note 6, Art. 201-2(1).

<sup>55</sup> See generally G. A. Res. 2200, U.N. Gaor, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). The Korean government made a reservation of Arts. 14-5, 14-7, 22.

<sup>56</sup> Id.

<sup>57</sup> CPC, *supra* note 6, Art. 201-2(1).

judge who has received a prosecutor's request for the issuance of a detention warrant should initiate the hearing without delay,<sup>58</sup> and then should decide whether or not to grant the request. Prosecutors and defense counsel are entitled to present their opinions during the hearing.<sup>59</sup>

### C. Strengthened *habeas corpus*

The CPC also provides *habeas corpus* for the arrested or detained suspect to review the legality and appropriateness of the arrest or detention.<sup>60</sup>

Before the revision of CPC in 2007, Article 214-2 of the CPC provided that *habeas corpus* is available for arrested or detained suspects *with* a warrant, while Article 12(6) of the Constitution provides that '*everyone* has a right to request judicial hearing when arrested or detained.'<sup>61</sup> In the decision of August 27, 1997, however, the Supreme Court held that a suspect arrested *without* warrant also has a right to request a judicial hearing to review the appropriateness of the arrest.<sup>62</sup> The Court stated that, considering Article 12(6) of the Constitution, Article 214-2 of the CPC must not be interpreted in a way that it deprives the suspect arrested without warrant of the right to *habeas corpus*.

Following this decision, the 2007 revision removed the terms 'with a warrant'<sup>63</sup> in Article 214-2. Now, all arrested or detained persons, with or without a warrant, have a right to *habeas corpus*. If the arrested or detained suspect believes that the arrest or detention was illegal or inappropriate, or that there has been a significant change in circumstances, he or she may request the court to examine the legality or appropriateness of the arrest or detention. Within 48 hours of receiving the request, the court should examine the suspect and decide whether to release the suspect.<sup>64</sup>

In 2004 the Constitutional Court also rendered a significant decision about the right to *habeas corpus*. The court held the prosecutor's practice of 'blitz prosecution' (*cheonkyeok kiso*) was unconstitutional.<sup>65</sup> Article 214-2 of the CPC provided that the *habeas corpus* system is available for arrested or detained suspects *before* prosecution, without mentioning whether or not the system is available for the accused persons after prosecution. Prosecutors often use a procedural tactic of filing a prosecution immediately to remove

<sup>58</sup> Id.

<sup>59</sup> Id Art. 201-2(4).

<sup>60</sup> The Korean Constitution, *supra* note 4, Art. 12(6); CPC, *supra* note 6, Arts. 214-2(1).

<sup>61</sup> Korean Constitution, Art. 12 (6); CPC, Art. 214-2 (emphasis added).

<sup>62</sup> See Decision of 27 August 1997, 97 Mo 21 (Korean Supreme Court).

<sup>63</sup> CPC, *supra* note 6, Art. 214-2(1).

<sup>64</sup> CPC, *supra* note 6, Art. 214-2(4).

<sup>65</sup> See Decision of 25 March 2004, 2002 Heon Ba 104 (Korean Constitutional Court).

suspects' standing for the judicial hearing when suspects request the hearing. The court pointed out that 'the blitz prosecution' is a one-sided action by a prosecutor who has no authority in deciding the constitutional legitimacy of the warrant, so it deprives the suspect who has requested the judicial hearing of 'procedural opportunity' to have his case reviewed by the court.<sup>66</sup> Finally, in September 2004, the National Assembly revised the CPC to prohibit 'blitz prosecution.'<sup>67</sup> So the accused persons after prosecution have a right to *habeas corpus* now.

The *habeas corpus* outlined in the CPC applies to persons arrested or detained by investigative authorities. Previously, *habeas corpus* had been not available to the persons under custody of medical facilities, social welfare facilities by administrative authorities or private persons. In 2007, however, the National Assembly passed the Habeas Corpus Act to expand *habeas corpus* to such persons.<sup>68</sup> This represented a long-awaited resurrection of Article 10(5) of the 1962 Constitution,<sup>69</sup> which stipulated the right of *habeas corpus* in cases where liberty was violated by private persons but was soon omitted in the 1969 revision of the Constitution.

#### D. Bail

Upon prosecution, the accused has the right to be released on bail.<sup>70</sup> A request for bail is permitted, except in a number of circumstances prescribed in article 95 of the CPC. The exceptions are as follows: (i) the defendant has committed a crime punishable by capital punishment, life imprisonment or an imprisonment for more than ten years; (ii) the defendant is a habitual or chronic offender; (iii) there are sufficient grounds to believe that the defendant may destroy evidence; (iv) there are sufficient grounds to believe that the defendant may attempt to escape; (v) the defendant's domicile is not clear; or (vi) there are sufficient grounds to believe that the defendant may inflict harm on the life, body and property of the victim, possible witness or their relatives.<sup>71</sup> Because of the wide range of exceptions, the right to bail may become fragile.

The 1997 revision of CPC newly established the bail system for suspects who have requested *habeas corpus*.<sup>72</sup> It is limited because it is not available

<sup>66</sup> Id. The Court did not invalidate Article 214-1 itself because the invalidation may stop the judicial hearing system itself.

<sup>67</sup> CPC, *supra* note 6, Art. 214-2(5).

<sup>68</sup> The Habeas Corpus Act (*insinbohobeop*) (Law No. 8724, 21 December 2007).

<sup>69</sup> The Korean Constitution (*heonbeop*) (26 December 1962, Constitutional Law No. 6), Art. 10(5).

<sup>70</sup> CPC, *supra* note 6, Art. 95.

<sup>71</sup> Id.

<sup>72</sup> CPC, *supra* note 6, Arts. 204-2(4).

for suspects who have not requested *habeas corpus*. It has been criticized in that there cannot be found any reason why the bail system is limited to the suspects who have requested *habeas corpus*. The basic purpose of bail is different from that of *habeas corpus*. The former, based on the legal and proper warrant, is to facilitate the reasonable operation of the detention system and to give the suspect the full chance to prepare for a trial. The latter is for judicial control of illegal or improper detention.<sup>73</sup>

In addition, the court may also permit a release on bail of its own accord regardless of the exceptions in the CPC.<sup>74</sup>

### 3. Interrogation

#### A. Bolstered rights to silence and counsel – Korean version of *Miranda* and *Massiah*

In a series of landmark decisions, the Korean Supreme Court has bolstered the rights to silence and counsel since democratization. First, in 1992 the Supreme Court made a landmark decision, which is often called the ‘New 21st Century Faction’ case, named after the title of the criminal organization the defendant belonged to. The Court held as follows:

Article 200(2) provides that prosecutors or policemen should inform a present suspect of the right to silence before interrogation. The right is based on the privilege against self-incrimination, which is guaranteed by the Constitution. Therefore, the statements elicited without informing of the right to silence in interrogation are illegally obtained evidence, and so should be excluded, even if they are disclosed voluntarily.<sup>75</sup>

The court excluded the defendant’s confession by adopting the rationale of the U.S. *Miranda* rule<sup>76</sup> to exclude the confession. Notably, the CPC did not have an explicit provision about the exclusion at that time.

Secondly, in two National Security Act violation cases in the 1990s,<sup>77</sup> the Supreme Court also made landmark decisions, which may be called the Korean version of the U.S. *Massiah* rule.<sup>78</sup> In these cases, the defendants requested to meet with their attorney when they were detained but the National

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<sup>73</sup> See Lee Jae Sang, at 257; Shin Dong-Woon, at 220–21.

<sup>74</sup> CPC, Art. 96.

<sup>75</sup> See Decision of 23 Jun 1992, 92 Do 682 (Korean Supreme Court).

<sup>76</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>77</sup> See Decision of 24 August 1990, 90 Do 1285 (Korean Supreme Court). This case is popularly called the ‘Legislator Seo Kyeong-Weon Case’; Decision of 25 September 1990, 90 Do 1586 (Korean Supreme Court). This case is popularly called the ‘Artist Hong Seong-Dam Case’.

<sup>78</sup> See *Massiah v. United States*, 377 U.S. 201 (1964).

Security Agency officers rejected their request. Then the defendants were referred to and interrogated by the prosecutor. The court held that the defendants' self-incriminating statements were illegally obtained for violating their right to counsel and, thus, were excluded, holding as follows:

Article 12(4) of the Constitution provides people with the right to assistance from counsel when arrested or detained, accordingly Articles 30 and 34 of the Criminal Procedure Code prescribe the right of suspects or defendants to appoint counsel and communicate with counsel when they are in custody. The right to counsel like this constitutes the nucleus of the constitutionally guaranteed right to assistance from counsel ... The limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right, so the illegally obtained confession of the suspect should be excluded, and the exclusion means a substantial and complete exclusion.<sup>79</sup>

The Constitutional Court has also repeatedly confirmed that the right to counsel in criminal process is an 'absolute right' of the defendant, so cannot be limited 'by *any* reason including national security, public order or public welfare.'<sup>80</sup>

Thirdly, in the decision of 11 November 2003, in a National Security Act violation case of Professor Song Doo Yul, an allegedly pro-North, left-wing Korean-German dissident who was arrested and detained when he visited Seoul, the Supreme Court made another ground-breaking decision to recognize the right to have counsel *during* interrogation as a constitutional right of suspects.<sup>81</sup>

Neither the Constitution nor the CPC had an explicit provision for the right to have a lawyer present during interrogation at that time, although both provide the right to counsel in general. Therefore law enforcement authorities had not allowed defense counsel, retained by suspects, to attend interrogation sessions until recently. However, the Supreme Court held that even without an explicit provision to guarantee the right to have counsel present during interrogation, the right can be recognized by analogical interpretation of the Article 34 of the CPC, which allows for 'the right to meet and communicate [with] counsel.' The Court also provided very narrow exceptions not to permit counsel's participation in interrogation, that is, the participation may be restricted *only when* there exists probable cause that the counsel would 'obstruct inter-

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<sup>79</sup> See Decision of 25 September 1990, *supra* note 77.

<sup>80</sup> See Decision of 28 January 1992, 91 Heon Ma 111 (Korean Constitutional Court); Decision of 21 July 1995, 92 Heon Ma 144 (Korean Constitutional Court); Decision of 23 September 2004, 2000 Heon Ma 138 (Korean Constitutional Court) (emphasis added).

<sup>81</sup> See Decision of 11 November 2003, 2003 Mo 402 (Korean Supreme Court).

rogation' or 'leak the secret of investigation.' Since this decision, the lower courts have excluded the defendants' statement elicited without their counsel's participation in interrogation.<sup>82</sup>

Reviewing the infringement of a non-detained suspect's right to counsel in a Public Office Election Act violation case, the 6-to-3 opinion of the Constitutional Court on 23 September 2004 also confirmed that the right to have counsel present during interrogation is a constitutional right of the suspect.<sup>83</sup>

The 2007 revision of the CPC codifies all the aforementioned decisions. Article 244-3 of the CPC provides the *Miranda* rule.<sup>84</sup> Prior to interrogation, investigative authorities should inform a suspect that (i) a suspect can choose not to make any statements or refuse to respond to specific questions; (ii) no disadvantage shall be suffered by a suspect even if he or she chooses not to make a statement; (iii) anything a suspect says after waiving the right to silence may be used as incriminatory evidence against the suspect in court; (iv) a suspect has a right to counsel including a right to have the counsel present during interrogation. Article 243-2 of the CPC provides the right to counsel during interrogation,<sup>85</sup> but it may be restricted when there is 'justifiable cause.'<sup>86</sup> The extent of 'justifiable cause' will be decided based on the 2003 Supreme Court decision in the Professor Song Doo Yul case.<sup>87</sup>

Article 308-2 of the CPC also provides that 'evidence obtained not through due process shall not be admissible.'<sup>88</sup> This Article provides a statutory ground to exclude confessions or statements obtained through violation of the procedural rights of suspects.

## **B. Newly introduced tape recording of interrogation**

Before the 2007 revision of the CPC, it contained no provision about the evidential power of videotapes recorded during interrogation. Videotapes were rarely used in practice by investigative authorities. The Supreme Court considered videotapes the same as the interrogation dossiers.<sup>89</sup>

Things have changed as nowadays videotaping is recognized by law enforcement authorities in preventing disputes over the admissibility and

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<sup>82</sup> Id.

<sup>83</sup> See Decision of 23 September 2004, 2000 Heon Ma 138 (Korean Constitutional Court).

<sup>84</sup> See CPC, *supra* note 6, Art. 244-3(1).

<sup>85</sup> See CPC, *supra* note 6, Art. 243-2(1).

<sup>86</sup> Id.

<sup>87</sup> See *supra* text accompanying notes 81-2.

<sup>88</sup> CPC, *supra* note 6, Art. 308-2.

<sup>89</sup> See Decision of 23 June 1992, 92 Do 682 (Korean Supreme Court); Decision of 3 September 1999, 99 Do 2317 (Korean Supreme Court).

accuracy of defendants' statements during interrogation. In particular, the Department of Scientific Investigation in the Supreme Prosecutors' Office has been very active in emphasizing the effectiveness of videotaping, and in 2004, recommended the Ministry of Justice and the Prosecutor General to adopt it. Prosecutors were encouraged by the mandatory videotaping experiments in some countries.<sup>90</sup> And they came to consider videotaping of interrogation as the best method of restoring public confidence in them. Further, such videotapes were seen as ways of avoiding potentially damaging cross-examination targeted at police officers or prosecutors regarding what exactly occurred in an interrogation room and as a means to back up the evidentiary power of the prosecutor-made interrogation dossiers. However, defense attorneys are concerned that videotaping may simply provide legitimacy to the interrogation.

Prosecutors' requests to insert in the CPC a provision regarding the evidential power of videotapes recorded during interrogation were accepted by the PCJR. The original draft of the PCJR gave the videotapes secondary evidentiary power.<sup>91</sup> However, concerned that such videotapes might prejudice juries and judges and might heighten incrimination of defendants, the National Assembly rejected the draft, providing that the videotapes may be used only 'when it is necessary to refresh the memory of a suspect or a witness' in a trial or a preparatory procedure for a trial.<sup>92</sup> Videotapes are not allowed to be watched by a judge but only by a suspect or a witness.

The original draft of the PCJR required consent by suspects or their counsel to record the videotapes, but the requirement was ultimately removed by the National Assembly.<sup>93</sup> Therefore, even if a suspect objects, the investigative

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<sup>90</sup> 725 Ill. Comp. Stat. Ann. 5/103-2.1(b) (LexisNexis 2005); D.C. Code Ann. Article 5-133.20 (2005); Me. Rev. Stat. Ann. tit. 25, Article 2803-B(1)(K) (West 2005); Tex. Code Crim. Proc. Ann. Art. 38.22 (Vernon 2005); Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, para. 11.5 (a) (1984) (U.K.); Crimes Act of 1914, Art. 23V (Austl.); Crimes Act of 1900, Art. 424A (N.S.W. Inc. Acts); Police Administration Act of 1978, Art. 139-43 (N. Terr. Austl. Laws); Summary Offenses Act of 1953, Art. 74C-G (S. Austl. Acts); Crimes Act of 1958, Art. 464H-J (Vict. Acts); Jurisdiction and Criminal Procedure Act of 1992, ch. LXA (W. Austl. Stat.).

<sup>91</sup> Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, Art. 312-2 (1) (2005) (S. Korea). The draft set a requirement for the admissibility of videotapes as follows: (i) the defendant denies in a trial what they stated during interrogation by prosecutors or police officers, and (ii) other methods such as statements of prosecutors, police officers or other participants in a preliminary hearing or a trial, are not of sufficient evidential weight.

<sup>92</sup> CPC, *supra* note 6, Art. 318-2(2).

<sup>93</sup> Different from the tape recording of suspect interrogation, the tape recording of the statements of non-suspect witnesses requires the consent of the witness. See CPC, *supra* note 6, Art. 221(1).

authorities may record interrogation, so there is a concern that the right to silence may be violated.

### C. Recording of investigation process

The 2007 revision of CPC also mandates the investigative authorities to record the arrival time of a suspect, the time an investigation began and ended, and other matters necessary to supervise the investigation process.<sup>94</sup> These other matters may include specific times of recess, the time a suspect ate a meal, and the time a suspect made a document by his or her own writing. The investigative authorities are required to orally read the records for the suspect or have the suspect read them.<sup>95</sup> This new system is to make the investigation process more transparent.

## 4. Prosecution

### A. Wide discretion of prosecution

At the conclusion of the investigation, the prosecutor has discretionary power whether or not to prosecute. It is called the ‘principle of opportunity’ (*Opportunitätsprinzip*). The prosecutor can exercise his discretionary power not to bring the case to court when he believes that the alleged facts do not constitute a crime or that there is insufficient evidence to prove the case. The prosecutor is also authorized to suspend prosecution in consideration of the suspect’s age, character, motive of crime, or other circumstances, even if incriminating evidence against the suspect is sufficient for prosecution.<sup>96</sup> With neither a grand jury system nor private prosecution, the prosecutor has the exclusive authority to institute prosecution.

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<sup>94</sup> CPC, *supra* note 6, Arts. 244-4(1), 244(2).

<sup>95</sup> Id Art. 244-4(2).

<sup>96</sup> Id Art. 247(1). Like the Japanese criminal justice system, the Korean system as a Continental system did not adopt the German principle of compulsory prosecution (*Legalitätsprinzip*). For more information regarding the German principle, see Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Am. J. Comp. L. 508 (1970); John H. Leingbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974); Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 Crime and Justice: An Annual Review of Research 400-04 (1980). For more information regarding the discretionary prosecution in Japan, see Shigemitsu Dando, *System of Discretionary Prosecution in Japan*, 18 Am. J. Comp. L. 518 (1970); B. J. George, Jr, *Discretionary Authority of Public Prosecutors in Japan*, 17 Law in Japan 42 (1984); Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA Pac. Basin L. J. 16 (1986).

Because of the monopoly of investigative power and wide discretion in the prosecution, the Korean criminal justice system is often called a ‘prosecutorial justice’ system.

### **B. Widened appeal to the court against non-prosecution**

The CPC provides a system of appeal to the High Court against non-prosecution. Before the 2007 revision, the scope in which the appeal was available was limited only to three crimes by governmental officers: the crime of abuse of power, the crime of illegal arrest and detention, and the crime of battery and cruel treatment.<sup>97</sup>

The 2007 revision expands the scope to make the appeal available to all crimes. The complainants who do not agree with non-prosecution may request that the High Court review the appropriateness of the non-prosecution.<sup>98</sup> Before making such a request to the court, the complainants should request that the Prosecutors’ Office review the non-prosecution.<sup>99</sup> If the High Court finds non-prosecution in appropriate, prosecutors must initiate prosecution.<sup>100</sup>

## **5. Pre-trial Procedure**

### **A. Expanded pre-trial discovery**

Article 35 of the CPC states that ‘defense counsel may review and copy the relevant documents or evidence after the prosecution is filed.’ Even before the 2007 revision of the CPC, two Constitutional Court decisions made strides toward adopting a ‘pre-trial discovery’ system.

In the decision of 27 November 1997, the 7–to–2 opinion of the Constitutional Court held, in a National Security Act violation case, that it is unconstitutional for prosecutors to prevent defendants and their attorneys from accessing the investigative records kept by prosecutors before a trial is open after prosecution is filed.<sup>101</sup> Prior to the decision, prosecutors had refused to allow defense attorneys to access the records, arguing that access is possible only after a trial is open because access before the trial would weaken the prosecution cases. The Court held:

The defense attorney’s access to the investigative records kept by prosecutors is indispensable to maintain the substantial equality between parties and materialize

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<sup>97</sup> See the Criminal Procedure Code (*hyeongsa sosongbeop*) (Law No. 341, 23 September 1954, revised 19 July 2006 as Law No. 7965), Art. 260.

<sup>98</sup> CPC, *supra* note 6, Art. 260(1).

<sup>99</sup> Id Art. 260(2).

<sup>100</sup> Id Art. 262(6).

<sup>101</sup> See Decision of 27 November 1997, 94 Heon Ma 60 (Korean Constitutional Court).

fast and fair trial. Excessive limitation on the access violates the defendant's right to fast and fair trial and right to counsel.

It stated that counsel's right to access the investigative records may be limited only when 'there exist concerns of leaking national secrets, eliminating evidence, threatening witnesses, violating privacy or causing conspicuous obstacles to investigation.'

Following the 1997 decision, the 2007 revision adopts a pre-trial discovery system. Defendants or their attorneys may request that prosecutors allow them to review or copy the documents or materials that prosecutors have kept *after* filing prosecution,<sup>102</sup> which include documents that prosecutors will submit as evidence to the court, documents that include the name and out-of-court statements by planned witnesses for the prosecution, and exculpatory documents for the defense.

Prosecutors may deny or limit the discovery when there is a clear danger to national security, eliminating evidence, threatening witnesses, or creation of obstacles to investigation.<sup>103</sup> If the request is denied, or the scope to review or copy is limited by the prosecutor, defendants or their attorneys may appeal to the court to review the prosecutor's decision.<sup>104</sup> If the request is accepted by the court, the court may order prosecutors to provide the documents to the defendants or to their attorneys.<sup>105</sup>

It is necessary to note that this new pre-trial discovery is not available to documents or materials that investigative authorities have kept *before* prosecution is filed. So defendants or their attorneys may not review or copy the documents or materials made by the investigative authorities before prosecution is filed. In the decision of 27 March 2003, however, the 5-to-4 opinion of the Constitutional Court extended the above 1997 decision to the setting of a fraud case where a judicial *habeas corpus* hearing for the suspect was about to be held, even *before* prosecution was filed,<sup>106</sup> even though Article 35 of the CPC applies only after prosecution. The majority stated that despite the words of the Article, if the defense attorneys are not allowed to access the investigative records, they cannot sufficiently defend their clients in the *habeas corpus* hearing.

Prosecutors may make use of the pre-trial discovery *only when* the defendants or their attorneys have presented argument that the defendant was not at

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<sup>102</sup> CPC, *supra* note 6, Art. 266-3(1).

<sup>103</sup> Id Art. 266-3(2).

<sup>104</sup> Id Art. 266-4(1).

<sup>105</sup> Id Art. 266-4(2).

<sup>106</sup> See Decision of 27 March 2003, 2000 Heon Ma 474 (Korean Constitutional Court).

the crime scene or he is insane in a court proceeding or preparatory procedure for a trial.<sup>107</sup> The scope of the discovery available to prosecutors is narrower than that available to the defense. Different from the discovery available to the defense, however, no exception is available in the discovery available to prosecutors.

### B. Pre-trial preparatory conference

The 2007 revision established a new pre-trial preparatory conference for an expeditious and effective trial. Presiding judges may open this procedure at their discretion.<sup>108</sup> Once opened, prosecutors, defendants, and defense attorneys have a duty to cooperate throughout the procedure.<sup>109</sup> Each party may submit the summary of its factual or legal argument and its plan for proving its arguments to the court, and a presiding judge may order each party to submit the summary and the plan.<sup>110</sup> The court should send the document that a party has submitted to the court to the other parties to the case.<sup>111</sup>

In the pre-trial preparatory conference the court may take one of the following actions: clarify the accused criminal fact and the applied legal provisions, allow alterations or amendments to the facts and provisions, arrange the issues of the case, allow the request of evidence, clarify the contents of the argument regarding the requested evidence, decide whether to admit evidence, and decide the appropriateness of a request to review or copy documents and so forth.<sup>112</sup>

## 6. Trial

### A. Bench trial by professional judges in the great majority of cases<sup>113</sup>

Except for cases where a defendant accused of serious felonies has requested a jury trial, which was newly introduced in 2007,<sup>114</sup> a defendant in a vast

<sup>107</sup> CPC, *supra* note 6, Art. 266-11(1).

<sup>108</sup> Id Art. 266-5(1).

<sup>109</sup> Id Art. 266-5 (3).

<sup>110</sup> Id Art. 266-6 (1), (2).

<sup>111</sup> Id Art. 266-6 (3).

<sup>112</sup> Id Art. 266-9.

<sup>113</sup> See id Arts. 448(1), 450, 453(1). The CPC provides for a 'Summarized Trial' when the offense is punishable by a fine and the procedure begins upon the prosecutor's request. The judge may either give summary judgment without holding any hearing, or transfer the case for regular trial procedure. Either the prosecutor or the defendant can request a formal trial within seven days from the date of receiving a summary judgment.

<sup>114</sup> The Act for Civil Participation in Criminal Trials (*kukmin eui hyeongsachaepan chamyeo e kwanhan beopryul*) (Law No. 8295, 1 June 2007). Regarding this new jury trial, see Kuk Cho, *The Newly Introduced Criminal Jury Trial in Korea: A Historic Step Toward 'Criminal Justice by the People'*, Australian Journal of Asian Law, vol. 10, Issue 2 (2008).

majority of cases is found guilty and given a sentence solely by a professional judge.<sup>115</sup>

Cases which involve offenses punishable by capital punishment, life imprisonment, or an imprisonment for not less than one year, are tried by a three-judge court.<sup>116</sup> All other cases are heard by a single judge.<sup>117</sup> Trials are open to the public, except in those rare instances where national security, public morals, or the privacy of individuals are at risk.<sup>118</sup>

A trial cannot proceed in the absence of defense counsel when the defendant has been charged with an offense punishable by the death penalty or a prison sentence of more than three years.<sup>119</sup> In addition to the above situations, the trial judge must also appoint defense counsel when the defendant is a minor, 70 years old or older, suspected of mental illness, or when she is indigent.<sup>120</sup> The defendant has the right to remain silent during the trial,<sup>121</sup> and the judge should inform the defendant of that right.<sup>122</sup>

### B. Newly arranged trial process

The 2007 revision changes the anatomy of a courtroom. Before the revision, the prosecutor and defense attorney sat facing each other, while the defendant was separated from his counsel and located in front of the bench facing the judges. This setup implied that the defendant was not an adversarial party equal to prosecutor and that the defendant was no more than the object of the trial. It also prevented the defendant from consulting with his counsel. The 2007 revision moves the defendant's seat next to that of his defense attorney.<sup>123</sup>

The 2007 revision stipulates two leading principles for trial process. The first is 'the principle of concentrated trial' to prevent the delay of trial.<sup>124</sup> According to the principle, except in the case of unavoidable circumstances a trial should run consecutively every day if more than two days are necessary

<sup>115</sup> See The Korean Constitution, *supra* note 4, Art. 27(1).

<sup>116</sup> See Court Organization Law (*beopweonchojikbeop*) (Law No. 3992, 4 December 1987), Art. 32(1).

<sup>117</sup> Id Art. 7(4).

<sup>118</sup> See The Korean Constitution, *supra* note 4, Art. 109, Court Organization Law, *supra* note 116, Art. 57(1).

<sup>119</sup> CPC, *supra* note 6, Arts. 282, 283.

<sup>120</sup> Id Art. 33.

<sup>121</sup> Id Art. 289.

<sup>122</sup> See Rules for Criminal Procedure (*hyeongsasosong kyuchik*) (Law No. 828, 31 December 1982), Art. 127.

<sup>123</sup> CPC, *supra* note 6, Art. 275(3).

<sup>124</sup> Id Art. 267-2(1).

for the trial.<sup>125</sup> The second is ‘the principle of oral pleadings.’<sup>126</sup> This principle is meant to overcome the phenomenon of ‘trial by dossiers’ in which truth-finding depends heavily on the dossiers submitted by parties rather than on the cross-examinations by the parties in a courtroom. Considering the strong evidentiary power of the prosecutor-made dossier,<sup>127</sup> the phenomenon tended to be advantageous to the prosecution.

The 2007 revision mandates that the prosecutor make an oral statement of the criminally accused fact and applied legal provisions at the beginning of a trial.<sup>128</sup> Before the revision, such a reading was not mandatory. The revision also mandates that the defendant make a statement regarding whether he admits the accused facts after the prosecutor makes his opening statement.<sup>129</sup> The defendant does not have to make such a statement if he exercises the right to silence.<sup>130</sup> If the defendant admits the accused crime, the case goes through more brief investigation of evidence and moves to the sentencing process.

The 2007 revision makes the questioning of a defendant available only after the investigation of evidence.<sup>131</sup> Before the revision the questioning of the defendant was initiated by prosecutor and defense attorneys consecutively before the investigation of evidence. This procedure was criticized for making the statements of defendants the main focus of trials, rather than evidence. Article 296-2 of the CPC thus moves the questioning after the investigation of evidence. So the statements of a witness or a victim or the result of scientific investigations, for example, will be examined before the defendant is questioned. If a presiding judge permits it, however, the question may be given to the defendant even before the investigation of evidence.<sup>132</sup>

The 2007 revision adopts a sanction system to ensure the attendance of a witness at trial. Article 150-2 imposes ‘a duty of reasonable efforts to make a witness attend in a trial’ on the party who has requested the witness.<sup>133</sup> Article 151 provides a much heavier sanction on witnesses who do not attend for no justifiable reason. Such a witness must pay the trial costs resulting from her non-attendance, and a fine of up to 5,000,000 won (currently equivalent to

<sup>125</sup> Id Art. 267-1(2).

<sup>126</sup> Id Art. 275-3.

<sup>127</sup> See *infra* text accompanying notes 158–61.

<sup>128</sup> CPC, *supra* note 6, Art. 285.

<sup>129</sup> Id Art. 286(1).

<sup>130</sup> Id. The presiding judge should inform the defendant of the right to silence. Id Art. 283-2(2).

<sup>131</sup> Id Art. 296-2.

<sup>132</sup> Id.

<sup>133</sup> CPC, *supra* note 6, Art. 150-2(2).

about U.S. \$3,600) may be imposed on her.<sup>134</sup> If the witness does not attend for no justifiable reason despite these sanctions, she may be put into jail for up to seven days.<sup>135</sup>

The 2007 revision also changes Article 316 to allow investigators' witnesses to testify regarding statements made by a defendant during interrogation when such statements were made under especially reliable circumstances.<sup>136</sup> The scope and admissibility of investigators' testimony, however, is not specified. These will be provided in the future by courts' decisions interpreting this change.

There exists a tension between Article 316 and current judicial decisions. The Supreme Court has held that a police officer's testimony that a suspect had confessed during interrogation is not admissible if the suspect denied his statement during interrogation.<sup>137</sup> Article 312(3) of the CPC has provided that dossiers made by police officers shall not be used as evidence if the defendants or their attorneys contest the contents of the dossiers as not matching what the defendants stated during interrogation.<sup>138</sup> Recognizing the coercive nature of police practices in interrogation rooms, the Supreme Court was, at the time of the aforementioned decision, trying to prevent investigative authorities from circumventing Article 312(3) of the CPC.

## 7. Evidence Law

The 2007 revision explicitly provides that prosecutors are given the burden of proving the defendant's guilt 'beyond reasonable doubt,'<sup>139</sup> which reconfirms the decisions of the Supreme Court.<sup>140</sup> The reliability of evidence is decided by a judge.<sup>141</sup>

### A. Confession rule

The Constitution and the CPC provide explicit legal provisions regarding the exclusion of an involuntary confession. Article 12(7) of the Constitution provides for the exclusion of 'involuntary confessions' made under torture,

<sup>134</sup> Id Art. 151(1).

<sup>135</sup> Id Art. 151(2).

<sup>136</sup> Id Art. 316(1).

<sup>137</sup> See, e.g. Decision of 8 May 1979, 79 Do 493 (Korean Supreme Court); Decision of 28 August 2002, 2002 Do 2112 (Korean Supreme Court).

<sup>138</sup> CPC, *supra* note 6, Art. 312(3).

<sup>139</sup> Id Art. 307(2).

<sup>140</sup> See, e.g., Decision of 28 December 1982, 82 Do 263 (Korean Supreme Court); Decision of 11 February 2003, 2002 Do 6110 (Korean Supreme Court); Decision of 9 March 2006, 2005 Do 8675 (Korean Supreme Court).

<sup>141</sup> CPC, *supra* note 6, Art. 308.

battery, threat, deceit or after prolonged custody.<sup>142</sup> Following Article 12(7), the CPC also provides an exclusionary rule for confessions whose voluntariness is doubtful.<sup>143</sup>

Relying on these provisions, the Supreme Court has excluded involuntary confessions in a number of cases.<sup>144</sup> After democratization, torture in interrogation seemed to disappear, and Lee Geun-Ahn, who was a notorious torture specialist, known for cruelly torturing Kim Geun-Tae and other democratization movement activists under the authoritarian regime, was sentenced to a seven-year imprisonment in 2000.<sup>145</sup> However, a case involving a murder suspect tortured to death during interrogation in the Seoul District Branch of the Supreme Prosecutors' Office in 2002 illustrates why civilized society needs the confession rule and why illegally-obtained confessions should be excluded.

Article 310 of the CPC also provides that a defendant shall not be found guilty solely on the basis of her confession, and there should be supplementary evidence to back up the confession.<sup>146</sup> Article 310 is to prevent the investigative authorities from concentrating on getting a confession from suspects without efforts to obtain other evidence.

## **B. Adoption of discretionary exclusionary rule in search-and-seizure – Korean version of *Mapp***

The CPC requires a judicial warrant for search-and-seizure and inspection.<sup>147</sup> The exceptions to the warrant requirement are: search-and-seizure and inspection incidental to arrest on warrant, emergency arrest, arrest of flagrant offend-

<sup>142</sup> The Korean Constitution, *supra* note 4, Art. 12(7).

<sup>143</sup> See CPC, *supra* note 6, Art. 309.

<sup>144</sup> See, e.g., Decision of 26 April 1977, 77 *Do* 210 (Korean Supreme Court); Decision of 31 January 1978, 77 *Do* 463 (Korean Supreme Court); Decision of 28 July 1981, 80 *Do* 2688 (Korean Supreme Court); Decision of 13 October 1981, 81 *Do* 2160 (Korean Supreme Court); Decision of 8 June 1982, 82 *Do* 850 (Korean Supreme Court); Decision of 13 March 1984, 84 *Do* 36 (Korean Supreme Court); Decision of 9 May 1984, 83 *Do* 2782 (Korean Supreme Court); Decision of 26 February 1985, 82 *Do* 4213 (Korean Supreme Court); Decision of 31 January 1989, 88 *Do* 680 (Korean Supreme Court); Decision of 26 February 1985, 82 *Do* 2413 (Korean Supreme Court); Decision of 10 March 1992, 91 *Do* 1 (Korean Supreme Court); Decision of 24 November 1992, 92 *Do* 2409 (Korean Supreme Court); Decision of 28 September 1993, 93 *Do* 1843 (Korean Supreme Court); Decision of 27 June 1997, 95 *Do* 1964 (Korean Supreme Court).

<sup>145</sup> See Dong-A Newspaper, 27 September 2000; Hankyoreh Newspaper, 27 September 2000.

<sup>146</sup> See CPC, *supra* note 6, Art. 310.

<sup>147</sup> See CPC, *supra* note 6, Art. 215.

ers, detention on warrant,<sup>148</sup> emergency search-and-seizure, and inspection on the spot of committed crimes.<sup>149</sup>

Before the 2007 revision of CPC, neither the Constitution nor the CPC contained a provision regarding the exclusion of illegally obtained physical evidence. Although the Supreme Court adopted *Miranda* and *Massiah*,<sup>150</sup> the Court had consistently declined to exclude the physical evidence obtained by illegal search-and-seizure procedures, providing the following rationale, '[e]ven though the procedure of seizure was illegal, the value as evidence does not change because the procedure did not affect the quality and shape of the substance itself.'<sup>151</sup> The court clearly rejected the U.S. Fourth Amendment *Mapp* exclusionary rule.<sup>152</sup>

Academics and defense attorneys argued that unless the illegally-obtained evidence is excluded, the constitutional requirement for the search-and-seizure warrant is left with no teeth. There are no other effective remedies for illegal police misconduct in Korea. Criminal or civil liability and internal discipline have not proven effective in deterring police misconduct in Korea.

The situation began to change with the Supreme Court decision of 11 June 2002. The Court held that, in a bribery case, the dossiers including the defendant's statement should be excluded because obtained by illegal 'emergency arrest' that does not fulfill the requirements of warrantless arrest in Article 200-3 (1) of the CPC.<sup>153</sup> This decision may be called a Korean version of the *McNabb-Mallory* rule.<sup>154</sup> This decision is to deter the abuse of 'emergency arrest' by law enforcement authorities.

The exclusionary rule was finally stipulated by the 2007 revision of the CPC. Article 308-2 of the CPC provides that 'evidence obtained not through due process shall not be admissible.'<sup>155</sup>

Before the 2007 revision of CPC, on 15 November 2007 the Supreme Court also made a decision to exclude illegally obtained physical evidence.<sup>156</sup> The Court held that the illegally obtained evidence should not be automatically excluded but could be excluded considering all the circumstances regarding

<sup>148</sup> Id Art. 216(1), (2).

<sup>149</sup> Id Art. 216(3).

<sup>150</sup> See *supra* text accompanying notes 75–82.

<sup>151</sup> See Decision of 17 September 1968, 68 Do 932 (Korean Supreme Court); Decision of 23 June 1987, 87 Do 705 (Korean Supreme Court); Decision of 8 February 1994, 93 Do 3318 (Korean Supreme Court).

<sup>152</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>153</sup> See Decision of 11 June 2002, 2000 Do 5701 (Korean Supreme Court).

<sup>154</sup> See *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

<sup>155</sup> CPC, *supra* note 6, Art. 308-2.

<sup>156</sup> See Decision of 15 November 2007, 2007 Do 3061 (Korean Supreme Court).

the illegality of the investigation. The Court, thus, adopted *discretionary* exclusionary rule rather than a mandatory one. The majority opinion of the Court also provided a standard by which to measure whether to exclude such evidence: illegally obtained evidence should be excluded in principle, but it may be exceptionally admissible when the violation made by investigative authorities does not infringe upon the ‘substantial contents of the due process.’ This standard itself is still abstract. The degree of the illegality and the intent of the investigative officer may be considered in applying the standard in a case.

It is also noteworthy that the majority opinion explicitly states that the secondary evidence derived from the first evidence obtained illegally should be excluded. Here the court explicitly adopts the U.S. principle of ‘the fruit of poisonous tree.’<sup>157</sup>

### C. Strong evidentiary power of prosecutor-made dossiers

Article 312(1) of the CPC has given an exceptionally strong evidentiary power to prosecutor-made dossiers even if they are hearsay.<sup>158</sup> Before the 2007 revision, it provided that the interrogation dossiers, which can include the defendant’s statement or confession, may be admissible at trial (i) if they contain a defendant’s signature and were made by prosecutors, and (ii) ‘if there exist special circumstances which make the dossiers reliable,’ *without* cross-examination of the interrogators *even if* the defendants contend that the contents of the dossiers do not match what they stated during interrogation.<sup>159</sup> Assuming the interrogation by prosecutors itself may fulfill the requirement of ‘special circumstances which make the dossiers reliable,’ the Supreme Court recognized the legitimacy of Article 312(1).<sup>160</sup> Thus, prosecutors enjoyed a significant evidentiary advantage.

However, Article 312(1) was strongly criticized because it made it extremely difficult for defendants to escape guilty verdicts at trial once they made self-incriminating statements in front of prosecutors. The disadvantage to the defendants is especially serious considering that, until the Professor

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<sup>157</sup> *Silverthorne Lumber v. United States*, 251 U.S. 385 (1920); *Nardone v. United States*, 308 U.S. 338 (1939).

<sup>158</sup> CPC, *supra* note 6, Art. 312(1). By contrast, the CPC provides different status to dossiers made by police officers. Police dossiers shall not be used as evidence if the defendants or their attorneys contend the contents of the dossiers do not match what the defendants stated during interrogation. See *Id* Art. 312(3).

<sup>159</sup> The Criminal Procedure Code (*hyeongsa sosongbeop*) (Law No. 341, 23 September 1954, revised 19 July 2006 as Law No. 7965), Art. 312(1)

<sup>160</sup> See Decision of 8 March 1983, 82 Do 3248 (Korean Supreme Court); Decision of 26 June 1984, 84 Do 748 (Korean Supreme Court).

Song case of 2004,<sup>161</sup> they had not been allowed to have a lawyer during interrogation. A number of scholars and defense attorneys have strongly criticized the Article for making the prosecutor a *de facto* judge, and for making defendants' statements in front of prosecutors in an interrogation room *de facto* testimonies in a trial.

The JRC under the Supreme Court in its final recommendations on 31 December 2004 stated that Article 312(1) is so dossiers-oriented that it infringes upon the defendants' right to cross-examination; and called for its revision. On 15 April 2005, responding to the above criticism on Article 312(1) and following the recommendation of the JRC, the PCJR submitted its first draft to revise the Article to prohibit prosecutors' interrogation dossiers from being admissible in a trial *unless* the defendants agree to their use. At the same time, the draft allows police officers or prosecutors who interrogated the defendants to testify against the defendants when the defendants deny what is recorded in the dossiers. The intention of the PCJR was to abolish the phenomenon of 'trial by dossiers' wherein truth-finding is made heavily dependent on prosecutor dossiers rather than cross-examination by the parties in front of judges in a courtroom. This intention came from the idea that the status of prosecutors as 'semi-judges' should be dismantled and prosecutors should be an adversarial party in every sense.

However, the draft caused strong objection from prosecutors even while it attracted praise from defense attorneys and academics. Prosecutors criticized that the draft allowed defendants to easily invalidate their confession or statement in the interrogation room later in a trial, thus incapacitating prosecutors to fight against crime. They were very uncomfortable that they might be called as a witness to testify regarding the defendant's statements and to be cross-examined by defense attorneys. They were also unsatisfied with the draft because it might intend to undermine their status of 'semi-judge' and make them no more than an adversarial party.<sup>162</sup>

While the debate is ongoing, the Constitutional Court, in a decision of 26 May 2005, reviewed the constitutionality of Article 312(1).<sup>163</sup> The 5-to-4 opinion of the Court held the requirement of 'special circumstances which

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<sup>161</sup> See *supra* text accompanying notes 81–2.

<sup>162</sup> See Chosun Ilbo, 16 January 2005; Dong-A Ilbo, 16 January 2005; Hankyoreh Shinmoon, 16 January 2005. Prosecutors in the Seoul District Branch of the Supreme Prosecutors' Office even held a meeting to criticize the draft and distributed a public statement against the draft. Prosecutors further argued that a plea bargaining system should be adopted to compensate for the difficulties that they could face in trials if the draft would be passed in the National Assembly.

<sup>163</sup> See Decision of 26 May 2005, 2003 Heon Ka 7 (Korean Constitutional Court).

make the dossiers reliable' constitutional. However, six out of nine Justices recommended that the vagueness of the requirement be removed. In particular, four Justices in their dissenting opinion stated that such a special evidentiary power given to the prosecutor-made dossiers may be allowed *only when* 'procedural transparency of the interrogation by prosecutors is reinforced and the defense attorney's participation in the interrogation is guaranteed.'

The hot debate over Article 312(1) ended in a compromise. The first draft did not get strong support either from judges, who were afraid that it could make trial much more complex and lengthy, or from the public, who were afraid that it could free criminals who have changed their mind after they confessed in front of prosecutors.

Then the PCJR submitted a new draft on 18 July 2005 which kept the evidentiary power of the prosecutor-made interrogation dossiers alive but imposed stricter requirements.<sup>164</sup> The National Assembly revised the new draft to make the 2007 revision, which provides two tracks for the admissibility of prosecutor-made interrogation dossiers. First, in cases where the defendant admits in a preliminary hearing or a trial that the dossiers are recorded as the defendants have stated, the dossiers are admissible (i) if they are made by legal process and method, and (ii) if it is proven that they are made under especially reliable circumstances.<sup>165</sup> Secondly, in cases where the defendants do not admit in a preliminary hearing or a trial that the dossiers are recorded as the defendants have stated, the dossiers are admissible (i) if they are made by legal process and method, (ii) if it is proven by objective method, such as recorded tapes that the dossiers are recorded as the defendants have stated, and (iii) if it is proven that they are made under especially reliable circumstances.<sup>166</sup>

It is not clear what the meaning of 'especially reliable circumstances' is here. Although the PCJP explicitly specified the 'presence of their attorney during interrogation' as an example of 'especially reliable circumstances' in its draft, this was ultimately omitted in the final version.<sup>167</sup> Prosecutors will keep making efforts to include self-incriminating statements of the defendant in the prosecutor-made interrogation dossiers and will argue that the dossiers should be admissible without cross-examination in the court even if they have been made without the presence of a defense attorney.

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<sup>164</sup> Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, Art. 312(1).

<sup>165</sup> See CPC, *supra* note 6, Art. 312(1).

<sup>166</sup> *Id.* Art. 312(2).

<sup>167</sup> Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, Art. 312(1).

#### D. Other dossiers

The admissibility of dossiers made by police officers remains intact although the police wanted police-made dossiers to have the same evidentiary power as prosecutor-made dossiers. Police dossiers shall not be used as evidence if the defendants or their attorneys contend that the contents of the dossiers do not match what the defendants stated during interrogation.<sup>168</sup>

The admissibility of the investigative dossiers regarding the statements of non-suspect references may be admissible in a trial (i) if they are made by legal process and method, (ii) if it is proven by objective method such as recorded tapes that the dossiers are recorded as the references have stated, (iii) if it is proven that they are made under especially reliable circumstances, and (iv) if the defendant or his counsel have the chance to question the reference in a trial.<sup>169</sup>

### 8. Victim Protection

Expanding the protective systems for sexual violence victims in the Act for the Punishment of Sexual Assault Crimes and Protection of Victims of 1993,<sup>170</sup> the 2007 revision of the CPC provides that the court may allow ‘a person who has a reliable relationship with a crime victim’ to sit with the victim during the trial in cases where it may cause the victim significant anxiety or tension to be questioned as a witness.<sup>171</sup> The Court should have ‘a person who has a reliable relationship with the victim’ sit with the victim in cases where the victim is under 13 years old or has any physical or mental disability.<sup>172</sup> These protective systems also apply to the investigation procedure employed by investigative authorities to question such victims.<sup>173</sup>

The 2007 revision also establishes a video system to protect vulnerable crime victims. When examining under-age victims about sexual violence crimes, the court may use video or closed-circuit television facilities to ensure that they do not have to face their offender during the examination.<sup>174</sup> Questioning by the use of video or closed-circuit television facilities may also be available for victims of non-sexual violence crimes in cases where they

<sup>168</sup> See CPC, *supra* note 6, Art. 312(3).

<sup>169</sup> *Id.* Art. 312(4).

<sup>170</sup> The Act for the Punishment of Sexual Violence Crimes and Protection of Victims (*Seongpokryok beomjoe eui cheobeol mit pihaeja boho deung e kwanhan beopryul*), Law No. 8059 of 2006, Law revised on 27 October 2006, as Law No. 8059.

<sup>171</sup> CPC, *supra* note 6, Art. 163-2(1).

<sup>172</sup> *Id.* Art. 163-2(2).

<sup>173</sup> *Id.* Art. 163-2(2).

<sup>174</sup> *Id.* Art. 165-2.

have significant difficulties in confronting the offender due to the nature of the crime, the age, or psychological or physical status of the victim.<sup>175</sup>

The 2007 revision strengthens the victim's right to make a statement during a trial. In the previous system, only the victim had such a right. Now the right is also given to the victim's agents including his spouse, relatives, brothers and sisters.<sup>176</sup> When a court questions the victim or his agents, it should give them a chance to speak his opinion about the degree and consequence of the damage caused by the crime as well as the punishment of the defendant.<sup>177</sup> The victim's statement as a witness in the trial may be disclosed by the court to protect his privacy or safety.<sup>178</sup> The 2007 revision also introduces a victim's right to review or copy court documents.<sup>179</sup>

#### IV. CONCLUSION

The 1987 Constitution has provided a new perspective for the constitutionalization of criminal procedure. The institutional reform of criminal procedure and a number of landmark judicial decisions may be called the Korean 'criminal procedure revolution.'<sup>180</sup> The 'revolution' has been oriented toward strengthening the defendants' procedural rights, restricting possible power abuses of investigative authorities, effectuating the trial process, weakening evidentiary power of prosecutor-made dossiers, and protecting the victim's privacy. Through this 'revolution,' the Korean criminal justice system has been totally reconstructed.

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<sup>175</sup> Id Art. 165-2.

<sup>176</sup> Id Art. 294-2(1).

<sup>177</sup> Id Art. 294-2(2).

<sup>178</sup> Id Art. 294-3(1).

<sup>179</sup> Id Art. 294-4(1).

<sup>180</sup> See Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 *Wash. U. L.Q.* 11, 16–18 (1988) (stating that there were three themes in the U.S. 'criminal procedure revolution' led by the Warren Court: (i) pursuit of equality, which is the effort to stamp out not only racial discrimination but also to insure fair treatment for rich and poor alike, (ii) concern with the dangers of unchecked executive power and reinforcement of adversarial procedure and (iii) a preoccupation with practical implementation beyond declaring new rights).

## 4. The role of the public prosecutor in Korea: is he half-judge?

**Heekyoon Kim\***

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### I. INTRODUCTION

The following comment, though not the result of an empirical survey, shows what ordinary people think of legal professionals:

[N]eutrality had been associated primarily with judges and was thought to describe a trait that distinguishes judges from lawyers. The emerging notion of prosecutorial neutrality recalls the traditional conception of prosecutors as ‘quasi-judicial’ officers. It emphasizes the distinction between prosecutors and lawyers for private parties.<sup>1</sup>

To summarize roughly, the public does not care much about how lawyers act in public or out of sight because they are believed to be no more than surrogates for private parties. However, with regard to the behaviors of the quasi-judicial officers or judicial officers, taxpayers expect a lot: they hope that a judge would be neutral and that a prosecutor would be nearly as neutral as the judge.

Korean prosecutors have recently been the key target of the government-oriented reform project.<sup>2</sup> They have been considered one of the most powerful legal professions in Korea for more than a half century after the emancipation from Japanese colonization. Reformers are complaining that the Korean prosecutors did not seem to be sufficiently neutral. They ‘have been criticized for their reluctance to investigate corruption cases involving powerful politicians or high-ranking government officials, or for their politically

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\* Parts of this chapter were originally published as *The Role of the Public Prosecutor in Korea: Is He Half-Judge?* 6 *Journal of Korean Law* 163.

<sup>1</sup> Bruce A. Green, *Prosecutorial Neutrality*, 204 *Wis. L. Rev.* 837, 839–40 (2004).

<sup>2</sup> The Korean judicial reform aimed to make the trial court the center for a fact-finding process. To do that, it was absolutely necessary to invite as much evidence as possible to be examined in an open court. Thus, the reforming effort was concentrated on redefining the admissibility of the transcript of a suspect’s statement as prepared by a public prosecutor according to the stricter hearsay rule.

biased investigation of the cases.<sup>3</sup> One notable commentator has gone even further. According to his description of the Korean prosecutors in general, as far as one is concerned about the prosecutorial office, Korean society needs a revolutionary change rather than a simple reformation or remodeling. Here is his grotesque description of Korean prosecutors, albeit that it is argumentative and not scientific:

In the past, [Korean prosecutors] have abused their mighty public power to please power-holders. For example, the prosecutors have indicted many political dissenters on charges of violating the National Security Law, which is designed to protect South Korea from the threat of North Korea .... The longstanding practice of misusing prosecutorial power to suppress political opposition has helped give Korean prosecutors a bad name.<sup>4</sup>

I personally do not intend to defend the Korean prosecutorial office. Moreover, if Korean people do not trust the prosecutor's office, I believe that they might have sufficient reasons to feel that way. However, critical views do not automatically guarantee a new set of measures to enhance the neutrality of the Korean prosecutors. Our primary interest is not in adding skeptical comments about the existing system, but to give a clear idea of who is a Korean prosecutor and of what he is supposed to do according to the Korean Constitution and the Korean Criminal Procedure Code (CPC).<sup>5</sup> After a clear picture has been given, we can analyze why the prosecutorial work has been wrongfully distorted. Then, we may be able to find a solution for democratizing the prosecutorial office. In that sense, any comments and recommendations for creating a more democratic or neutral prosecutorial office should be based on the understanding of how the office presently works in Korea.

A second section will focus on the regulatory scheme of Korea with regard to the public prosecutor's judicial powers. While carefully examining which powers are given to the prosecutors, we can possibly think about another interesting project – that is, to compare the Korean prosecutor with any functionaries familiar to the Western system. The Korean prosecutor is very similar to the English Justice of the Peace<sup>6</sup> (JP), but there is a substan-

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<sup>3</sup> Kuk Cho, *The Unfinished 'Criminal Procedure Revolution' of Post-Democratization South Korea*, 30 *Denv. J. Int'l. Law and Pol'y* 377, 386 (2002).

<sup>4</sup> Jaewon Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 *Asian-Pac. L. and Pol'y J.* 45, 55–7 (2001).

<sup>5</sup> See generally the Korean Criminal Procedure Code (*hyeongsa sosongbeop*) (Law No. 341, Sept. 23, 1954, last revised 31 December 2008 as Law No. 8730).

<sup>6</sup> See generally John H. Langbein, *Prosecuting Crime in the Renaissance*, at Part I (1974).

tial difference between them. The Korean prosecutor is also basically doing the same things as the French *procureur de la République* (public prosecutor), but these two are not of the same class. Another interesting similarity is between the Korean prosecutor and the so-called examining magistrate.<sup>7</sup> All these comparisons will be discussed in the third section. In the fourth part, I would like to return to the very real issue of why the Korean prosecutor has come to be the main target in the Korean judiciary reform project. I would also question whether or not it is really reasonable to attack the reliability of a document made by the Korean prosecutor. That issue will be fully discussed just prior to the final comment on ongoing judiciary reform in Korea.

## II. THE ROLE OF A KOREAN PROSECUTOR

As is generally acknowledged in Korea, the prosecutor governs the entire criminal procedure. He has the right to open an investigation and to stop it. He 'is in charge of criminal investigation,'<sup>8</sup> and the police are under his command.<sup>9</sup> Save for some misdemeanors which are punishable by fines,<sup>10</sup> almost every crime has to be reported to the prosecutorial office.<sup>11</sup> The police and private parties are prohibited from releasing any suspects without the prosecutor's permission after the criminal incident has been recorded in the police file.<sup>12</sup> There is not any private prosecution<sup>13</sup> nor any grand jury

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<sup>7</sup> For the definition of the magistrates in France, see e.g., Gaston Stefani, *Procédure Penale* 37 (17d ed. 2001).

<sup>8</sup> Jaesang Lee, *New Criminal Procedure Code (Shinhyeongsa sosongbeop)* 97 (2007). See also CPC, *supra* note 5, at arts. 196–8.

<sup>9</sup> *Id.* The French Criminal Procedure Code also states that the prosecutor 'directs the activity of the judicial police officers and agents within the area of jurisdiction of his court,' C. pr. pen. Art. 41.

<sup>10</sup> See, e.g., 'some minor offenses, which are punishable by fines of not more than 200,000 won (currently equivalent to about U.S. \$ 170) or detention for less than 30 days, may be brought by the chief of police before the court without a formal indictment,' Kuk Cho, *supra* note 3, at 381.

<sup>11</sup> See, e.g., '[W]hen a judicial police officer receives a complaint or accusation, he shall report the matter pertaining thereto promptly, to a public prosecutor,' CPC, *supra* note 5, at Art. 238.

<sup>12</sup> See 'Only the prosecutor has the right to terminate any investigation,' Jaesang Lee, *supra* note 8, at 97; See generally CPC, *supra* note 5, at Arts. 246–7.

<sup>13</sup> See *id.* On the other hand, the French Criminal Procedure Code opens the possibility of civil action by stating that '[C]ivil action aimed at the reparation of the damage suffered because of a felony, a misdemeanor or a petty offence is open to all those who have personally suffered damage directly caused by the offence,' C. pr. pen. Art. 2.

indictment.<sup>14</sup> Only the prosecutors have the right to notify crimes to the trial court, whether it is a bench or jury trial.<sup>15</sup> Thus, in everyday practice, the prosecutor is in the very center of criminal procedure.

He not only handles almost every crime that occurs in Korea, but the prosecutor also has the power to decide how to close criminal cases. If he closes a case not involved with any functionaries' misuse of administrative power,<sup>16</sup> the only remedy available for criminal victims or harmed parties was the constitutional challenge. That sort of challenge had been so rapidly accumulated in the dockets of the Constitutional Tribunal that it was not considered an effective way to control the prosecutor's power. As a matter of fact, Korean 'prosecutors retain full authority for both investigation and prosecution in Korea under a principle of monopoly.'<sup>17</sup>

The case in Korea is allegedly this:

The prosecutor is supposed to be involved in any stages from the primary investigation to the execution of the court's decision and can be defined as a governmental agent playing the active role in accomplishing the criminal justice. In other words, he directs and commands the police officers in investigation, solely decides whether or not to indict suspects, petitions, in an open court, strict application of a certain criminal act for those suspects, and finally, after the trial, manages the execution of sentences.<sup>18</sup>

If we say that the prosecutors in general have enormous power in the criminal justice system, it is also true in Korea.

However, we need to think about and clarify one thing in order to correctly understand the role of a prosecutor in Korea – that is, whether or not he has the right to make a dossier, transcript, protocol or whatever, and certify it to the trial court. If the answer is in the positive, the Korean prosecutor is not basically different from the examining magistrate *proprement dit* in France, and our criminal procedure code can be said to be close to the Continental Inquisitorial system. If we say that the Korean prosecutor is just in charge of

<sup>14</sup> There is no provision regarding the grand jury indictment even in the recently promulgated Law on the Lay Participation in the Criminal Justice (*Kukmineui Hyeongsajaipan Chamyoe Gwanhan Beoplyul*) (Law No. 8495, promulgated 1 June 2007).

<sup>15</sup> With the promulgation of the Law on the Lay Participation in the Criminal Justice (LPCJ), the defendant is given the right to a jury trial. See generally LPCJ at Arts. 8, 13.

<sup>16</sup> Before the recent revision, any challenge to the prosecutor's exclusive right of prosecution was possible in several crimes such as wrongful exercise of authority. However, it is now open to every crime. See generally CPC, *supra* note 5, at art. 260.

<sup>17</sup> Kuk Cho, *supra* note 3, at 381.

<sup>18</sup> Jaesang Lee, *supra* note 8, at 81.

the investigation and, with the results of that investigation, simply represents the government in the trial, our system will be described as adversarial.

The factor that distinguishes an inquisitorial system from an adversarial one is closely related to the prosecutor's pretrial examination. The United States' Supreme Court accordingly pointed out that:

English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.<sup>19</sup>

The point is that, in the Continental Inquisitions (or inquisitorial) process, several judicial officers may be involved with the fact-finding process and even certify some facts as evidence to the trial court. The Inquisition system is that 'of criminal procedure in which the magistrate investigated, principally by interrogation of the accused; reduced the results of his investigation, including the testimony of the accused, to writing; and transmitted this dossier to the final sentencing court for a judgment which was based upon and effectively controlled by the dossier.'<sup>20</sup> To understand the Korean prosecutor, we need to locate prosecutors somewhere in the pre-trial process and examine the nature of their job. Generally speaking, prosecutors are nearly as powerful as the *juge d'instruction* (investigating judge in France). However, this is not the case in every country. In some countries, prosecutors are doing jobs that could basically be assigned to the police.<sup>21</sup> The task that the Korean prosecutors are in charge of is surely related to connecting the police and the trial court. Not yet clear is whether they are closer to the police or to the court. Visibly, '[a]ll prosecutors' offices in Korea, which are as big and dignified as those of the courts, are located next to court buildings.'<sup>22</sup> However, this does not provide the answer to my question. It does not say that prosecutors are equal to judges. The point is whether the prosecutors are capable of replacing the judges as fact/evidence finders in the pre-trial examination, and thus of governing the whole criminal procedure beside judges.

### III. WHO IS THE KOREAN PROSECUTOR?

Next, I would like to compare the Korean prosecutor with various types of

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<sup>19</sup> Crawford v. Washington, 124 S. Ct. 1354, 1359 (2004) (citing 3 W. Blackstone, Commentaries on the Laws of England 373-4 (1768)).

<sup>20</sup> John H. Langbein, *supra* note 6, at 21.

<sup>21</sup> See *supra* note 6.

<sup>22</sup> Jaewon Kim, *supra* note 4, at 55.

judicial officers. They have different names and assignments. To compare them with the Korean prosecutor will help develop a clearer idea of who he is.

## 1. Korean Prosecutor v. American Prosecutor

Some argue that ‘the Korean prosecutors do not view their judicial role or function as subordinate to that of judge’<sup>23</sup> and that ‘this mentality is ... incompatible with the adversarial system, which the Korean legal system presupposes.’<sup>24</sup> Many commentators actively ascertain that Korea has an adversarial criminal procedure.<sup>25</sup> In some aspects, they have reasonable ground to insist that.<sup>26</sup> However, it is a different thing to say that the Korean prosecutors are supposed to do the same work as the American counterpart, just because Korea and the United States are both employing the so-called adversarial criminal system. In reality, the two countries’ prosecutors are not of the same kind. The American prosecutors seem rather bizarre in terms of police–prosecutor relations, and this is evident from simply comparing them with the French/Korean colleagues. The following description is about the difference between two groups of prosecutors face-to-face over the Atlantic:

The French prosecutor must be kept informed, at an early stage, of the existence and progress of the investigation. This permits the prosecutor to have more input into the direction and methods of investigation. If the offense is one that will probably not be prosecuted, the police may avoid wasting time and unnecessarily bothering the suspect, his or her associates, and witnesses. If the police are using questionable investigatory methods, the prosecutor may be able to intervene in time to protect both the rights of citizens and the admissibility of the evidence.<sup>27</sup> In contrast to this ‘integrated’ model, the police and prosecutorial functions in the United States seem to reflect a strict ‘division of labor’ theory. American prosecutors are rarely involved in pre-arrest investigation decisions or in the arrest decision itself.<sup>28</sup>

If we are able to designate the French criminal procedure model as an ‘integrated’ one, Korea has the same system as France. To understand the prosecutor’s role in Korea, all we have to do is just to replace the word ‘French’ with

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<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> See, e.g., Yongseok Cha and Yongseong Choi, Criminal Procedure Code (*Shinhyeongsa sosongbeop*) 62 (2d ed. 2004).

<sup>26</sup> About the typical features showing that the Korean criminal procedure embodies the adversarial system, see generally Jaesang Lee, *supra* note 8, at 42–4.

<sup>27</sup> In Korea, this sort of prosecutorial power is called the right to inspect the detention place. See CPC, *supra* note 5, at art. 198–2.

<sup>28</sup> Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539, 557–8 (1990).

'Korean' in the above sentences. The Korean prosecutor works with the police under the 'integrated' model. There is no theory of 'division of labor,' as far as we are concerned with pre-trial activity. However, a difference from the French scenario is that there is no direct path from the police station to the judge in Korea.<sup>29</sup> Save some minor offenses,<sup>30</sup> all the results of criminal investigations are to be gathered in the prosecutorial office. There it is decided whether or not to take the case to the court. In that sense, Korea has a far more integrated model than France.

That being so, the fact that two nations, such as Korea and the United States, both basically have an adversarial criminal system does not say much about the similarity of the prosecutors' work in the two nations. As is generally taught in the Judicial Research Training Institute,<sup>31</sup> from the comparative point of view, the Korean prosecutor is rather an adherent to the French *procureur de la République*.

Prosecutors are historical products of the Continental criminal procedure governed by the Nation. The position of the prosecutor is very close to the so-called *procureur du roi* in the fourteenth century. Nonetheless the *procureur du roi* at that time was nothing more than an officer who was in charge of governmental lawsuits for procuring fines and forfeits. In 1808, the Napoleonean Criminal Instruction Code (*le Code d'Instruction Criminelle*) changed the name to the *procureur de la république*, and this was imported through Germany and Japan to our country.<sup>32</sup>

## 2. Korean Prosecutor v. French Prosecutor/French Examining Magistrate

To understand the nature of the French prosecutorial work, we have to juxtapose the prosecutor with the examining magistrate, and '[o]ne of the most distinctive institutions of French criminal procedure is that of the examining magistrate.'<sup>33</sup> Without saying anything about small crimes and infractions, every serious crime should not directly reach the trial court. Two sorts of magistrates are supposed to handle the cases before a trial.

*Ces magistrats dont la situation est différente se différencient surtout par leurs fonctions. Le juge qui n'a pas le droit de poursuivre, ne peut se saisir lui-même d'une affaire pénale. De son côté, le [procureur de la République] qui a seulement le droit*

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<sup>29</sup> See generally Mary M. Preumont, *La Procédure de Comparution Immédiate en matière Pénale* 33 (Brussels, 2001).

<sup>30</sup> See *supra* note 10.

<sup>31</sup> See generally Judicial Research Training Institute, *Prosecutorial Practice I (Gumchal Silmu I)* 3-5 (JRTI, 2005).

<sup>32</sup> Jaesang Lee, *supra* note 8, at 87.

<sup>33</sup> Richard S. Frase, *supra* note 28, at 666.

*de poursuivre, n'a pas en principe le pouvoir d'effectuer des actes d'instruction.* [These magistrates whose positions are different are supposed to do different jobs. The investigating judge, who does not have the right to accuse, cannot take charge of any criminal case for himself. On the other hand, the public prosecutor who exclusively has the right to accuse cannot effectuate the acts of pre-trial examination].<sup>34</sup>

The examining magistrate, called *juge d'instruction* in France, has been invented 'for more direct and efficient judicial control over both police and prosecutorial discretion at the investigatory and charging stages'<sup>35</sup> and 'combines the functions of police, prosecutor, investigating grand jury.'<sup>36</sup> Certainly, 'the French today make relatively little use of this procedure [of the examining magistrate].'<sup>37</sup> Nevertheless, the basic structure of pre-trial investigation remains undisturbed. There is on the one hand the *procureur de la république* who 'receives complaints and denunciations and decides how to deal with them,'<sup>38</sup> and 'institutes or causes to be taken any step necessary for the discovery and prosecution of violations of criminal law'.<sup>39</sup> Judicial police operations are carried out under the direction of the district prosecutor.<sup>40</sup> On the other hand, there is an investigating judge who has the right to interrogation.<sup>41</sup>

The same is basically true in Korea. There is a prosecutor who commands and directs the investigation. Furthermore, as is true in France, his investigating power is limited in certain aspects. He has to have the warrant of arrest or detention from the district judge who is assigned to issue the warrants for some periods. To officially gather evidence and preserve it, he has to address the district judge.<sup>42</sup> As is true for interrogating witnesses before a trial, the article states that:

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<sup>34</sup> Gaston Stefani, *supra* note 7, at 37.

<sup>35</sup> Richard S. Frase, *supra* note 28, at 666–7.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> C. pr. pen. Art. 40.

<sup>39</sup> C. pr. pen. Art. 41.

<sup>40</sup> C. pr. pen. Art. 12.

<sup>41</sup> For the explication of the interrogation, *l'interrogatoire* in French, see generally Georges Levasseur et al., *Droit Penal General et Procedure Penale* 156 (13d ed. 1999).

<sup>42</sup> See CPC, *supra* note 5, at Art. 184, which states that:

Article 184 (Request and Procedure for Preservation of Evidence)

(1) The public prosecutor, the defendant, a suspect, or his defense counsel may, when there are reasons which may make it difficult to use evidence unless it is preserved in advance, even prior to the date of the first public trial, request a judge to effect such measures as attachment, investigation, verification, examination of witness, or expert opinion.

In case persons who are deemed likely to know facts that are indispensable for the investigation of crimes refuse to appear or make statements under the preceding Article, public prosecutors may request judges to interrogate them as witnesses only before the date of the first public trial day.<sup>43</sup>

All proceedings, which include ‘attachment, investigation, verification, examination of witness, or expert opinion,’<sup>44</sup> are called pre-trial examination or simply *instruction* in French.

*Les actes d’instruction. Ce sont les actes qui ont pour but la recherche et la réunion des preuves de l’infraction, qu’ils soient accomplis par les juridictions d’instruction ou même par des officiers de la police judiciaire.* [Acts of examination. They are the acts which are means of searching or gathering the evidence of crime, and which are accomplished by the examining magistrate or even by the judicial police officers (OJP)].<sup>45</sup>

It is very important to figure out whether or not the Korean prosecutor has the right of examination. As is shown above, and as opposed to the examining magistrate, the French prosecutor does not have the right to do that. Neither does the Korean prosecutor. In other words, the initiative in the first step of criminal procedure is not in the hands of prosecutors but in those of the examining magistrate. In a certain sense, prosecutors and district judges or examining magistrates are cooperators, and the basic structure of the pre-trial investigation in Korea or France consists of those two top positions. However, the prosecutor cannot be a judge in any event.

The result is that everything said or declared in the presence of the district judge can be qualified as evidence, but what is said to the prosecutor has to pass some sort of evidentiary rule, such as the hearsay rule, in Korea. That is the crucial difference between the roles of prosecutors and those of district judges. Article 311 makes this point clear by stating that:

Any protocol which contains statements made by the defendant or persons other than the defendant at a preparatory hearing or during public trial, and results of inspection of evidence by courts or judges may be used as evidence. The same shall apply to a protocol prepared pursuant to articles 184 and 221–2.<sup>46</sup>

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(2) The judge who has received the request prescribed in the preceding paragraph has the same authority as a court or presiding judge has, regarding the disposition of such request.

<sup>43</sup> CPC, *supra* note 5, at Art. 221-2.

<sup>44</sup> CPC, *supra* note 5, at Art. 184.

<sup>45</sup> Gaston Stefani, *supra* note 7, at 172.

<sup>46</sup> CPC, *supra* note 5, at Art. 311.

However, worthy of note is that the Korean prosecutors actually interrogated the suspects and the prospective witnesses like the French examining magistrate did. Furthermore, they reported the result to the trial courts, and the courts' decisions were widely based on those reports, as a practical matter.<sup>47</sup> We might be able to say that, in that sense, the Korean prosecutors might be considered half-judges. It was sometimes argued that the Korean prosecutors had been nearly promoted to the group of examining magistrate.<sup>48</sup>

All that happened was due to the practice that gives relatively high evidential weight to the protocols of the prosecutors. As is true in France, the CPC in Korea gives full evidential weight to the judges' records. However, the records made by the prosecutors have not been given full evidential weight differently from magistrates' records.<sup>49</sup> Thus, the old article 312 said that the transcripts made by the prosecutors could be used as evidence in the trial court, but it specified certain conditions as following:

- (1) A protocol which contains a statement of a suspect or any other person, prepared by a public prosecutor ... may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during public trial: provided that a protocol containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement was made in particularly reliable state, regardless of the statement made at a preparatory hearing or during public trial by the defendant.<sup>50</sup>

To summarize roughly, 'the person making the original statement' has to approve 'the genuineness' of the protocol and there should be 'particularly reliable state' at the moment of making protocol. The CPC's attitude toward the prosecutor's protocol is very similar to that of the French Code regarding the police officer's records. The French Code states that, in principle, the police officers' records or reports 'only have the value of simple information,'<sup>51</sup> but

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<sup>47</sup> See, e.g., 'A public prosecutor or judicial police officer shall interrogate as to the necessary matters concerning the facts and conditions of the offense, and shall give the suspect an opportunity to state facts beneficial to himself,' CPC, *supra* note 5, at Art. 242.

<sup>48</sup> Former President Noh also pointed out the abusive power of Korean prosecutors. See, e.g., *Are You Satisfied with Having Insulted the Prosecutorial Office*, Ohmynews (Seoul), 12 March 2003.

<sup>49</sup> CPC article 311 does not include the documents prepared by the prosecutors as one of the dossiers which are automatically qualified as evidence. See CPC, *supra* note 5, at Art. 311.

<sup>50</sup> See generally the Korean Criminal Procedure Code (*hyeongsa sosongbeop*) (Law No. 341, 23 September 1954, last revised 1 June 2007 as Law No. 8496).

<sup>51</sup> C. pr. pen. Art. 430.

... in the cases where judicial police officers, judicial police agents or the civil servants and agents entrusted with certain judicial police duties have been granted by a special legislative provision the power to establish misdemeanors by official records or reports, proof of the contrary may only be brought in writing or through witnesses.<sup>52</sup>

The wordings of the Korean and French Codes are not the same, but they agree to the point that the protocols or *procès-verbaux* made by the police and prosecutors should not be accorded full evidential weight.

### 3. Conclusion

At the very least, one thing is not in doubt: namely that the Korean prosecutor is very different from his American counterpart. At the same time, he is not one of the examining magistrates or investigating judges. Nor is the prosecutor a police officer. All that I can say with sufficient conviction is that the Korean prosecutor is located somewhere between the OJPs and the examining magistrate, or the police officer and the district judge, in terms of pre-trial examination. This is in fact the point which ignites the judiciary reform in Korea.

## IV. JUDICIARY REFORM AND THE PROSECUTORIAL OFFICE

### 1. Is the Prosecutor Half-Judge?

A suspect says that he killed a victim, and a public prosecutor writes it down in a document and lets the suspect sign it. It mainly occurred in the investigation office operated by a public prosecutor. When the suspect is accused and summoned in the public court, the judge asks him whether he consented to the introduction of the protocol into evidence. If he says 'yes,' there is no problem. If he says 'no,' the foundation process begins. There Article 312(1) comes into play and the judge, in most cases, asks the defendant (who was a suspect when the protocol was made), whether the signature is his or not. If he says, 'yes, that is mine,' it is proved that the statement was formally made.<sup>53</sup> Then

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<sup>52</sup> C. pr. pen. Art. 431.

<sup>53</sup> The Korean law has invented a notion that the truthful making of a document consists of formal/truthful making and substantial/truth making. The fact that the signature in a document is truthful only guarantees the formal/truthful making. See generally Jaesang Lee, *supra* note 8, at 551.

it can be, according to the Supreme Court of Korea (SCK), legally inferred as fact that the statement was actually made and properly recorded by the prosecutor because the defendant's signature is genuine.<sup>54</sup> Traditionally, the SCK ruled likewise for several decades when article 312 was at issue.<sup>55</sup>

How about the second requirement that 'the statement recorded in the protocol was made in a particularly reliable state'? The SCK was fairly relaxed, minding only if formal and actual genuineness could be established.

The SCK's ruling on December 16, 2004,<sup>56</sup> has changed nearly everything. It no longer infers the actual genuineness of a transcript from the fact that the accused has signed it.<sup>57</sup> Furthermore, it requires that the transcript should have been prepared and made 'in a particularly reliable state' as the article says. What does this change mean? It means that the Korean judiciary has decided to introduce more developed adversarial settings into the criminal procedure by imposing a stricter hearsay rule and by emphasizing the adversarial nature partly embodied in the CPC.

From the beginning of 2005, a paradigm shift can clearly be seen in Korean legal circles. Even the Chief Justice has publicly demanded, 'cast away protocols!'<sup>58</sup> The quarrel between the judiciary and the Department of Justice has been noisy and widely publicised in newspapers and on TV. To support the reform project, [t]he presidential Committee on Judicial Reform was formed on 18 January 2005. This committee [was] focusing on accomplishing an even more democratic, fair, and efficient judiciary with more openness and transparency.<sup>59</sup>

## 2. Downfall of the Prosecutor

To have an open and transparent criminal procedure, all the facts should be assessed and questioned in an open court. Regardless of what one said to the police officer at the scene, one has to have the right to deny it in court, and that is important. That issue was handled in the legislation and one legislator concluded that:

In fact, torture in the criminal process in Korea is well-known. The point is how to stop it. I believe that, first of all, we have to exclude the transcripts and protocols

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<sup>54</sup> See Decision of 23 September 1994, 94 Do 1853 (Korean Supreme Court).

<sup>55</sup> See, e.g., Decision of 26 June 1984, 84 Do 748 (Korean Supreme Court).

<sup>56</sup> Decision of 16 December 2004, 2002 Do 537 (Korean Supreme Court).

<sup>57</sup> See *id.*

<sup>58</sup> *Cast Away Protocols [Investigating Records]*, Hankook Ilbo (Seoul), 20 September 2006.

<sup>59</sup> [www.scourt.go.kr/scourt\\_en/jdc\\_info/jdc\\_reform/index.html](http://www.scourt.go.kr/scourt_en/jdc_info/jdc_reform/index.html) (last visited August 2009).

made by the police and the prosecutors as evidence. I acknowledge that a police officer or a public prosecutor can possibly interrogate persons to find out what really happened but to qualify their findings as evidence in the court is a totally different thing. I insist that the transcripts and protocols cannot be used as evidence without the consents of the defendants and their lawyers.<sup>60</sup>

Accordingly, the current CPC article 312(3) states that '[a] protocol containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in cases where the defendant who has been a suspect, or the defense counsel at a preparatory hearing or during public trial verifies the contents of the protocol.'<sup>61</sup> However, the legislator himself showed a more lenient attitude towards the prosecutor's protocol by saying that:

Nonetheless, the human resources in the prosecutorial offices are better than those working in the police stations, so at least to accelerate the trial process, we need to approve the evidentiary power of the protocols that the prosecutors made.<sup>62</sup>

And more than 50 years have passed after the first promulgation of the CPC. In the meantime, the prosecutors' protocols were widely accepted by the trial courts and the courts seemed to be ready to approve the results of the investigation without any scrutinized assessment. Otherwise, the percentage of those found guilty at trial could not be so high, as some commentators have pointed out.<sup>63</sup>

The situation being so, the paradigm shift in 2004 is quite revolutionary to the point of view of the prosecutorial office. The recently amended CPC has made two big changes.<sup>64</sup> One is to put off the interrogation of the defendant after all the taking of evidence.<sup>65</sup> By doing that, the importance of the prosecutors' protocols of the suspects' statements as evidence has been substantially lowered. The other is to attack the admissibility of the other protocols which are made in the course of interrogating the witnesses, victims, and all the third parties. In consequence, the newly amended article declares that:

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<sup>60</sup> Dongwoon Shin, *Criminal Procedure Code (Hyeongsasosongbeop)* 804, n.3 (3d ed. 2005).

<sup>61</sup> CPC, *supra* note 5, at Art. 312(3).

<sup>62</sup> Dongwoon Shin, *supra* note 60, at 804, n.3.

<sup>63</sup> See, e.g., 'The percentage of acquittal is fluctuating between 0.4% and 0.6%,' Sangki Park et al., *Criminal Policy (Hyeongsajeongchaik)* 432 (7d ed. 2003).

<sup>64</sup> First of all, the old article 312(1) has been replaced with a new one, which requires that the defendant himself should recognize in an open trial that 'the contents are the same as he stated' in making the prosecutor's protocol, see CPC *supra* note 5, at Art. 312(1).

<sup>65</sup> CPC, *supra* note 5, at Art. 296-2.

A protocol which contains a statement of the person other than the defendant, prepared by a public prosecutor, may be introduced into evidence, on the condition that the statement is subject to cross-examination by the defendant or his lawyer, if it is made under the due process and method, and that the genuineness thereof is proved by the person making the original statement at a preparatory hearing or during public trial, or by objective proof such as videotapes: provided, that it is proved that the statement was made in a particularly reliable state.<sup>66</sup>

All this means that the validity and the legality of the prosecutor's pre-trial examination will be fully inspected by the trial court using the exclusionary rule of evidence. The article emphasizes not only 'particularly reliable state' but also 'due process and method.' Even though they are guaranteed, what is recorded in the prosecutor's protocol should be 'subject to cross-examination.' Looking at the wording of the article, we cannot help concluding that the Korean prosecutor is no longer as powerful as the examining magistrate. In a certain sense, the position of the prosecutor can be compared to that of the English JP whose role was closer to the police than to the prosecutors.<sup>67</sup> It might be possible that the trial court considers the protocol made by the prosecutor as records that 'only have the value of simple information.'<sup>68</sup>

### 3. Conclusion

The fact that the Korean prosecutor comes to be compared to the English JP means that a transition occurs from the 'prosecutorial justice'<sup>69</sup> to another paradigm. It is visibly clear that the prosecutor is coming down from the place of magistrate to that of a subordinate to the examining magistrate, i.e. district judge.

<sup>66</sup> CPC, *supra* note 5, at Art. 312(4).

<sup>67</sup> Historical research shows that the records made by the JPs have been treated as inconclusive, and their foundational requirements are basically the same with the wordings in the Art. 312(4). See 'Sir Matthew Hale's account, bearing the impress of his judicial experience, underscores how exceptionally the depositions of witnesses were used in evidence, and how inconclusive the written examination of the accused might be: These examinations and informations ... may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not. 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession,' John H. Langbein, *supra* note 6, at 29.

<sup>68</sup> *Supra* note 51.

<sup>69</sup> Kuk Cho, *supra* note 3, at 386.

## V. CONCLUSION

I repeat that prosecutorial neutrality has been at issue in Korea. Certainly, prosecutorial work has been much distorted. However, the problem is not whether the prosecutors are neutral or not. More dangerous is the fact that he has powers which are not legally given to him. Even if he is not an examining magistrate or district judge, he seems to have the right to ‘compile an authoritative written dossier recording his examinations of witnesses and accused.’<sup>70</sup> This is not at all desirable. It is because there was no practical means to stop the prosecutor’s misuse of power.

All the more horrible was that the courts themselves aggravated this problem by abandoning their duty of control. Now, the Judiciary Reform in Korea begins to consider the prosecutor just as the commander of the investigation and, at the same time, as the proper party in an open trial. This means that the true adversarial system is being introduced and tried here. I am curious to see how the prosecutorial office will react to this paradigm shift. Visibly, the prosecutors are well prepared for the change.

However, we also need to remember that the prosecutor is still a member of the magistracy. He is ‘in the control tower’ and has to do a lot of things there. It is also a good thing that the prosecutor stops playing the role of judge. He has to now find a way of cooperating with the examining magistrate as one of two key players of the whole criminal procedure. (6 JKL 163.)

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<sup>70</sup> John H. Langbein, *supra* note 6, at 33.

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# 5. The admissibility of suspect interrogation record\* in the new era of Korean criminal procedure

**Yong Chul Park**

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## I. INTRODUCTION

Since Japan transplanted its German-influenced legal structure in Korea during the Japanese occupation period of the early 20th Century, Korea has taken the form of authoritative bureaucracy where public officials hold great power. Public officials including judges and prosecutors have shared and exercised a vast amount of discretion in terms of enforcing laws.<sup>1</sup> Previously as enforcers of criminal justice, prosecutors had long enjoyed corroborative kinship with judges; now there is productive tension.<sup>2</sup> Oftentimes judges helped prosecutors to prove their cases.<sup>3</sup> Since judges were geared to work as supporting partners to help and prove prosecutions, there were not exactly impartial umpires.<sup>4</sup> There have been two similar but different sets of evidence showing judges' mighty power and their kinship with prosecutors in criminal trials. The first one is the fact that the many aspects of rules of criminal evidence posit rather in common law status without a lot of necessary details.<sup>5</sup> Heavily relying upon judges' discretionary power, it was implicitly noted that a lot of detailed aspects of the Rules were considered better if they were

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\* Section 1 of Article 312 of the Criminal Procedure Code (CPC) (*hyeongsasosongbeop*) (Law No. 341, 23 September 1954, last revised 21 December 2007 as Law No. 8730) (KCPA) terms it as 'A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor.'

<sup>1</sup> Yong Chul Park, *Does It Matter Who Wrote It?: The Admissibility of Suspect Interrogation Record Written by Prosecutors in Korea*, *Journal of Korean Law*, Volume 6, Number 2, 181 (2007) (Park 1).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

unwritten.<sup>6</sup> The second had been the very existence and usage of so called ‘Suspect Interrogation Record.’ The Suspect Interrogation Record can be defined as ‘a protocol containing a statement of a suspect or of any other person, prepared by a public prosecutor or a judicial police officer.’<sup>7</sup> Although by definition a judicial police officer or a public prosecutor has an equal opportunity to prepare the Record as investigating authority, the Record prepared by a prosecutor had had greater authority because it could be used as admissible evidence in court even if the accused denied the contents.

Before anyone is formally charged with any crime he holds the status of suspect under any kind of investigation.<sup>8</sup> Suspects, once they are in the custody of an interrogating authority such as the police or the prosecutors, will be under ‘direct’ interrogation by either investigating authority.<sup>9</sup> The Suspect Interrogation Record is the fruit of the interrogation.<sup>10</sup> After the investigation is finished, the suspect must sign a paper written by the interrogating authority.<sup>11</sup> Here, the meaning of ‘direct’ interrogation is that the suspect would be left alone with virtually no assistance of counsel.<sup>12</sup> People might be curious how such kind of practice could be possible in Korea where the right to counsel is constitutionally provided.<sup>13</sup> The key to understand this awkward reality is that regardless of attorney presence during the investigation, counsel is not allowed to interfere.<sup>14</sup> In Korea it is specified that since the object of interrogation is the suspect, counsel should not interrupt during the interrogation. So, the Suspect Interrogation Record, by nature, has worked as a record of confession elicited without ample assistance of counsel.<sup>15</sup> That is, the Record became a crucial tool to enable the prosecution to obtain a guilty verdict.<sup>16</sup>

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Yong Chul Park, *Devising a Korean Adversarial System Using Thoroughly Detailed Evidentiary Rules*, JSD Dissertation 139 (January 2006) (Park 2).

<sup>9</sup> Park 1, supra note 1 at 182.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> The Constitution of the Republic of Korea (*heonbeop*) Article 12(4) provides: ‘(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act’.

<sup>14</sup> Jin-Yeon Chung, *Constitutional Contents and Limits to the Right of Counsel – With Special Reference to Interrogation of Suspect and Presence of Counsel*, *Sungkyunkwan Law Review*, Volume 18-3, at 644-5 (2006).

<sup>15</sup> Park 1, supra note 1 at 182.

<sup>16</sup> Id.

Consequently, it is not a surprise to find out that one of the most crucial features of Korean evidentiary rules is that those rules revolve around that protocol called the Suspect Interrogation Record.<sup>17</sup> For prosecutions, the Record was a very effective and appealing tool to draw a guilty verdict alongside a friendly relationship with the judges. On the other hand, the Record could not be a strong piece of evidence, because basically the Record is hearsay. The Record fits virtually every aspect of the definition of hearsay (although the definition only accords with the commonly acceptable one of hearsay in the United States).<sup>18</sup> Looking at the definition of hearsay in the United States, the Federal Rules of Evidence (the FRE) provide that hearsay is ‘a statement,<sup>19</sup> other than one made by the declarant<sup>20</sup> while testifying at trial or hearing, to prove the truth of the matter asserted.’ Although the CPC does not state what the definition of hearsay is, considering the location of the rule regarding the Suspect Interrogation Record, there should be no doubt that the Record is hearsay.<sup>21</sup>

As mentioned above, because of the strong presence of the Suspect Interrogation Record in Korean criminal trials, it is very likely that many wrongful convictions were made based upon the defendants’ own confession to a crime he did not commit.<sup>22</sup> Such a possibility of wrongful conviction should not be overlooked.<sup>23</sup>

Besides, since January 2008, the law on jury trial has come into effect in Korea. Accordingly, import of the Suspect Interrogation Record is predicted to lessen, since jury members would not weigh on the Record as much as judges. This chapter examines the changing dynamics surrounding the Suspect Interrogation Record.<sup>24</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> A prominent prosecutor argues that any out-of-court statement against interest by the accused can be admissible as an exception to hearsay in the United States (Wan-Kyu Lee, *The History and the Future of Evidentiary Rules in the Korean Criminal Procedure Act*, The 50th Anniversary Conference for Korean Criminal Law Association (2007), at 134). Obviously, such argument is flawed because only some of out-of-court statements against interest by the accused can be found admissible as long as it fits specific exceptions to hearsay.

<sup>19</sup> Fed. R. Evid 801(a) provides that a ‘statement’ is (1) oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

<sup>20</sup> Fed. R. Evid 801(b) provides that a ‘declarant’ is a person who makes a statement.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## II. PROGRESS

As mentioned above, arguably the Suspect Interrogation Record has been in the center of evidentiary rules partially because the matter is inevitably intertwined with hearsay evidence in the CPC.<sup>25</sup> Also, the Record had continued to give an edge to the prosecutions, because the function of it was a record of confession made while there was at least no effective presence of attorney.<sup>26</sup> However, over the years, the existence of the Record faced many challenges and finally these challenges result in changes in laws.<sup>27</sup> The change in the CPC regarding the Suspect Interrogation Record started from the Korean Supreme Court's taking a different position on the issue.<sup>28</sup>

In this chapter, firstly I want address the past in terms of law and court decisions on the Record.<sup>29</sup> Secondly, I look at how the transformation in court decisions affected the change in law. Thirdly, I look at issues for the future resolution.<sup>30</sup> Finally, predictions about the perspective changes in relation to the Suspect Interrogation Record in the era of jury trial will be offered.

### 1. Who are the Writers of the Record?

#### A. Law treats it differently

As briefly noted in the introduction, the admissibility of the Record was quite different depending upon who performed the interrogation.<sup>31</sup> Section 1 of Article 312 of CPC<sup>32</sup> provides that 'a protocol which contains a statement of

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> See generally Kuk Cho, *The Admissibility and Verification of Genuineness of an Interrogation of a Suspect Made by Prosecutors – Confirmation of Prosecutorial Justice by Courts*, Criminal Case Study Vol. 9, The Korean Criminal Law Society, Parkyoungsa (2001) (Cho 1).

<sup>32</sup> Article 312 (Protocol Prepared by Public Prosecutor or Judicial Police Officer) of the CPC provides:

- (1) A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor, or a protocol containing the result of inspection of evidence, prepared by a public prosecutor or judicial police officer, may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during the public trial: Provided that a protocol containing the statement of the defendant who has been a suspect may be introduced into evidence only where the state-

a suspect..., prepared by a public prosecutor' may be admissible in court, if the suspect (then the accused) acknowledged the genuineness of the Record 'at a preparatory hearing or during the public trial.' The Section continues to provide that where the protocol is written by a public prosecutor, even if the defendant does not acknowledge or verify the genuineness of the statement 'at a preparatory hearing or during the public trial' as long as there are 'circumstances where the statement was made under such circumstances that is undoubtedly believed to be true' the statement would be admissible.<sup>33</sup> The perception among scholars is that 'such circumstances that is undoubtedly believed to be true' is equivalent to 'special indicia of reliability' in the United States.<sup>34</sup> In other words, the CPC cut a prosecutor some slack by providing leeway to admit the Record prepared by him when the accused does not want the Record to be used in trial.<sup>35</sup> Still, a lot of lingering questions remain.<sup>36</sup> What does it mean by 'verification of genuineness of the statement'?<sup>37</sup> What kind of accused would be willing to do such verification or acknowledgement?<sup>38</sup> How can a public prosecutor prove that there is 'special indicia of reliability' in the Record when the accused denies the genuineness of it?<sup>39</sup> Definitions and partial answers to these questions are to be found in some recent Korean Supreme Court decisions which I address later in this chapter.

Until now, we have observed how the Record made by prosecutors was treated in the court; but what about the Suspect Interrogation Record written by the police?<sup>40</sup> Section 2 of Article 312 of the CPC<sup>41</sup> provides that unless the accused does 'verify the content of the protocol' such a statement would never be admissible.<sup>42</sup> That is, there is no 'special indicia of reliability' leeway where such statement could be found to be admissible in cases where the

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ment was made under such circumstances that it is undoubtedly believed to be true, regardless of the statement made at a preparatory hearing or during public trial by the defendant.

- (2) A protocol containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in cases where the defendant who has been a suspect, or the defense counsel at a preparatory hearing or during public trial verifies the contents of the protocol. [This Article wholly amended by Act No. 705, 1 September 1961].

<sup>33</sup> Park 1, *supra* note 1 at 184.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 184–5.

<sup>40</sup> *Id.* at 185.

<sup>41</sup> Article 312 of the CPC, *supra* note at 32.

<sup>42</sup> Park 1, *supra* note 1 at 185.

accused refuses to verify the content.<sup>43</sup> In addition, the verification by the accused should amount to admitting the fact that the content of the Record was consistent with his intention to make such a statement.<sup>44</sup> ‘Verifying the content’ is a much stronger expression than just acknowledging the genuineness of the statement provided in Section 2 of Article 312 of the CPC which was applied to the Record written by the prosecution.<sup>45</sup> Then what would be a plausible justifying explanation for such discrepancy between the Record prepared by the prosecution and by the police?<sup>46</sup> The reason for differentiating the level of admitting the Record seems to stem from the prosecutors’ superior status to the police.<sup>47</sup> Also, one very convincing argument for the difference was that prosecutors are obliged to be objective pursuant to the law;<sup>48</sup> therefore they are more trustworthy than the police in terms of not committing to any illegal means to elicit confession.<sup>49</sup>

### **B. Difference in acknowledging the genuineness of the record**

Two ways of interpreting the acknowledgment of the genuineness of the

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Article 196(1) of the CPC provides:

- (1) Investigators, police administrative officials, police superintendents, police captains or police lieutenants shall investigate crimes as judicial police officers under instructions of a public prosecutor.

Also, Section 1 of Article 4 of Public Prosecutor’s Office Act provides:

- (1) The public prosecutors shall have the following duties and authority as representatives of the public interest:
- (2) The direction and supervision of judicial police officials with respect to the investigation of crimes.

In addition, Professor Kuk Cho explains:

The investigative authorities are composed of two bodies. First, police are a subsidiary organ of the prosecution, lacking independent powers of investigation. (Kuk, Cho, *The Unfinished ‘Criminal Procedure Revolution’ of Post-Democratization South Korea*, 30 Denv. J. Int’l. Law and Pol’y 377, 381 (Summer, 2002) (Cho 2).

<sup>48</sup> Section 2 of Article 4 of Public Prosecutor’s Office Act provides:

In performing his duties, the public prosecutor shall observe political neutrality as a servant of the people and shall not abuse the powers bestowed upon him [newly inserted by Act No. 5263, Jan 13, 1997].

<sup>49</sup> Cho, *supra* note 47.

Record had been provided in Section 1 of Article 312 of the CPC, which was reserved only for the Record prepared by a prosecutor.<sup>50</sup> The first can be termed as 'formal acknowledgment' where the defendant admits the fact that he signed the Record at the end of interrogation.<sup>51</sup> The second is referred to as 'substantial acknowledgment' where the defendant verifies the content of the Record.<sup>52</sup> The Korean Supreme Court had been very firm in upholding a presumptive position in this acknowledgment issue.<sup>53</sup> That is to say, once formal acknowledgment was made by the defendant then substantial acknowledgment is presumed to have been made as well.<sup>54</sup> Such theory of presumption was certainly another way of providing leeway to the prosecutions, because formal acknowledgment was easy to obtain as long as the signature of the accused was on the Record.<sup>55</sup>

On the other hand, pursuant to Section 2 of Article 312 of the CPC, to be able to admit the Suspect Interrogation Record prepared by the police, the accused needs to do substantial acknowledgment.<sup>56</sup> That is, the weight of admissibility was different depending upon who was the writer of the Record.<sup>57</sup> It is common sense that no accused would be willing to give substantial acknowledgment for the Suspect Interrogation Record prepared by the police.<sup>58</sup> For that reason, in order to avoid any expected danger of the Suspect Interrogation Record being excluded because it lacks admissibility due to the refusal from the defendant in terms of verifying the content of the Record it became a custom that the same interrogation had to be redone by prosecutors.<sup>59</sup> Such tradition caused unnecessary workload for the prosecutors to redo all the interrogation process just to make another Suspect Interrogation Record by him.<sup>60</sup>

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<sup>50</sup> Park 1, *supra* note 1 at 186.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Decision of 26 June 1984, 84 Do 748 (Korean Supreme Court); Decision of 23 June 1992, 92 Do 769 (Korean Supreme Court); Decision of 12 May 1995, 95 Do 484 (Korean Supreme Court); Decision of 28 July 2000, 2000 Do 2617 (Korean Supreme Court).

<sup>55</sup> Park 1, *supra* note 1 at 186.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

## 2. New Chapter for the Suspect Interrogation Record

### A. The change in holdings

As mentioned above, in terms of having a two-tier system – formal and substantial acknowledgment – with respect to verifying ‘the genuineness of the statement,’ as the close tie between the prosecutors and the court has been estranged or Korean society has become more interested in approaching an adversarial court system (depending upon how scholars see it), the court’s firm stance on presumptive theory on the Suspect Interrogation Record, which had been heavily criticized, began to soften up.<sup>61</sup>

Finally, the Korean Supreme Court ruled<sup>62</sup> that even in a case of a Suspect Interrogation Record prepared by a prosecutor, substantial acknowledgment by the accused is necessary to be able to admit the Record.<sup>63</sup> Along with such a ruling, the court practically found that the Record prepared by a prosecutor would hold the same status as the Record by the police.<sup>64</sup> The change in the Supreme Court’s ruling startled the prosecutor’s office as well as subordinate courts because it practically meant that it became much easier for the defendant to wipe out the admissibility of the Record by simply refusing to verify its content in court.<sup>65</sup> The inevitable discrepancy between the court decision and the law demanded changes to the CPC.<sup>66</sup>

### B. The New Criminal Procedure Act

In October 2003, the Committee on Judicial Reform was established in the Supreme Court to revolutionize the legal system in Korea.<sup>67</sup> The baton for judicial reform was passed on to the Presidential Committee on Judicial Reform, which was formed in January 2004.<sup>68</sup> The Committee made an effort to change the law on the Suspect Interrogation Record along with a lot of progressive reform in the CPC.<sup>69</sup> Initially, the Committee made a new startling recommendation excluding the admissibility of the Suspect Interrogation Record.<sup>70</sup> However, this attempt faced fierce opposition from the Prosecutor’s office and finally was rejected.<sup>71</sup>

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<sup>61</sup> Id at 186–7.

<sup>62</sup> Decision of 16 December 2004, 2002 Do 537 (Korean Supreme Court).

<sup>63</sup> Park 1, *supra* note 1 at 187.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

Finally, with some changes regarding the Suspect Interrogation Record having been reflected in the review process, the Criminal Procedure Code became effective on 1 January 2008. The new Section 1 of Article 312 of the CPC confirms that there should be substantial acknowledgment to be able to admit the Suspect Interrogation Record written by a prosecutor.<sup>72</sup> Also, the new Section 2 of Article 312 of the CPC continues to provide that one way to prove substantial acknowledgement in case the accused refuses to acknowledge the genuineness of content is by using videotapes filming the interrogation process.<sup>73</sup>

One more aspect worth noting on the matter of the Suspect Interrogation Record is the introduction of the exclusionary rule for evidence gathered by illegal means. Article 308-2 of the CPC provides that any evidence gathered without legal process is not admissible. This Article will have impact on how the interrogation is carried out. That is, if any force is used during suspect interrogation, the Record as a fruit of such illegal tactics would not be admissible.

By the way, the stance on the Suspect Interrogation Record prepared by the police did not change in any meaningful way. Therefore, the stricter rule for the Record written by the police is expected to continue to be applied without any change.

### C. The trial of jury trial

From 1 January 2008,<sup>74</sup> Korea started a new experiment to implement a lay jury system.<sup>75</sup> So far 114 cases have been filed for the jury trial and 23 out of that total number have been resolved.<sup>76</sup> According to the Act on jury trial, only certain serious offences can be tried as jury trials when the accused wants his case tried by jury and the court has no objection to it.<sup>77</sup> The Act also provides that any decision made by the jury is only advisory.<sup>78</sup>

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<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Act on People's Participation in Criminal Trial (Law No. 8495, 1 June 2007). Since the name of the Act on jury trial is People's Participation in Criminal Trial and the jury trial is not exactly a lay jury system where their verdict is not final and judges might have opportunity to influence their deliberation when jurors cannot reach agreement the first time, the jury trial in Korea is called a 'People's Participation Trial.'

<sup>75</sup> For information on South Korea's jury trial adoption, available at [www.reuters.com/article/lifestyleMolt/idUSSEO16342120070503](http://www.reuters.com/article/lifestyleMolt/idUSSEO16342120070503) (last visited August 2009).

<sup>76</sup> *People's Participation Trial, the Final Holding-Verdict 91% Match*, The Korean Bar Association News, 21 July 2008, at 1.

<sup>77</sup> Article 5, Article 9 of Act on People's Participation in Criminal Trial.

<sup>78</sup> Article 46(5) of Act on People's Participation in Criminal Trial.

So what would be the impact of jury trial on the Suspect Interrogation Record? As noted, the Suspect Interrogation Record was one piece of crucial evidence that judges and prosecutors worked on together; rather than judges acting fairly like umpires with a balanced view on the issues. Such practice was based upon the system where judges ruled upon the dossier rather than live testimony. However, it is expected that the Suspect Interrogation Record will get less attention because for lay jurors live testimony would be a more appreciated form of evidence in the course of forming the opinion on decision-making.

### **3. Unfinished Business**

#### **A. The definition of ‘special indicia of reliability’**

Although the new CPC reaffirms that substantial acknowledgement is necessary for the Suspect Interrogation Record prepared by the prosecution and by the police, proving special indicia of reliability, which is the next step in gaining a decision as to admissibility, is still open to interpretation.<sup>79</sup> The Constitutional Court of Korea found that the special indicia of reliability requirement in regard to the Suspect Interrogation Record is constitutional, although minority opinion added that there should be clarity in terms of how to prove special indicia of reliability.<sup>80</sup> The new CPC leaves much to be desired in that regard, because it merely suggests that videotaping of the interrogation would work as one of the means to prove that there was genuine acknowledgement by the accused during the interrogation.<sup>81</sup> In the end, special indicia of reliability decisions are still being left to judges to make – a remnant of an inquisitorial court system.<sup>82</sup>

#### **B. Need for defense lawyer presence**

As mentioned already, lawyers’ presence can be meaningful only when they have the opportunity to defend their client by blocking any question that might incriminate their clients and by talking to the interrogating authority directly. Right now, the role of defense lawyers is just minimal.<sup>83</sup> Although the newly made Section 1 of Article 243-2 of the CPC provides that a lawyer can be present when law enforcement interrogates suspects, Section 3 of the same Article states that the lawyer participating in the interrogation process is able to object only when the interrogation method is unjust and he can give his

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<sup>79</sup> Park 1, *supra* note 1 at 188.

<sup>80</sup> Decision of 26 May 2005, 2003 Hun-Ka 7 (Korean Constitutional Court).

<sup>81</sup> Park 1, *supra* note 1 at 188.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

opinion only after the law enforcement personnel such as a police officer or prosecutor approves it.<sup>84</sup>

The fact that a defense lawyer cannot function as a direct channel for interrogation leaves much room for improvement.<sup>85</sup> To be able to achieve the true meaning of assistance of counsel and presumption of innocence, the interrogation and questions should be addressed to counsel not to the suspect.<sup>86</sup> The law should be moved in that direction in the near future.<sup>87</sup>

### **C. Is the Suspect Interrogation Record really necessary?**

As noted, originally the members of Presidential Committee on Judicial Reform intended to wipe out the Suspect Interrogation Record altogether, because they saw the Record obviously outweighing the demand for the right of fair trial bestowed on the accused.<sup>88</sup> Even although they failed to eradicate it due to strong resistance from prosecutors, the attempt in itself has led to a suggestion that the Record is now useless because videotaped interrogation can be used to verify the content of the Record pursuant to the new Section 2 of Article 312 of the CPC.<sup>89</sup>

On the other hand, there might be no objection in admitting the Record as long as the right to counsel is being guaranteed during suspect interrogation.<sup>90</sup> If this were a reality, the Record would not be such an appealing tool for the prosecution to prove their cases because confession would not be easily elicited.<sup>91</sup> In addition, confession should not be a vital form of gaining a conviction to begin with.<sup>92</sup> That is, testimonial evidence such as the Record should not have too much weight in proving cases.<sup>93</sup> Rather, real evidence such as DNA evidence, fingerprints or weapons used for the charged offense should be given more weight.<sup>94</sup> Arguably that will give a better chance for the defense to have a fair trial.<sup>95</sup> Also, as noted earlier, as a jury system is in place for certain crimes where the defendants choose to have a jury trial, the Suspect

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<sup>84</sup> Id at 188–9.

<sup>85</sup> Id at 189.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> For information regarding discussion on admissibility of the Suspect Interrogation Record written by a prosecutor, available at [http://news.naver.com/news/read.php?mode=LSD&office\\_id=086&article\\_id=0000021131&section\\_id=102&menu\\_id=102](http://news.naver.com/news/read.php?mode=LSD&office_id=086&article_id=0000021131&section_id=102&menu_id=102) (last visited August 2009).

<sup>89</sup> Park 1, *supra* note 1 at 189.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

Interrogation Record might not be an effective tool for prosecutions because it could be expected that jury members would not give too much weight to that anyway. That provides one more reason to remove the Record in the near future.<sup>96</sup>

#### **D. Lack of hearsay provisions**

Although it should be acknowledged that the new version of the CPC and the law on jury trial was a great attempt to transform the criminal court in Korea, still it lacks many provisions on evidentiary rules.<sup>97</sup> Specifically, the new CPC adds no additional exceptions to hearsay.<sup>98</sup> Although it would be nearly impossible to devise elaborate exceptions (as the Federal Rules of Evidence in the United States do) given the fact that there has not been any historical background on hearsay and hearsay exceptions in Korea, a meaningful attempt to equip the evidentiary rules with hearsay exceptions is necessary. The matter needs to be revisited in the near future.<sup>99</sup>

### **III. CONCLUSION**

Giving a special treatment for the Suspect Interrogation Record prepared by a prosecutor is a relic of the inquisitorial system where judges and prosecutors work as one unit in the criminal justice system.<sup>100</sup> Also in the era of experimenting with a jury system, the practice of showing reluctance to give up the Record is not compatible with what people demand.

The change regarding the admissibility of the Suspect Interrogation Record prepared by a prosecutor was the first step toward having a true adversarial system where the right of the accused can be guaranteed in a more meaningful way.<sup>101</sup> People's desire to have a fairer criminal justice system will be fulfilled when both the prosecution and the defense share a level playing field.<sup>102</sup>

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<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

# 6. The structure and basic principles of constitutional adjudication in the Republic of Korea

**Jongcheol Kim**

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## I. INTRODUCTION

Modern constitutionalism posits the political doctrine that political power should be authorized and bound by a constitution enacted according to the will of the people and that people's fundamental liberties and rights enshrined in the constitution should be protected (Lane 1996, p.17). This doctrine has become ideologically dominant in most Western countries since the 18th century. In 1948, when a three-year long period of American military rule came to an end, Koreans, who had never experienced Western-style civil revolution throughout their history, had the opportunity to establish a republican form of government adopting the principal tenets of constitutionalism.<sup>1</sup> Since then, at least on the surface, Korea has been a constitutionalist state as it has maintained a written constitution confirming popular sovereignty and unalienable human rights. However, one would be hard pressed to make a convincing argument that the reality of Korea has matched this superficial appearance. The history of modern Korea has shown that the core components of constitutionalism, namely the protection of human rights, popular sovereignty, and the separation of powers, have never been properly put into practice. The provisions of the Korean constitutions since the First Republic (1948–1960) were merely 'nominal' as they were continuously ignored by authoritarian regimes. However, the Korean people's consistent struggle for democracy encountered a watershed in the June 1987 Uprising, leading to the ninth revision of the Korean Constitution. Under this new constitution, Korean people are accelerating

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<sup>1</sup> This does not mean that Koreans were not aware of constitutionalism before 1948. For example, recent research shows that in the mid-19th century, constitutional democracy was introduced by a school of practical Confucianism called 'Silhak,' e.g. Choi Han-ki (Chong 1998).

constitutional democracy not only in principle but also in practice. The most remarkable achievement in this process of democratization has been the establishment of a new Constitutional Court and its success in bolstering the protection of human rights in Korea.

This chapter aims to explain in what ways the new constitutional adjudication system is successfully built into Korean constitutional arrangements and to demonstrate how the Korean system of constitutional adjudication works.

## II. THE ESTABLISHMENT OF THE CONSTITUTIONAL ADJUDICATION SYSTEM AND ITS DEVELOPMENT IN KOREA

### 1. Background to the Creation of a European-Style Constitutional Adjudication System

The People's Uprising of June 1987 and the June 29 Declaration paved the way for the ninth constitutional revision, the thrust of which is the institutionalization of constitutionalism by adopting direct presidential election, curtailing the president's power, and the establishment of the Constitutional Court. The Korean people's struggle for the restoration of constitutional democracy before 1987 tactically focused on the democratic election of the president, who used to have immense constitutional power but was elected by an indirect electoral college system that has been mocked as a 'gymnasium election.' Therefore, the first aim of the June 1987 Uprising was the establishment of direct presidential elections, which then-President Chun Doo-whan's authoritarian government, its own political power stemming from a 1980 military coup, was reluctant to accept. Actually, the general election on 12 February 1985 expressly represented the Korean people's desire for the restoration of constitutional democracy challenging authoritarian regimes. This election made the New Korea Democratic Party, which had been organized just before the election by the then political dissidents Kim Young-sam and Kim Dae-jung, the main Opposition party. Beginning with that election, Chun's government had to face strong popular demand for the revision of presidential election law that called for a reform of the indirect electoral college system into a direct voting system. Chun's last resistance to that demand, namely his 13 April 1987 Declaration that the next presidential election would take place by the indirect system, ignited popular uprisings that were supported by almost all parts of the country. Surrendering to the people's demand, the ruling party presidential candidate Roh Tae-woo dramatically accepted the revision of the Constitution on 29 June 1987.

The new Constitution was drafted by the common initiative of the ruling and opposition parties on 12 October 1987 and finally came into effect via referendum on 27 October 1987. The resulting Roh Tae-woo government, the first government under the new Constitution, put into practice the constitutional democratic ideas represented in the constitution by establishing the Constitutional Court and amending controversial laws enacted in former authoritarian regimes to oppress the opposition and the governed.

As a matter of fact, it is true that debates among politicians about the new constitution after the June 1987 Uprising focused on forms of government with relatively less attention paid to the new constitutional adjudication system. However, the Korean people, who had seriously suffered from arbitrary abuse of power during the prior periods of authoritarian rule, strongly demanded a new substantive device for the protection of human rights. Such sincere public demands resulted in the creation of a European-style constitutional adjudication system, much as the European countries who had previously suffered from totalitarian autocracy did after the Second World War.

## **2. Performance of the Constitutional Court since 1988**

The 1987 Constitution was not the first attempt to adopt a constitutional adjudication system in Korean constitutional history. However, due to not only an oppressive political environment but also to institutional restraints, the previous constitutional adjudication bodies<sup>2</sup> were anything but successful and were derided as mere rubber stamp institutions for the military dictatorship or as institutions existing only nominally on paper (Yang 1998, p.161). Institutionally, the Constitutional Commission (or occasionally the Supreme Court) in charge of constitutional adjudication under previous constitutions did not have authority equivalent to its constitutional importance as the final arbiter of the constitution. In particular, since the Supreme Court's decision striking down the State Compensation Act in the Third Republic (1962–1971), which caused a political dispute between the Judiciary and the President, political power tended to view the system of constitutional review as an inroad to the efficient execution of state policies. Therefore, in the Fourth Republic, called the Yusin period (1972–1979), the Constitutional Commission took over the authority of constitutional adjudication from the Supreme Court but was not free from the president's political influence and did nothing in relation to its main function, i.e. constitutional review. This situation continued under

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<sup>2</sup> The forms of constitutional adjudication adopted between 1948 and 1987 included a Constitutional Committee system, a European Constitutional Court system, and an American Judicial Review system. For a brief history of constitutional adjudication in Korea (The Constitutional Court 2001, pp. 6–11; Healy 2000, pp. 214–18).

the 1980 Constitution, which itself expressly excluded laws enacted by the Special Committee for National Security that had unconstitutionally taken over legislative functions from the National Assembly regarding the Constitutional Commission's jurisdiction over the review of laws' constitutionality. Furthermore, the Supreme Court, which was hesitant to refer cases to other institutions due in part to institutional egoism, had the power of prior review of the constitutionality of statutes. The agonizing situation was verified by statistics that illustrated that no case was overturned by the Constitutional Commission during the 15 years between 1972 and 1987. This was precisely the reason why there was widespread and deep skepticism about the success of this new institution and uncertainty about its proper functioning when the new Constitutional Court of Korea was established in the wake of the Korean people's victory over President Chun Doo-whan's iron-fisted rule in 1987.

However, with the people's strong will for further democratization and their growing awareness of constitutional rights, the court has successfully overcome this early skepticism by taking an activist role in wielding its powers of constitutional review and hearing constitutional complaints.<sup>3</sup> Indeed, since there were a great number of laws passed in haste and for unjustifiable purposes, as well as many unreasonable governmental practices under the authoritarian regimes, the early court faced little problem in striking them down and thus establishing the image of the protector of the people's fundamental constitutional rights.

As of 31 January 2009, in the 20 years after its establishment, the court has invalidated or partially repudiated legislative Acts in 516 cases, of which 189 cases were referred by the ordinary courts for rulings on the constitutionality of laws and 327 cases were heard in the form of constitutional complaints.<sup>4</sup> Given that the number of cases the court disposed of in the form of norms control or constitutional review<sup>5</sup> amounts to 2,178 cases, the proportion of the judgments resulting in unconstitutionality (unconditional or conditional), is

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<sup>3</sup> Professor Yang pointed out four factors contributing to the unprecedented activism of the early Constitutional Court: (1) a more liberal political climate, (2) a heightened rights consciousness, (3) the active role of 'human rights lawyers', and (4) the appointment of activist judges made possible by the creation of an independent constitutional court separated from bureaucratized ordinary courts (Yang 1998, pp. 166–7). See also, Ahn 1997, pp. 76–85.

<sup>4</sup> The latter number is exclusive of 89 cases striking down statutory provisions in the course of constitutional complaints directly challenging public powers under Art. 68(1) of CCA. See the official statistics of the Court on its website, <http://english.court.go.kr>.

<sup>5</sup> That is, those cases decided through Art. 41 of the Constitutional Court Act procedure (constitutional review of statutes upon judicial requests) and Art. 68(2) of the CCA procedure (constitutional review of statutes upon individual requests).

relatively high. Although a high rate of unconstitutionality decisions is not always desirable, it would be safe to say that as far as the protection of human rights is concerned, the statistics show the active performance of the court in their function as opposed to its predecessors' dormancy. Now most Koreans know at least roughly what the constitutional adjudication system means to their lives and which institution they have recourse to when their human rights are infringed.

### III. THE STRUCTURE OF THE CONSTITUTIONAL ADJUDICATION SYSTEM IN KOREA

#### 1. Legal Sources of Constitutional Adjudication

The establishment and functioning of the Constitutional Court ('the court') is based upon Chapter 6 of the current Constitution, consisting of three articles from Art. 111 to Art. 113. Art. 111 consists of four provisions for five jurisdictions of the court and sets forth the composition of the court. Art. 112 consists of three clauses that lay out the term of office of the constitutional justices and their privileges and concurrent obligations. Finally, three provisions for special quorum of important decisions, the court's power to make regulations and the legislative delegation for organization and function of the court are stipulated in Art. 113.

The Constitutional Court Act (CCA) was first enacted on 5 August 1988 and revised 11 times as of 15 February 2009 according to the legislative delegation clause of Art. 113 of the Constitution to further elaborate the organization of the court and procedures of constitutional adjudication.

The court has the constitutional power to make rules and regulations relating to its proceedings and internal discipline and regulations on administrative matters (Art. 113(2) of the Constitution). They include the Constitutional Court Rules on Adjudication Proceedings, the Constitutional Court Rules on Council of Justices, and the Constitutional Court Advisory Committee Rules.

#### 2. Jurisdiction

Under Art. 111 of the Constitution, the court has jurisdiction in five areas: the constitutionality of a law upon the request of ordinary courts; impeachment; dissolution of a political party; competence disputes between State agencies, between State agencies and local governments, and between local governments; and constitutional complaint as prescribed by Act.

### A. Constitutional review of the constitutionality of laws

The court has power to review the constitutionality of statutes or Acts made by the National Assembly upon the request of ordinary courts. The court has ruled that its constitutional review covers not only statutes or Acts made by the National Assembly but also other forms of law that have equivalent force as Acts, such as treaties and extraordinary presidential decrees.<sup>6</sup>

The courts set up by Art. 101 of the Constitution, including the military court, shall request a decision of the Constitutional Court when they find that the constitutionality of a law is at issue in a trial or judicial judgment (Art. 107(1) of the Constitution). The necessity of such a request can be decided *ex officio* or by decision upon a motion by a party to the original case (Art. 41(1) of the CCA). The request of the courts to the Constitutional Court should be by way of the Supreme Court for administrative purposes (Art. 41(5) of CCA).<sup>7</sup> The decision of the courts on the request is final so that no appeal shall be made against it (Art. 41(4) of CCA). If the motion of a party to the original case is rejected, the party may file a constitutional complaint with the Constitutional Court (Art. 68(2) of CCA).

Decisions of unconstitutionality can only be made with the concurrence of six or more Justices (Art. 113(1) of the Constitution and Art. 23(2) of CCA). Any decision that statutes at stake are unconstitutional shall bind the ordinary courts, other state agencies, and local governments (Art. 47(1) of CCA). Such laws declared unconstitutional shall lose their effect from the day on which the decision is made, but laws relating to criminal penalties lose effect retroactively (Art. 47(2) of CCA). In this regard, however, there are some exceptions developed by not only the Constitutional Court but also the Supreme Court. The very case where the constitutional adjudication issue arises should comply with the court's unconstitutionality decision because it is made particularly not to apply the unconstitutional law to the pending case. The Constitutional Court expanded this exceptional effect to not only those cases that are already included in the docket of the Constitutional Court but also those cases that are pending in the courts where the same laws should be applied at the time of the court's unconstitutionality decision. The Supreme Court recognizes the invalidation effect of the Constitutional Court's unconstitutionality decision even in those cases that are brought before the courts after the day on which the deci-

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<sup>6</sup> As a matter of fact, this is not the only way to trigger constitutional review of laws though it is the most common one. The court can perform the same function in two different procedures of the Constitutional Complaints.

<sup>7</sup> In the fifth Republic, the Supreme Court was empowered to review the constitutionality of laws before referring to the Constitutional Commission. In other words, final constitutional review was possible only with the Supreme Court's prior consent.

sion is made if they would not cause any serious harm to the stability and credibility of judicial judgments.

As of 31 January 2009, 189 unconstitutionality decisions, including decisions of incompatibility with the Constitution and decisions of unconstitutionality/constitutionality in a certain context, were made out of a total of 595 requests made to the court.

Regarding the scope of the court's jurisdiction, there have been some criticisms (J. Kim 2001, pp. 22–4). For example, it has been argued that the legal requirement for constitutional review of statutes is too narrow to protect the values and order enshrined in the Constitution. It is suggested that a French-style preliminary review or a German-style abstract norms control should be adopted so that the constitutionality of laws should be examined before their promulgation or application to the citizen's life. Such recommendations have the advantage of avoiding the legal instability that inevitably results from a decision of unconstitutionality under post review systems. However, the expansion of the court's constitutional review power may pave a way for the 'judicialization of politics' (Hirschl 2004) in that what has been decided and should be decided in politics increasingly refer to the constitutional review of the court.

## **B. Impeachment**

The court is empowered to decide whether certain public officials have violated the Constitution or other Acts in the performance of their official functions and should therefore be removed from office. The officials designated to be impeached by Art. 65(1) of the Constitution and statutes or Acts of the National Assembly include the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and prosecutors.

The overall impeachment process starts with a resolution of the National Assembly that must be proposed by one-third or more of the total members of the National Assembly and passed by a concurrent vote of a majority of the total members of the National Assembly, except in cases of impeachment against the President. In the case of the President, the motion of impeachment must be proposed by a majority of the total members of the National Assembly and approved by two-thirds or more of the total members of the National Assembly (Art. 65(2) of the Constitution).

The official impeached by the National Assembly will be suspended from exercising his or her power until the court makes a decision on impeachment. The court's impeachment decision needs the concurrence of six Justices or more (Art. 113(1) of the Constitution and Art. 23(2) of CCA). It shall not extend further than the removal of the accused officials from public office

though it shall not exempt them from civil or criminal liability (Art. 65(4) of the Constitution and Art. 54(1) of CCA). The impeached officials shall not be a public official until five years have passed from the date on which the impeachment decision is pronounced (Art. 54(2) of CCA).

As of 31 January 2009, only one impeachment case was brought before the court. It was against the President Roh Moo Hyun in 2004 and was ultimately rejected, though some counts of violation of the Constitution and the Election Act were found by the court.

### **C. Dissolution of political parties**

The court has power to dissolve political parties upon the Executive's motion with the State Council's deliberation if it finds that their purposes or activities would be contrary to the basic order of democracy.

The court may make, *ex officio* or upon a motion of the applicant, a decision to suspend the activities of the defendant until its final decision of dissolution is made (Art. 57 of CCA). Notice of the written decision ordering dissolution of a political party should be given not only to the parties concerned but also the National Assembly, the Executive, and the National Election Commission (Art. 58(2) of CCA). While the court renders dissolution decisions, it is the National Election Commission that is in charge of execution of such a decision in accordance with the Political Parties Act. No dissolution of a political party case has been taken place since the introduction of constitutional adjudication system in Korea.

### **D. Competence disputes**

The court's fourth area of jurisdiction is Competence or Jurisdictional Disputes (Competence Disputes) between public authorities. It has the power to decide which public authorities have competence or jurisdiction when any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments. However, every competence dispute can be brought before the court. A concerned state agency or local government may request the court to engage in competence review only when an action or omission by the respondent infringes or is in obvious danger of infringing upon the applicant's competence granted by the Constitution or Acts (Art. 61(2) of CCA).

Public authorities qualified to make a request for a competence dispute are state agencies such as the National Assembly, the Executive, ordinary courts, and the National Election Commission and local governments such as the Special Metropolitan City, Metropolitan City or Province, the City/County, or Self-governing District. The court has expanded the scope of state agencies that may bring competence disputes depending on whether they are instituted by the Constitution and have independent powers granted by the Constitution

or statute and/or whether there is any dispute resolution procedure through which competence disputes between such agencies can be resolved. State agencies have become recognized as qualified applicants in the court's jurisprudence on such matters, and such agencies include the Speaker and Vice Speaker of the National Assembly, members of the National Assembly, and committees of the National Assembly.<sup>8</sup>

The court may, upon receiving a request for adjudication of a competence dispute, make *ex officio* or upon a motion by the applicant a decision to suspend the effect of an action taken by the respondent that is the object of the adjudication until the pronouncement of a final decision (Art. 65 of CCA).<sup>9</sup> In such a final decision, the court shall decide as to the existence or scope of the competence of disputed public authorities. In so doing, the court may cancel an action of the respondent that is the cause of the competence dispute or may confirm the invalidity of the action (Art. 66 of CCA).

The court's final decision is a binding force over all public authorities. However, even such a decision to revoke public authorities' action may not alter any legal effect that has already been made to the person whom the action is directed against (Art. 67 of CCA).

As of 31 January 2009, the court rendered 40 decisions out of 55 applications filed in this area of disputes.

### **E. Constitutional complaints**

The court also has jurisdiction over constitutional complaints brought by ordinary citizens, either when his basic constitutional rights have been violated by an exercise or non-exercise of governmental power or when a party of an original case for the concerned courts' request to the court for constitutional review of statutes or Acts is rejected. While complaints comprising the latter category of constitutional complaints are called 'complaints for constitutional review' or 'complaints via Art. 68(2) of CCA,' the former are usually referred to as 'complaints for rights redress' or 'complaints via Art. 68(1) of CCA.' The two categories are different from each other in terms of the legal requirements for a petitioner to file a complaint. As far as complaints for constitutional review are concerned, like constitutional review proceedings, relevancy of the laws applied to the original case is required to reach to the court's decision on

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<sup>8</sup> For example, 96Hun-Ra2, 9-2 KCCR 154 (16 July 1997); 99Hun-Ra1, 12-1 KCCR 115 (24 February 2000); 2002Hun-Ra1, 15-2 KCCR 17 (30 October 2003); 2005Hun-Ra6, 18-1 (Sang) KCCR 82 (2 February 2006).

<sup>9</sup> The first case where this provisional order in a competence dispute was accepted by the Court is 98Hun-Sa98, 11-1 KCCR 264 (25 March 1999) where the City of Seongnam challenged Kyong-gi Province over the latter's direct order of construction.

the merits. Complaints for rights redress require that the petitioners exhaust all relief processes provided by law. The petitioners in complaints for rights redress may not challenge the judgments of the ordinary courts except when those judgments were made according to such laws made unconstitutional by the court.

More than 90 per cent of total cases of the court are constitutional complaints. As of 31 January 2009, 14,444 cases have been filed in the form of complaints for rights redress while 1,846 cases have been filed in the form of complaints for constitutional review.

### **3. Organization of the Court**

#### **A. Constitutional justices**

The court consists of nine Justices appointed by the President. The President's power to appoint is constitutionally limited because among the Justices, he should appoint three selected by the National Assembly and three designated by the Chief Justice of the Supreme Court (Art. 111(2) of the Constitution). To be appointed as Justices, all the candidates should be 'qualified as judges,' more than 40 years of age, and have more than 15 years of career experience as a judge, prosecutor, or attorney (Art. 111(2) of the Constitution and Art. 5 of the CCA). The Justices' term in office is six years and may be renewed (Art. 7(1) of the CCA). They should retire at the age of 65 except for the Chief Justice whose retirement age is 70 (Art. 7(2) of the CCA). Until their retirement age, no Justices are forced out of office against their will unless they are impeached or are criminally sanctioned with a sentence of imprisonment or something more severe. Justices are subject to constitutional obligations not to join a political party or participate in politics (Art. 112(2) of the Constitution and Art. 9 of the CCA).

Some problems with the process of constitutional justice appointment and the status of constitutional justices can be identified (J. Kim 2005). Firstly, the Chief Justice of the Supreme Court's power of nomination of three Justices has been criticized (Yang et al. 1999, pp. 14–16; H. Kim 1998, pp. 68–9, 72–3). Secondly, strong criticism has been raised against the constitutional requirement that only those qualified as judges may be chosen as Justices. Given the homogeneous culture of the legal profession due to a highly selective judicial examination process combined with the simplified training course, such a requirement inhibits the diversity of Justices of Court. Thirdly, it has been pointed out that the relatively short term of Justices with their reappointment scheme may hinder the independence of the court by making Justices sensitive to the opinions of those with appointive power (Yang et al. 1999, pp. 17–19).

**B. Chief Justice**<sup>10</sup>

The Chief Justice of the court is appointed by the President with the consent of the National Assembly. He represents the court, takes charge of the affairs of the court, and directs and supervises those public officials under his or her authority.

**C. Council of Justices**

Article 16 of CCA sets up a Council of Justices with the power of decision-making concerning important matters related to constitutionally designated functions or the organization of the court. The Council consists of all Justices including the Chief Justice as the Chairperson with a right to vote. Decisions of the Council of Justices shall be taken with the attendance of seven or more Justices and by the affirmative vote of a majority of the Justices present. The Council's terms of reference cover: (1) matters concerning the enactment and amendment of the Constitutional Court Rules and matters concerning a submission of legislative opinions relating to the organization, personnel affairs, operation, adjudicative procedure, and other functions of the Court; (2) matters concerning a request for budget, appropriation of reserve funds, and settlement of accounts; (3) matters concerning the appointment or dismissal of the Secretary General, Deputy Secretary General, Constitution Research Officers, and public officials of Grade III or higher; and (4) matters deemed specially important and presented by the Chief Justice of the Court for discussion.

**D. The Constitutional Court Administration and research officers**

The court maintains the Constitutional Court Administration, which is responsible for the general administrative affairs of the court, and the Constitution Research Officers, who are responsible for investigation and research concerning the deliberation and adjudication of cases.

The head of the Administration is the Secretary General who, under the direction of the President of the Constitutional Court, takes charge of the affairs of the administrative department, directs and supervises those public officials under his or her authority, and may attend the National Assembly or the State Council and speak about the administration of the Constitutional Court on behalf of the Chief Justice (Art. 17 of the CCA).

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<sup>10</sup> The head of the Constitutional Court is often translated to 'President' in English. For example, see *The Constitutional Court 2008*, p.106. However, I prefer the title 'Chief Justice' to emphasize the egalitarian nature of the position in that the Chief has the same voting power as his or her brethren, while the word 'President' implies a ranking higher than that of the other Justices.

The Constitution Research Officers are established to be engaged in investigation and research concerning the deliberation and adjudication of cases under the order of the Chief Justice of the Court (Art. 19 of the CCA). The court may appoint academic advisers for professional investigation and research concerning the deliberation and adjudication of cases (Art. 19-3 of the CCA).

### **E. Various committees**

There are various committees set up according to various Acts or the Constitutional Court Rules. They are intended to provide professional opinions regarding the Court's function and administration. They include the Constitutional Court Advisory Committee, the Constitutional Court Ethics Committee, and the Constitutional Court Committee for Rules Deliberation.

## **4. Institutional Features**

### **A. Intensified quorum in major forms of decision**

There are two different quorums in the Court's decision-making process. In general, the court decides on a majority basis. However, Art. 113(1) of the Constitution and Art. 23(2) of the CCA requires a special quorum of six Justices when the court strikes down a law, impeaches certain public office holders, decides to dissolve a political party, or makes a decision to uphold a constitutional complaint. Such an intensified quorum is also required to overrule a precedent on the interpretation and application of the Constitution or laws made by the court. The underlying justification of the special quorum is to make it much more difficult for other independent branches' decisions to be made void or rejected. However, giving state institutions a much higher priority may not be compatible with the ideal of constitutional adjudication cherishing the protection of constitutional rights and the rule of law.<sup>11</sup>

### **B. Dualism in constitutional review of norms**

As seen above, the object of the court's power of constitutional review is confined to statutes or Acts. According to Art. 107(2) of the Constitution, constitutionality of subordinate legislation such as administrative orders, regulations, rules, and measures are subject to the Supreme Court's judgment. This dualism causes serious problems:

[t]he Constitution has no express provision concerning whose opinion would be final if there is a difference in constitutional interpretation between the two institutions. This incomplete dualism not only sows the seeds of conflict between the two

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<sup>11</sup> For other problems with this special quorum (J. Kim 2001, pp. 26–8).

institutions, but also has a danger of undermining the consistency and uniformity of the constitutional order. Moreover, the Supreme Court's power to review administrative legislation can seriously undermine the function of constitutional complaint by excluding almost all administrative actions, which have the highest possibility of violating human rights (J. Kim 2001, p. 28).

### **C. Mandatory representation by attorney**

Although litigation generally does not require mandatory representation by Attorney, Art. 25 of the CCA requires that every party in any constitutional adjudication proceeding be represented by an attorney. This means that without an attorney, ordinary citizens cannot bring their own cases before the court as they are forced by law to hire an attorney. The problem of this requirement is that it may prevent those with limited financial resources from having recourse in the court. For this reason, Art. 25(3) of the CCA was challenged in 1990. The court upheld the constitutionality of this provision, however, on the ground that 'mandatory representation by attorney would be advantageous to the petitioners by guaranteeing professional and skillful representation and thus preventing reckless and negligent pursuit of complaints.'<sup>12</sup> This line of the court's jurisprudence can be challenged because the real issue at stake is the money required to hire an attorney and because it is very difficult to accept that the question of whether fundamental rights are infringed must depend on money rather than the truth of the matter.

### **D. Exclusion of judicial judgments from constitutional complaints**

Art. 68(1) of the CCA excludes judicial judgments from the court's jurisdiction over constitutional complaints. At first glance, this exclusion may not raise any serious objections, especially because the ordinary courts including the Supreme Court, like the Constitutional Court, consist of judges and are envisaged to be guardians of constitutional rights just as much as the Constitutional Court. From this viewpoint, one could view such review as one more, final instance for the Constitutional Court to review judicial decisions. However, it is argued that the judicial branch itself is a public authority which is in danger of abusing power, though this danger is comparably less than legislative and administrative counterparts, and therefore it is justifiable to establish another mechanism to control judicial power in order to intensify the protection of individual constitutional rights.

The court upheld the exclusion clause itself in a constitutional complaint case by saying that it is within the discretion of the legislature to decide to what extent the Constitutional Court can have jurisdiction over constitutional complaints. However, the court made clear at the same time that the exclusion

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<sup>12</sup> 89Hun-Ma120 etc., 2 KCCR 296 (3 September 1990).

clause should not be interpreted as allowing the courts to apply the laws made unconstitutional by the Constitutional Court in ongoing ordinary cases. Thus, in cases where the courts infringe people's constitutional rights by applying unconstitutional laws, the Constitutional Court's jurisdiction over constitutional complaints may apply.<sup>13</sup>

#### IV. THE PRINCIPLES OF CONSTITUTIONAL ADJUDICATION IN KOREA

The court has developed a number of principles and rules of constitutional adjudication, both procedural and substantive, over the last two decades. They have been produced through instances of constitutional and statutory interpretation. What follows is an introduction of the main principles or rules.

##### 1. Procedural Principles and Rules

###### A. Extension of the rule of justiciability in constitutional complaints

To bring their cases before the court, claimants in constitutional complaints need to prove in principle that their constitutional rights are infringed in a direct way by activities or omissions of public authorities. Firstly, the claimants themselves must show that they have suffered or will suffer an injury by their own constitutional rights being infringed. This means that if anybody else's rights are encroached rather than the claimant himself, it is not justiciable. For example, even the father of a victim of medical malpractice is not qualified to challenge the prosecutor's denial of indictment.<sup>14</sup> Secondly, the claimants should prove that the suffered right reaches the level of constitutional rights as opposed to *de facto* privileges. For example, the court ruled that even though the legislature's decisions to expand permits to sell oriental herb medicines to pharmacists may affect the earnings of oriental medical doctors who had previously had exclusive permits to sell such herb medicines, the affected interests are not rights but privileges so that they cannot be redressed through constitutional complaint.<sup>15</sup> Thirdly, the infringement should be directly caused by the activities of public authorities. This means that indirect impact between the cause of infringement and its result may not be sufficient to fulfill the standing requirement. For example, legislative provisions

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<sup>13</sup> See 96Hun-Ma172 etc., 9-2 KCCR 842 (24 December 1997).

<sup>14</sup> See 93Hun-Ma81, 5-2KCCR 535 (25 November 1993).

<sup>15</sup> See 99Hun-Ma660, 42 Constitutional Court Official Notice 152 (27 January 2000).

allowing construction zoning *per se* cannot be challenged in the process of constitutional complaints because they are merely the legal basis of administrative zoning so that their involvement with infringement cannot be recognized as a direct one.<sup>16</sup> Fourthly, it should be alleged that the infringement has already taken place or that there is a danger of immediate infringement.<sup>17</sup>

The court has developed jurisprudence stating that the standing requirements may be waived or eased in certain contexts. In a 1991 constitutional complaint case<sup>18</sup> reviewing the law enforcement authority's rejection of detainees' application to meet with their counsel, the court held that (1) if an issue at stake is of vital importance to the maintenance of constitutional order so that the court should clarify what the constitutional provisions mean, or (2) if there is a strong possibility that similar infringement upon constitutional rights would take place repeatedly, it would review on the merits even if personal and legally protectable interests in the relevant case were extinguished. The court justified its position by declaring that constitutional complaints are envisaged to perform not single but dual functions so that they can be used not only to provide constitutional relief to particular individuals (the 'subjective' function) but also to protect constitutional order ('objective' function).

### **B. Exceptions to the exhaustion principle in constitutional complaints**

As mentioned above, Art. 68(1) of the CCA requires anyone who wishes to file constitutional complaints to the court to exhaust all relief processes provided by other laws. The court narrowed the meaning of 'relief process' to those processes through which the claimant may challenge directly the activities or omissions of public authorities. Therefore, the possibility of legal processes for damages or compensation cannot obstruct constitutional complaints.

Furthermore, the court recognized exceptional cases where the exhaustion principle does not apply. It held that the claimants may file constitutional complaints without prior exhaustion of other relief processes if the requirement of such exhaustion is unreasonable. For example, if the failure of exhaustion is due to mistake, the responsibility of which cannot be reduced to the claimants; or if there is no reasonable expectation because the availability of other relief processes is not firmly recognized.<sup>19</sup> On the other hand, if there is

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<sup>16</sup> See 89Hun-Ma46, 3KCCR263,266 (3 June 1991).

<sup>17</sup> See 92Hun-Ma68, 4KCCR659, 659 (1 October 1992) (case concerning the Seoul National University Entrance Examination Plan).

<sup>18</sup> 89Hun-Ma181, 3 KCCR 357, 358 (8 July 1991).

<sup>19</sup> 91Hun-Ma80, 7-2 KCCR 851, 865 (28 December 1995). For cases where this jurisprudence was applied, see 92Hun-Ma144, 7-2 KCCR 94,102 (21 July 1995) (censorship of letters in prison case).

no legal relief at all, the claimants may bring complaints before the court. For example, constitutional complaints can be raised against orders and rules when they infringe upon the claimants' constitutional rights without any other substantive intermediate involvement of administration,<sup>20</sup> or activities or omissions of public authorities that the Supreme Court has regarded as unjustifiable by using strict construction of protectable interests in administrative suits.<sup>21</sup>

## **2. Substantive Principles and Rules**

The court has also developed a number of substantive principles and rules against which subject matters are examined. They include the principle against excessive restriction (the proportionality principle), the multi-tier equal protection principle, the principle of clarity of law,<sup>22</sup> prohibition of blanket delegation,<sup>23</sup> and protection of expectation interest principle. Two of the most frequently cited substantive principles, prohibition of excessive restriction principle and multi-tier equal protection principle, will be introduced below.

### **A. Prohibition of excessive restriction principle or proportionality principle**

Art. 37(2) of the Constitution provides that 'the freedoms and rights of citizens may be restricted as prescribed by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated'. The court construes the 'only when necessary' clause of this provision as the constitutional acknowledgement of 'prohibition of excessive restriction principle' or 'proportionality principle,' which originally stems from the rule of law as a basic constitutional principle.

In the court's jurisprudence, this principle consists of four elements: (1) legitimacy or rationality of the end, (2) appropriateness of the means, (3) the least restrictive means, and (4) balance between the importance of public inter-

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<sup>20</sup> See, for example, 89Hun-Ma178, 2KCCR365, 366 (15 October 1990) (case concerning the Supreme Court Rules for the Judicial Certified Scriveners Act).

<sup>21</sup> See, for example, 92Hun-Ma68, 4KCCR659, 659 (1 October 1992) (case concerning the Seoul National University Entrance Examination Plan).

<sup>22</sup> This principle is a Korean version of 'the doctrine of void for vagueness' in American constitutional adjudication jurisprudence.

<sup>23</sup> This rule is the result of constitutional interpretation of Art. 75 of the Constitution providing the delegation of order-making power by statutes or Acts. The court ruled that the enabling statute must specify the subject matter delegated to subordinate legislation so clearly and concretely as to allow people to infer from the statute itself the basic outlines of the presidential decrees.

est and the degree of infringement of freedoms or rights. To be constitutional, state activities in general and legislation restricting constitutional rights in particular should pass the four-tier test through which all four elements of the proportionality principle apply to state restrictions.<sup>24</sup>

In a number of cases, the court has struck down laws on the grounds that they violated the prohibition of excessive restriction principle. For example, Article 58-2 Section 1 of the Private School Act was invalidated because the provision that mandated the removal of all private school teachers being criminally prosecuted from their posts did not comply with the prohibition of excessive restriction. The court's reasoning pointed out that the mandated removal provision deprived the school of the discretion to consider in the dismissal procedure 'severity of the charged offense, credibility of evidence and the predicted judgment.'<sup>25</sup>

### **B. Multi-tier equal protection principle**

Along with the proportionality principle, the most commonly cited principle among the court's jurisprudence is its multi-tiered equal protection principle. In construing equality before the law as set forth in Art. 11(1) of the Constitution, the court initially took a very relaxed stance in that discriminatory treatment is not always regarded as unconstitutional under the principle of equality unless it is based upon arbitrary intention.

In a 1999 constitutional complaint case where the extra points system for veterans of a certain grade was at issue, however, the court changed its earlier position and developed a two-tiered approach in examining legislation containing unequal treatment, thus putting forward a more stringent test. The court held that when reviewing cases related to the right of equality or the principle of equality, a strict standard of review should be taken if the case is connected to certain areas which are given extra equal protection by the express provisions of the Constitution, or if unequal treatment causes a severe restriction on constitutional rights connected to such treatment. This exceptional strict scrutiny as opposed to the regular arbitrariness test means a test of requiring proportionality between the purpose of discrimination and the means employed to achieve that purpose.<sup>26</sup>

This two-tier test was further elaborated upon in 2001. In reviewing another extra points system, the court divided the strict standard of review in equality cases into two categories: strict scrutiny in a narrow sense and relaxed strict scrutiny. The latter is employed when the Constitution specifically recognizes privileged treatment even though such treatment may place certain areas of

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<sup>24</sup> 89Hun-Ka95, 2 KCCR 245, 260 (3 September 1990).

<sup>25</sup> 93Hun-Ka3 et al., 6-2 KCCR 1, 11-12 (29 July 1994).

<sup>26</sup> 98Hun-Ma363, 11-2 KCCR 770 (23 December 1999).

rights in danger of severe encroachment. For example, the court ruled that a relaxed scrutiny test should be applied to an Act incorporating Art. 32(6) of the Constitution, which stipulates that the opportunity to work shall be accorded preferentially according the conditions as prescribed by Act, to those who have given distinguished service to the State.<sup>27</sup>

## V. CONCLUDING REMARKS

No attempt to summarize the preceding explanations and descriptions is necessary here. However, I would like to briefly contextualize where the Korean Constitutional Adjudication System is today, especially in terms of political and constitutional implications.

The dynamic political changes in recent Korea represent a dramatically ambivalent image of judicial activism. Since the launch of the Roh Moo-hyun government in 2003, the fourth since the establishment of the 1987 constitution, a bigger political spotlight has been given to the court than ever before. In the Roh Government, Koreans witnessed the growing influence of the court on matters which were once considered purely political.

Let me offer two examples. Firstly, the first impeachment trial against the President in the history of Korean constitutional democracy resulted in the curtailment of presidential power by the Constitutional Court even though impeachment itself was ultimately rejected. Secondly, the Special Act for the Construction of the New Administrative Capital supporting the most ambitious agendum of Roh government was struck down on the ground that it violated a kind of unwritten constitution that Seoul is the capital city of the Republic of Korea. What may be called 'judicialization' or a movement towards 'juristocracy' (Hirschl 2004; Koopmans 2003) in Korea invokes strong political antagonism against the court.

This change provides an opportunity to rethink the problem of constitutional justices' role perception. The political and social outcomes of judicial activism depend upon the nature of rights or values to which justices show their commitment. On the one hand, if they concern themselves more with individuals' political freedoms than other public concern, e.g. national security, judicial activism may contribute to constitutional engineering of liberal society. On the other hand, if they concern themselves more about national security, it may degrade a free society. Even after the Lee Myong Bak Government succeeded the Roh Government, the trend that important social

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<sup>27</sup> 2000Hun-Ma25, 13-1 KCCR 386, 404-405 (22 February 2001).

and political issues are brought before the Constitutional Court has remained in place.

Judicialization is an ambivalent phenomenon. On the one hand, it can control the abuse of political powers in the direction of protecting human rights and other constitutional values and thus enhance constitutionalism. On the other hand, however, it can distort democratic visions enshrined in our constitution by replacing constitutional values and decisions with those of a small group of unaccountable judges. The ambivalence of judicialization persuades us to take a middle route. The judiciary is entitled to review political decisions but only on certain conditions and in a self-contained manner. Such conditions include democratic constitution of the judicial powers, prudential exercise of judicial powers based upon persuasive reasoning and rationales, and the reservation of the public sphere for the judicial powers. The author believes that if jurists with judicial powers go hand in hand with us under this strategy, our constitutional democracy will be upgraded in the near future.

The democratization and development of constitutionalism in Korea over the last decade is remarkable. Koreans deserve to be proud of achieving such a high level of constitutional democracy in such a short time. However, it is also true that there are a number of problems Korean people still have to manage to solve in the course of consolidating constitutionalism. When and how such problems can be solved is not clear but one clear thing is that Korean people's sincere belief in democracy and constitutionalism would be the basic requirement to overcome all such inroads as they have successfully done so far.

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# 7. Democratic legitimacy of law and the constitutional adjudication in the Republic of Korea

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## I. INTRODUCTION: CONSTITUTIONAL ADJUDICATION IN THE REPUBLIC OF KOREA

### 1. **Constitution, Constitutionalism, Constitutional Adjudication and Constitutional Court in the Republic of Korea**

The essence of constitutionalism lies in the fact that legislation is bound by the nation's constitution and that the powers of the government including the executive and adjudicative powers are governed by such law.<sup>1</sup> Since the establishment of popular sovereignty and constitutionalism, the constitution has gradually become directly applicable in and through adjudication. Like many other counterparts, under the current Constitution of the Republic of Korea, the legislative function of the nation is primarily exercised in the form of enactment of the statute and revision thereof by the National Assembly, the national legislature composed through direct democratic election, as well as administrative and judicial lawmaking. Further, under the separation of powers design of the current Constitution, the Constitutional Court of the Republic of Korea checks and controls such legislative function, to keep both the process and the substance of the legislative Act in compliance with the Constitution. Specifically, control over the legislative process is effectively exercised by way of adjudication over disputes between and among the governmental institutions, while control over the legislative outcome including the statutes, executive orders and rules is primarily exercised by way of constitutionality review over a specific law or its provisions.

A system under the Constitution of the Republic of Korea through which a separate and independent constitutional institution reviews the constitutionality

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<sup>1</sup> Kun Yang, Lectures on Constitutional Law 23 (Bobmunsa Publishing Co., 2007) (available only in Korean).

of and decides upon the validity of statutes enacted by the legislative body is grounded primarily upon the supremacy of the constitution or constitutional law, and the theories of separation of powers and limited government. Particularly, due to the expanding influence of the political parties, as there is an incrementally increasing need for checking strategic legislation by the legislative body and guaranteeing the supremacy of the Constitution, the function of the constitutionality review over the statute enacted by the legislative body as a checking and controlling device has a greater pertinence to both normative and structural integrity of the nation's law and legal system as a whole.<sup>2</sup> Indeed, in most of the constitutional democracies of modern times,<sup>3</sup> the constitutional adjudication by an adjudicative institution<sup>4</sup> is one of the

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<sup>2</sup> Tcheolsu Kim, *Constitutional Law* 1441 (18th edition, Pakyoung Publishing Co., 2006) (available only in Korean).

<sup>3</sup> For discussions of the relationship and relevance between constitutionalism and democracy, see generally Ronald Dworkin, *Constitutionalism and Democracy*, 3 *European Journal of Philosophy* 2 (1995).

<sup>4</sup> The Constitutional Court of the Republic of Korea was established in 1988 as an integral part of the constitutional system under the current Constitution, the Constitution of the Sixth Republic of Korea. The 1988 Constitution of the Republic of Korea introduced the Constitutional Court as an independent constitutional institution with specialized and limited jurisdictions, in addition to the judicial court headed by the Supreme Court. The jurisdiction of the Constitutional Court of the Republic of Korea is limited to deciding on the constitutionality of statutes, disputes over competence between and among governmental entities, constitutional complaints filed by private parties, impeachment charges brought by the National Assembly, and the dissolution of the political parties. There are nine justices including one chief justice, or president, at the Constitutional Court. The chief justice serves a six-year non-renewable term. The rest of the justices serve a six-year renewable term. The age limit for the justices is 65 years, with the exception that the chief justice may sit until the age of 70. Of the nine justices, three are appointed by the President of the Republic of Korea, three are elected by the National Assembly, and three are designated by the Chief Justice of the Supreme Court. All nine justices are commissioned by the President of the Republic of Korea. Except as otherwise provided in the Constitutional Court Act, the Constitutional Court hears all cases *en banc*. The Full Bench hears a case with the attendance of seven or more justices. The Full Bench renders a decision in a case with the concurrent vote of a majority of the justices participating in the final review. However, a concurrent vote of six or more justices is required in the following cases: (a) judgment on the constitutionality of the statute, the dissolution of a political party, or the acceptance of a constitutional complaint; and (b) overruling the precedent of the Constitutional Court on the interpretation or application of the Constitution or a statute. When a private individual is a party to a case, that is, practically, when the petitioner of a constitutional complaint is a private individual, such an individual should be represented by an attorney, unless such an individual is qualified as an attorney. Should such an individual have no financial resources to retain an attorney as the representative, that individual may request the Constitutional Court to appoint an attorney, and the Constitutional Court, upon receiving such a request, shall appoint a court-designated attorney as the representative, as prescribed in the Constitutional Court Rules.

essential elements of a 'constitutional state,' together with the guarantee of fundamental rights, the adoption of representative democracy, the establishment of a written constitution and the implementation of the rule of law, which in turn consists of the separation of powers, superiority of statute enacted by the legislature over administrative lawmaking, administration by and under the law, independence of the judiciary, and provision of legal remedy for any government infringement of citizens' rights.<sup>5</sup>

As a part of such a complex and multifaceted system that is to operate in an integrated, interrelated and coordinated fashion, the constitutional adjudication is designed, ultimately, to enable various governmental functions to be implemented in compliance with the nation's constitution.<sup>6</sup> Specifically, the constitutional adjudication checks the power of the government to secure the constitutionality of the legislative function of the National Assembly, the administrative function of the executive branch, and the adjudication of the judicial branch, while confirming the allocation of the powers between the national and the local governments and also among different branches of the government, thereby functioning to maintain the order and integrity of the law and legal system of the nation. In so doing, the constitutional adjudication including the constitutionality review simultaneously serves adjudicative, political, and legislative functions.<sup>7</sup>

## 2. Constitutional Adjudication in the Republic of Korea from the Legislative Perspective

Here, issues pertaining to the legislative nature or function of the constitutional adjudication become pertinent, irrespective of specific forms of the constitutional adjudication, as long as the constitutionality of a statute is reviewed in the form of adjudication.<sup>8</sup> Pursuant to the premise of representative democracy,

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<sup>5</sup> Ronald Dworkin, *Constitutionalism and Democracy*, 3 *European Journal of Philosophy* 2 (1995).

<sup>6</sup> Jong-Sup Chong, *Constitutional Litigation* 26 (5th edition, Pakyoung Publishing Co., 2008) (available only in Korean).

<sup>7</sup> Id at 9-20; Tcheolsu Kim, *supra* note 2, at 1445-6.

<sup>8</sup> For general accounts of the constitutional control over the legislation and the relationship between the National Assembly and the Constitutional Court of the Republic of Korea, see, e.g., Myung-Whan Pyo, *Obligation of the Legislature to Guarantee Fundamental Rights and the Constitutional Control thereon*, 11-2 *Korea Constitutional Law Association Journal* 211 (2005) (available only in Korean); Jin-Wan Park, *The Relationship between the Constitutional Court and the National Assembly*, 11-2 *Korea Constitutional Law Association Journal* 75 (2005) (available only in Korean); and Bok-Hyeon Nam, *The Relationship between the National Assembly's Legislation of the Statute and the Constitutional Court's Unconstitutionality Decision Practices*, 24 *Law and Society* 213 (2003) (available only in Korean).

when a statute or a provision thereof is in violation of the Constitution, the National Assembly assumes a legislative function by enacting or revising such a provision or statute. Here, under the system of constitutionality review over the statute as it is in operation in the Republic of Korea, the constitutional adjudication may be triggered to invalidate a statute or to refuse the application thereof, upon the Constitutional Court's holding that the specific statute or its provisions are in violation of the higher law of the constitution. Such a function assumed by the Constitutional Court in the form of adjudication over the constitutionality of a statute is equivalent, on the normative plane, to the enactment, revision and repealing of a statute or part of it which are normally to be conducted by the National Assembly.<sup>9</sup> Thus, adjudication by the Constitutional Court over the constitutionality of a statute may be perceived as normatively equivalent to the legislation by the National Assembly, the legislature.<sup>10</sup>

Although the current constitutionality review under the Constitution of the Republic of Korea and the Constitutional Court Act is primarily an adjudicative means to guarantee the Constitution against the enactment of an unconstitutional statute by the national legislature, i.e., the National Assembly,<sup>11</sup> the legislative function assumed by the adjudication over the constitutionality of a statute exercised by the Constitutional Court has further significant constitutional ramifications. In a nation governed by the principle of people's sovereignty, as the legislative function of the nation is assumed by the legislative body that is based upon firm democratic legitimacy, any other governmental

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<sup>9</sup> For example, nullification of a statute by the Constitutional Court on the ground of its unconstitutionality has the effect equivalent to the National Assembly's repealing of the statute. Also, the Constitutional Court's annulling part of a statute or a provision of a statute on the ground of its unconstitutionality or restricting the interpretation of a specific provision of the Constitution by way of the decision of limited constitutionality or limited unconstitutionality is equivalent to the National Assembly's act of revising the relevant part of the statute or a provision thereof respectively. While the judiciary also conducts statutory interpretation within the limits of the Constitution, such statutory interpretation is limited to the construction and application of the applicable statute or its provisions in conformity with the Constitution and may not be extended to annulling a statute or the provisions thereof, whereas the Constitutional Court may strike out part of the meaning of the relevant statute or its provisions. In the case of a decision of nonconformity to the constitution by the Constitutional Court along with advice to the National Assembly for statutory revision, such a decision results in the revision of the statute by the National Assembly. Further, the Constitutional Court's decision of unconstitutionality over legislative omission can be deemed to be equivalent to legislation as such a decision compels the enactment of a particular statute or a statutory provision.

<sup>10</sup> Jong-Sup Chong, *supra* note 6, at 11.

<sup>11</sup> Id at 12, n 2-3 ('[T]he essential nature of the constitutional adjudication lies in its adjudicative function [*translation by the author*].').

branch or constitutional institution that exercises the normatively equivalent legislative function should also secure democratic legitimacy on a par with that of the legislature, should it stand in conformity with the principle of people's sovereignty.

Thus, the normatively legislative function assumed by the Constitutional Court in adjudication over the constitutionality of a statute requests in turn that the Constitutional Court and its adjudication in the constitutionality review cases secure democratic legitimacy as well as constitutional legitimacy. Hence, the adjudication over the constitutionality of a statute should possess the requisite democratic as well as constitutional legitimacy, and the Constitutional Court as an institution performing such normatively legislative function should also be endowed with democratic as well as constitutional legitimacy. The core issue concerning the democratic legitimacy of the constitutionality review over the statute in light of the legislative function of the constitutional adjudication lies in whether the judicial officers not elected as representatives by the sovereign constituents may justifiably decide the effect of the statute enacted by the National Assembly, which is constituted by way of democratic elections and whose allegiance is deemed to be to the nation rather than to specific constituencies, in light of the principles of democracy and separation of powers.

It should be noted at this point that the legislature consisting of democratically elected representatives might still enact the law that is in violation of the Constitution. In such a circumstance, such law should be controlled somehow with binding force, by the decision of an institution that is independent of the legislative body. This is the core legitimizing factor of the review over the constitutionality of the statute enacted by the legislature, by way of adjudication. The democratic legitimacy of the constitutionality review over the statute through adjudication that essentially follows judicial proceedings by an independent institution is based upon the following grounds: (i) the principle of substantive democracy to guarantee the liberty and rights of the sovereign constituents, (ii) the higher norm that the majority rule does not suffice to determine in a justifiable fashion the liberty and rights of the sovereign constituents, (iii) the request from the constitutionalism that the nation's constitutional law should be implemented with the binding force as it provides for and regulates as the supreme law the liberty and rights of the sovereign constituents, (iv) the command of popular sovereignty that the legislative power as the power of the national government should also be subjected to the constitution as the constitution is ordained and established by the constituents as the holder of the sovereignty, (v) the theory of limited power mandating that the act of the nation may be endowed with authority and legitimacy only when any and all acts of the nation are restricted within the limits of the constitution, (vi) the call from natural justice that no national institution may be permitted

to check and control its own wrong, (vii) the doctrine of the separation of powers, and that (viii) the decision over the conformity to the constitution of an act of the nation should be conducted by an independent and essentially judicial institution with requisite expertise in a way that respects the precedents.

The following part of this chapter analyzes the legislative function of the constitutional adjudication in the Republic of Korea in light of the democratic legitimacy of law. First, it will discuss the concept of legitimacy of the legislation under a representative democracy, from conventional perspectives of both proceduralism and functionalism. It will then move on to indicate that two of the core factors legitimating lawmaking from either proceduralist or functionalist theory are participation on the one hand and interest representation on the other. Based on such findings, this chapter will analyze democratic legitimacy of the legislative function of the constitutionality review over the statute assumed by the Constitutional Court in the Republic of Korea to further deliberate upon constitutional ramifications of the legislative function of the constitutionality review over the statute.

## II. DEMOCRATIC LEGITIMACY OF LAW AND THE LEGISLATIVE FUNCTION OF THE CONSTITUTIONAL ADJUDICATION

### 1. Legitimacy of the Legislation in a Representative Democracy

The authority of law in a democratic state is grounded on an account of democratic political authority, i.e., the ways in which the decisions of a democratic majority legitimately govern dissenters who would prefer to pursue an alternative course of action but have been outvoted. There have been two conventional positions and perspectives assessing and analyzing the legitimacy of law and legislation in light of democracy: proceduralism and functionalism. The liberal account of democracy as an application of more general principles of justice has largely evolved along two different lines: by perceiving democracy as the political branch of a more general ideal of equality, and by connecting democracy to ideals concerning public reason and the demand that power be justified to those against whom it is exercised.<sup>12</sup> Recently, based on the obser-

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<sup>12</sup> For general accounts and discussions of the idea of public reason from liberalist perspectives and its relevance to democratic authority, see, for examples, John Rawls, *The Idea of Public Reason Revisited*, 64 *University of Chicago Law Review* 765 (1997); and Robert P. George & Christopher Wolfe, 'Public Reason' and Reasons for Action by Public Authority: An Exchange of Views, 42 *American Journal of*

vation that the liberal view have failed to fully articulate the actual experience of democratic politics, Ronald Dworkin, for example, has sought a formulation of the idea that democracy is political equality, which puts less emphasis on democratic procedures in favor of a broadly substantive conception that identifies democracy as the form of government 'most likely to produce the substantive decisions and results that treat all members of the community with equal concern.'<sup>13</sup> According to the liberalist view, the democratic process has no independent political value but serves the end of 'improv[ing] the accuracy' of political decisions by making them more consistent with the demands of liberal equality.<sup>14</sup>

However, this places democratic decisionmaking, which is in the intuitive sense associated with elections and the majority rule, at the mercy of substantive values. Yet, a counterintuitive possibility that democracy might constrain voting for the demands from equality and various other substantive values does not always burden the liberal theory. It is an acclaimed feature of liberalism that constitutionality review over the democratically promulgated statutes by an institution consisting of unelected officials – in the South Korean case, mainly the Constitutional Court – is justified, insofar as they enforce the fundamental rights of the minority against the tyranny of the majority. However, when this feature of the liberal view is emphasized, to the extent that it encroaches on the majoritarian and procedural elements that dominate first-hand democratic understandings, the liberal ideal of political equality ceases to present a satisfying account of democracy or democratic legitimacy of law.

The second liberal approach connects democracy to liberal ideals concerning public reason and in particular to the idea that political power is never its own justification but must always be legitimated through arguments that are, in principle, acceptable to all citizens or constituents.<sup>15</sup> This approach appears, for example, in John Rawls's later work, as when he describes democracy as an attempt to 'meet [the] condition' that political power must be justified in

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Jurisprudence 31 (1997). For a discussion for deference for National Assembly's legislation on this ground and for a system that will obligate a judicial court to present to the Constitutional Court sufficient prima facie reason for unconstitutionality of a statute or a provision thereof in order to request constitutionality review, see Boo-Ha Lee, *The Obligation to Present Ground for Unconstitutionality Upon Request for Constitutionality Review*, 34-3 Public Law (Korean Public Law Association Journal) 273 (2006) (available only in Korean).

<sup>13</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 184 (Harvard University Press, 2002).

<sup>14</sup> *Id.* at 204.

<sup>15</sup> John Rawls, *Political Liberalism* 218 (Columbia University Press, 2005). Also, on this point, see generally, for examples, John Rawls, *The Idea of Public Reason Revisited*, 64 *University of Chicago Law Review* 765 (1997); and Robert P. George and Christopher Wolfe, *supra* note 12.

terms that all citizens 'might endorse as consistent with their freedom and equality.'<sup>16</sup>

The connection between public justification and democracy is most clearly developed by Bruce Ackerman, who expressly seeks to 'reconcile majoritarianism with the principles of liberal dialogue,'<sup>17</sup> that is, with the liberal demand for political legitimization on mutually acceptable terms. Ackerman's argument begins from a theorem that identifies four formal properties of collective decision procedures that are, together, logically equivalent to the majority rule.<sup>18</sup> Ackerman defends the legitimacy of each of these properties by reference to the liberal ideal of mutual public justification. Ackerman's argument that these properties express the liberal commitment to public reason and mutual justification amounts to a liberal explanation of the authority of democratic decision-making. However, as Ackerman himself acknowledges, '[i]t is not the act of voting but the act of dialogue that legitimates the use of power in a liberal state', and the majority rule 'is only appropriate for collective choices between options of equivalent liberal legitimacy.'<sup>19</sup> Thus, Ackerman's liberal justification of democratic authority applies only when the range of democratic politics is constrained according to antecedent liberal principles. Such constraints are less restrictive than the constraints imposed by Dworkin's substantive account of democracy, although the scope of liberal democracy under Ackerman's view remains narrower than the scope of actual democratic practice.

Thus, the liberal view of democracy denies that democracy in its common procedural sense can legitimately resolve deep disagreements about political principles or even justice, and it therefore contradicts the central place that democracy occupies in the experience of politics and political authority, as

<sup>16</sup> John Rawls, *Political Liberalism*, *supra* note 15, at 218. Rawls did not entirely abandon his earlier suggestion that democracy arises when substantive equality is applied to politics, and he continuously proposes that democracy gives all citizens 'an equal share in the coercive political power that citizens exercise over one another by voting and in other ways.' *Id.* at 217–18.

<sup>17</sup> Bruce Ackerman, *Social Justice in the Liberal State* 277 (new edition, Yale University Press, 1981).

<sup>18</sup> The conditions, as articulated by Ackerman, are (1) universal domain: that the decision rule specifies some collective choice for all possible sets of individual preferences, (2) anonymity: that the decision rule requires the same degree of support for enactment of a collective choice regardless of the identities of the individuals who support the choice, (3) outcome indifference: that the decision rule makes the degree of support necessary for an option to be chosen collectively the same for all alternatives, and (4) positive responsiveness: that the decision rule allows each individual to break a tie among the others by joining one side and carrying the collective choice with her or him. Bruce Ackerman, *supra* note 17, at 278–83.

<sup>19</sup> Bruce Ackerman, *supra* note 17, at 297.

well as widespread perception thereon.<sup>20</sup> Instead, the liberal view marginalizes the democratic process to be employed only in the narrow range of cases in which liberal principles of justice produce indeterminate results. Rawls puts this point clearly when he says that ‘we submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system.’<sup>21</sup> The liberal view has thus provided no answer to democracy’s power to produce authoritative resolutions of deep political disagreements, which is crucial in seeking persuasive grounds for legitimacy of the legislation in terms of democracy, and, further, for constitutional adjudication of constitutionality review over such legislation.

The republican view of democracy reverses the basic structure of the liberal view. Where the liberal view holds that democratic political authority depends on antecedent and more fundamental political principles, the republican view proposes that democracy is a freestanding political value that contributes to political authority on its own. Where the liberal view concludes that democracy ultimately sounds in equality, the republican view concludes that it ultimately sounds in liberty, and in particular in the connection between individual and collective self-governance. The republican view proposes to explain democratic authority in terms of the consequences of engagement with the democratic political process, in terms of the influence that democratic politics aspires to have on the political attitudes of the persons who participate in it.<sup>22</sup>

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<sup>20</sup> See Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); Jeremy Waldron, *Law and Disagreement* (new edition, Oxford University Press, 2001).

<sup>21</sup> John Rawls, *A Theory of Justice* 355 (new edition, Belknap Press, 2005).

<sup>22</sup> The republican view of democracy sets out from the idea that persons are free only insofar as they are governed by laws that they have given themselves. The challenge of freedom is therefore particularly stark when persons must live together with others, because the need to regulate the conduct of all constrains the conduct of each. As Robert Post states, ‘[t]he essential problematic of democracy ... lies in the reconciliation of individual and collective autonomy.’ Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 7 (Harvard University Press, 1995). The republican view proposes that the democratic process, properly constructed and managed, transforms citizens from isolated individuals into members of a democratic sovereign, with which they identify and whose will they take as their own, even when they have been outvoted. It proposes, adopting Post’s language, that the participants in a well-functioning democratic process remain individually free because they take authorship of the collective choices that the process generates. Robert C. Post, *Democracy and Equality*, 1 *Law, Culture and Humanity* 142 (2005). In particular, in order for democracy to reconcile individual and collective autonomy, i.e., in order for a democratic sovereign to come into being, the democratic process must be more than simply a mechanism for aggregating the instantaneous preferences of voters. In the specifically South Korean context, Jong-Sup Chong concludes that the legitimacy of a

Nonetheless, the republican view of democracy does not seek to eliminate from political thought the ideals of equality that underlie the liberal view or to deny a connection between liberal ideals and political legitimacy. Indeed, proponents of the republican view may and commonly do accept that liberal principles may constrain the democratic process by, for example, insisting on the inviolability of certain fundamental rights. However, the contrast between the liberal and the republican views remains important in understanding the concept of democratic legitimacy of the legislation and the control on it through constitutional adjudication. Most broadly, the republican view, because it treats democracy as a freestanding political value, opens up the possibility that democracy may conflict with, and indeed outweigh, liberal political ideals.<sup>23</sup> Further, the republican view opens up the possibility that constitutionality review by unelected officials through adjudication may be democratically justified even when it cannot be cast as protecting fundamental rights.

Although the republican approach to democracy rejects the idea that democratic authority must be an articulation of some substantive political value and insists instead that democracy is procedural in a fundamental way, the procedure at issue cannot be a simple majority rule. This tradition emphasizing the deliberative process underscores that the sovereign will, i.e., the will of the people, is not simply the fair adding up of the immediate preferences of the citizenry taken severally.<sup>24</sup> The democratic sovereign cannot possibly arise out of a simple majoritarianism, at least not if democratic government is to make good on its promise to reconcile individual freedom with collective freedom by ensuring that even those who lose a vote take authorship of the collective decision. No simply aggregative procedure can possibly induce those whose preferences lose out to take ownership of collective decisions in a diversified and multifaceted society. Nor can the practice of voting at regular terms, taken on its own, cure these shortcomings. A person may rationally retain minority preferences even in the face of the knowledge that most persons' preferences depart from hers or his, and the simple adding up of the majority's preferences

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statute in a democracy comes from legality and legitimacy in both substance and procedure, and underscores participation of the citizens in the legislative process within the National Assembly and beyond. See Jong-Sup Chong, *Diagnosis of the Problems faced by the Legislative Process of the Republic of Korea and the Solutions thereto*, 6 *Law and Society* 6, 9–10, 17–27 (1992) (available only in Korean).

<sup>23</sup> Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 *Michigan Law Review* 1517, 1538 (1997) ('Approaches that attempt to maximize other kinds of equality of ideas or of persons are either implausible or inconsistent with the principle of collective self-governance [that is, democracy].').

<sup>24</sup> For example, see Alexander M. Bickel, *The Morality and Consent* 17 (new edition, Yale University Press, 1977) ('The people are something else than a majority registered on election day').

cannot possibly engage her or him in a manner that gives her or him reason to accept, let alone authorize, the decision of the greater number.

The rise of a democratic sovereign, whose decisions command the allegiance even of dissenters, therefore requires more than just fair adding up of fixed and inviolate preferences. Republican theorists of democracy have elaborated this need for engagement in a variety of ways and at several levels of abstraction. They have identified the opportunities for political engagement on which democratic sovereignty depends and have explained how these forms of engagement induce persons to take authorship even of collective decisions that differ from theirs: some by identifying the general conditions under which collective self-government is conceptually possible,<sup>25</sup> others by characterizing the general forms of political discourse on which widespread acceptance of democratic decision depends,<sup>26</sup> and still others by identifying the specific institutions and practices through which particular democracies have historically generated the political engagement that democratic sovereignty requires and the specific historical moments at which particular democratic sovereigns have appeared.<sup>27</sup>

Rejecting simple majoritarianism in favor of engagement-encouraging methods of aggregation is a necessary part of the very idea of representative democracy and appears on the face of every such government. Insofar as elected officials are, as they inevitably must in some measure be, true representatives rather than mere delegates – entitled to vote their consciences rather than simply tracking the preferences of their constituents – governments cannot possibly achieve democratic legitimacy on the model of simple majoritarianism. No matter how much of such discretion democratic representatives enjoy, the democratic sovereign must be the whole people and never just the government.<sup>28</sup> Representative democracy thus implicitly abandons the simple

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<sup>25</sup> Jeb Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 163 (Yale University Press, 2001). See also Jong-Sup Chong, *supra* note 22, from this perspective.

<sup>26</sup> Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 2004).

<sup>27</sup> Bruce Ackerman, *We the People*, Vol. I 1–2 (reprint edition, Foundation Press, 1993).

<sup>28</sup> Akhil Reed Amar, *Of Sovereignty And Federalism*, 96 *Yale Law Journal* 1425, 1432–66 (1987). Further, in the specific South Korean context, Jae-Hwang Chung diagnoses that insufficient representation of interests of the whole people, both actual and perceived, combined with the increased influence of the political parties over legislation and insufficient guarantee of the right to know as a fundamental right, is the primary ground for legislation by the South Korean National Assembly that lacks legitimacy and constitutionality. Jae-Hwang Chung, *Control over National Assembly's Inappropriate Legislation*, 6 *Law And Society* 33, 39–41 (1992) (available only in Korean).

majoritarian view of democratic authority. It functions 'not merely as a sharer of power, but as a generator of consent.'<sup>29</sup> Representative democracy is the conclusion of an argument that simple majoritarianism cannot sustain democratic authority and that the democratic sovereign becomes realized by the complex processes that representative government necessarily involves. Moreover, actual representative democracies depart from simple majoritarianism in ways that promote forms of political engagement.<sup>30,31</sup>

All of the above leads to the following statements. First, democracy has a broader scope than what is credited under liberal theories, and a republican as well as liberal approach is necessary in order to delve into the democratic legitimacy of law and the legislation and of the constitutional control thereupon. Secondly, this approach to democratic political authority as the ground for democratic legitimacy of law and the legislation emphasizes that the democratic process underwrites the development of a democratic sovereign and that individual citizens come, through participating in the democratic process, to take authorship of the sovereign's collective decisions in the name of law, including even those that they initially opposed. Thirdly, the democratic process can function in this way only if it is more than a simple majority rule but instead involves an intensive engagement in one way or another among the participants. This engagement is fostered by political practices and institutions such as free expression and an independent press, and political parties. It also depends, in representative democracies, on more involved and complex mechanisms of preference aggregation, which encourage political engagement among the populace in choosing representatives or among representatives in forming policy or both. In combination all of the above affect the unique function and the legitimating factors of the constitutional adjudication over the constitutionality of the statute representing the majority will in a specific society, and South Korea is no exception.

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<sup>29</sup> Alexander M. Bickel, *supra* note 24, at 15.

<sup>30</sup> Democracies may depart from simple majoritarianism and require engagement, at two levels – involving elected representatives, on the one hand, and the voting population, on the other – and democratic political systems differ with respect to which of these forms of engagement they promote. On this regard, refer to, for example, Dennis C. Mueller, *Public Choice* 98-105 (3rd edition, Cambridge University Press, 2003); and Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 *American Journal of Political Science* 27 (1979). See also Jong-Sup Chong, *supra* note 22, at 17–27, in this regard.

<sup>31</sup> For discussions on the conceptual relationship between democracy and constitutionalism in this context, refer to Kun Yang, *supra* note 1, at 25.

### **A. Proceduralist perspective: legitimacy of law and lawmaking through process**

What basic properties of lawmaking by the legislature legitimize the authority of a democratic regime to coerce its citizens by means of law? The answer to this question is in turn the core of the legitimacy and the function of the constitutionality review over the statute, and also what is to be taken most seriously in developing the standard for such constitutionality review. As seen above in general terms, this question has been answered by two different kinds of justificatory theories of democracy. The first can be described as proceduralist theories. Proceduralist theories emphasize the value that may be derived from the very process of citizens participating in their government. Proceduralist justifications of democracy thus locate the value of the form of government not in the quality of the substantive legislation it generates, but rather in the inherent fairness or justice of its system of substantial and equal participation in legislation by the governed.

Proceduralist theories of democracy treat the very act of individual control of or consent to the process of government – the very act of individual participation in the process of government in some way – as morally valuable. They value the process of democracy, because it allows individual participation. Proceduralist theories differ from one another according to the ways in which each believes participation to be morally valuable. Some may see participation as valuable in itself, as an expression or necessary corollary of fundamental moral principles. Others may see participation as valuable because of the positive influences the very process of participatory government is likely to have on individuals or on society at large. Rousseau saw the majority rule as a mechanism by which the majority, faced with a dissenter, could force her or him to be free.<sup>32</sup> Part of what he meant was that the process of participating in democratic deliberation could teach the individual to abandon her or his private will and adopt a concern for the common good.

### **B. Functionalist perspective: legitimacy of law and lawmaking through outcome**

The second kind of democratic justificatory theory for the legitimacy of democratic lawmaking can be described as functionalist theories. Functionalist theories focus on the quality of the substantive governance provided by democracy. They hold that democracy, because of its characteristic aggregation of diverse interests and viewpoints in the decision-making process, is at least the best possible way to produce the best substantive rules

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<sup>32</sup> Jean Jacques Rousseau, *The Social Contract* 25 (Willmoore Kendall ed. and trans., 1954).

to govern society. They posit that objectively better decisions are more likely to be generated by a form of government that takes into account the interests and opinions of all of its citizens, like democracy, than by a form of government that restricts participation to, for example, a privileged few.

In functionalist view, a democratic government can be valued because it generates legislation through a process of reasoned deliberation and negotiation among a wide variety of viewpoints and interests, thus increasing the likelihood that its laws will serve the common good.<sup>33</sup> The basic reasons why democracy is thought to function well as substantive government to produce decisions and laws of high quality are intertwined with and dependent upon one another. They are that democracy allocates decision-making power to those most interested in the decisions; that it allows a diversity of interests to assert themselves in government; that it permits the participation of the most suitable decision-makers in government; and that it produces decisions through a process of reasoned deliberation. Each of these reasons, like proceduralist theories, relies upon the participatory nature of democracy.

### **C. Participation and interest representation as legitimating factors in lawmaking**

Proceduralism and functionalism discussed in the preceding paragraphs should not be seen as mutually exclusive. Ultimately, in one sense, with respect to the democratic legitimacy of law promulgated by the legislature or the representatives, both proceduralism and functionalism are procedural or process-based theories of legitimacy. That is, although the goals of each theory are different, the theories share a focus on the decision-making processes used to reach those goals. Functionalism in this sense cares about outcome or the substantive quality of government decisions including lawmaking in a general sense.<sup>34</sup> Functionalism, like proceduralism, measures the democratic legitimacy of a particular decision according to the process that was used to produce it, in the sense that a functionalist democrat would consider a law produced by representatives in a deliberative body who have been elected by universal suffrage at the regularly held election to be a democratically legitimate law. Functionalism, like proceduralism, is thus concerned with whether the processes of decision-making are legitimate. Its difference from proceduralism

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<sup>33</sup> For a discussion on the effect of proceduralism upon legislative deliberation that is succinct yet on point, see William N. Eskridge, Jr., Philip P. Frickey and Elizabeth Garrett, *Legislation And Statutory Interpretation* 78–81 (Foundation Press, 2000).

<sup>34</sup> Functionalism does not assess the democratic legitimacy of a particular decision or statute by asking whether the substantive outcome of that decision is good or bad. Such teleological assessment would be merely the project of moral theories.

lies in the reasons why it believes a certain kind of process to be legitimate, that is, reasons having to do with the quality of the decisions or statutes which that kind of process tends to produce.

Thus, both proceduralist and functionalist theories of democracy, especially with respect to the legitimacy of law and lawmaking, value the individuals' participation in government, and see the participation of the governed in lawmaking as the core value animating democratic legitimacy of law. Proceduralists value participation for its own sake, holding that the ability of the governed to participate in government decisionmaking gives expression to fundamental values or serves important ends. Functionalists value participation because they believe that a participatory process of decisionmaking generates decisions that are substantively better than those that would be generated by a process of decisionmaking by fiat. Yet, in a system of representative government just like the one we have in the Republic of Korea, most citizens participate in the government by voting for representatives who then convene and make laws for the common good and interest, not those who are legally bound by the particular wishes of the constituents constituting their own regional districts.<sup>35</sup> How does this square with the emphasis placed by both proceduralist and functionalist strains of democratic theory upon participatory government?

In representative democracy, the principle of participation is implemented by proxy. The values served by participation in this sense are preserved by the fact that everyone may participate in deciding who will represent them and in replacing those people if they do not represent well. From a proceduralist standpoint, legitimacy of law and the legislation in a system of representative democracy is achieved in part because citizens have the ability to freely choose their legislators and to replace them periodically by holding elections. This mechanism of electoral control provides an incentive for legislators to act in accordance with citizens' wishes to enact the sorts of laws that citizens want enacted. It is a matter of continuing controversy whether legislative representatives should be guided primarily by the preferences or wishes of their constituents, by the best interest of their constituents as judged by the representatives, by the good of the nation as a whole, or by some combination of these standards. Regardless of how elected representatives ideally should act on behalf of their constituents, however, the democratic system of electoral control ensures that the people have the ability to replace legislators.<sup>36</sup> This

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<sup>35</sup> Article 46 of the Constitution and Sections 24 and 114-2 of the National Assembly Act of the Republic of Korea particularly pertain to this aspect of the nature of the representation and the status of the representatives in the Republic of Korea.

<sup>36</sup> The Constitutional Court of the Republic of Korea has also consistently underscored this aspect of the election in, e.g., the following decisions: 16-1 KCCR 468, 2002 Hun-Ma 411, 25 March 2004; 14-1 KCCR 211, 2000 Hun-Ma 283, 28 March

fact of electoral control means that the laws produced by the elected legislators can be said to have been created through a system of citizen participation. Such electoral coercion is important on a functionalist view as well, in that functionalism, like proceduralism, relies upon a close correspondence between the actions of the legislative representatives and the viewpoints and interests of their constituents.

Besides electoral control, another important, related aspect of representative democracy that allows the electorate to control or consent to legislation is the representation of the interests, or the interest representation through interest congruity between the representatives and their constituents. Part of the point of democratically electing legislative representatives is not simply to provide an incentive for them to act in ways the constituents find satisfactory and to replace them if they fail to do so, but also to allow people to elect representatives likely to look out for their constituents' interests even aside from the coercive force of the polls.<sup>37</sup> Thus, the idea of interest representation in this sense is incorporated within a proceduralist theory of democracy. The idea of interest representation reflects faith not only in the power of electoral coercion, but also in the power of electoral affinity.

In this regard of interest representation, it should be noted that a crucial difference between proceduralist and functionalist theories of democracy is that functionalist theories require the legislators at critical moments to exercise their own independent judgment, at least partially unfettered by the expressed wishes of their constituents. This is necessary to actuate the deliberation component of deliberative democracy, as legislators strictly bound by the wishes of their constituents cannot engage in the process of negotiation, compromise and persuasion required to produce reasoned legislation. Functional theories of democracy thus require that a legislator, while representing the distinct interests and viewpoints that comprise the particular contribution of her or his constituents, acts as her or his constituents would act if presented with all of the information and opposing arguments available to the legislator. A legislator, who is similarly situated to her or his constituents sharing a body of common interests with them, can strike a balance between responsiveness and independence. To the functionalist defender of democracy, the interest representative in this sense is thus close to the ideal legislator, as such a legislator brings to the legislative process both a commitment to the distinct interests of her or his constituency and an openness to persuasion, reason and compromise during the deliberation process.

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2002; 7-1 KCCR 722, 91 Hun-Ma 67, 25 May 1995; and 4-2 KCCR 15, 93 Hun-Ga 4, 29 July 1994.

<sup>37</sup> On this point, refer to, *inter alia*, Article 46 of the Constitution and Sections 24 and 114-2 of the National Assembly Act of the Republic of Korea.

## **2. Democratic Legitimacy of the Legislative Function of the Constitutionality Review over the Statute conducted by the Constitutional Court in the Republic of Korea**

Whether we view democratic legislation by the legislature from a proceduralist or from a functionalist angle, such lawmaking is legitimized because it is legislation by participation rather than by fiat, and it is legislation where interests of the constituents are represented. Compared with democratic lawmaking in the National Assembly, we tend to characterize the functionally and normatively adjudicative lawmaking or the legislative function of the constitutional adjudication in particular as nonparticipatory and thus nondemocratic. Thus, we tend to look elsewhere to justify the latter than democratic legitimacy. The result is an uneasy tension between institutions such as the legislation by the National Assembly, judicial interpretation of the statutes by various courts, and the constitutionality review over the statutes by the Constitutional Court.<sup>38</sup>

However, this approach might ignore two of the features that would help us understand the legislative function of the constitutional adjudication in light of the similar sort of legitimacy to a significant degree present in the legislation by the National Assembly. The first is that the decisions reached through the constitutional adjudication are to a great extent the products not of the unilateral decree of a panel of justices, but rather of a process of participation and debates among the parties to the case, especially in those cases triggered by constitutional complaints, which may restrict the decisional options available to the Constitutional Court. The second feature is that the prospectively binding

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<sup>38</sup> Although discussed in a wider context than the one adopted in this article, John Hart Ely's perception of the role of the judicial review provides an invaluable pertinent insight in understanding the relationship between the legislation and the constitutionality review over it by an independent constitutional institution, in terms of democratic as well as constitutional justification of the normatively legislative function of the constitutionality review over the statute that was enacted in a democratic fashion. Ely argues that the most defensible approach for judicial review in a democratic society is a representation-reinforcing role. This approach to judicial review is an 'antitrust' as opposed to a regulatory orientation. Rather than dictate substantive results, it intervenes only when the 'market', i.e., the political market, is systematically malfunctioning. According to Ely, the political market is failing, and therefore 'undeserving of trust, when (i) the "ins" are choking off the channels of political change to ensure that they will stay "in" and the "outs" will stay "out", or (ii) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.' John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 102–103 (Harvard University, 1980).

nature of the outcome of the constitutionality review as constitutional adjudication is tied to the degree in which the parties and institutions who participated in the creation of those rules represented the interests and rights of those who will be bound by them. In this sense, the parties to precedential cases (albeit in a rather loose sense in the South Korean context), thus can be said to serve as interest representatives of potential subsequent litigants in a similar way that we expect the elected legislators to serve as interest representatives of their constituents.<sup>39</sup>

Statutes – and, in this regard, also the Constitution – as commands of a sovereign, seem to demand a process of making particular decisions within their purview that is concrete and unchanging. However, statutes – and the Constitution in this context as well – are not self-interpreting, and, inevitably, their language presents ambiguities, gaps that must be filled through the process of reasoning that also operates in legislative lawmaking. This process can generate the same conditions of legitimacy in statutory and constitutional cases in constitutional adjudication as in the legislation by the National Assembly: conditions of participatory decision-making and interest representation. Viewed as such through the lens of adjudication as representation, the constitutionality review over the statute by the Constitutional Court might not seem quite so problematic an antithesis to democratic government.

Understanding constitutional adjudication as representation suggests that how to apply the Constitution is something of a democratic choice after all, in a larger context of the Constitution of the Republic of Korea. The implications of this suggestion are two-fold. First, under this view, the constitutionality review by the Constitutional Court is not as susceptible to the politics of particular justices as it might seem, and the constitutional adjudication is not ultimately a matter of rule by judicial fiat. At the same time, understanding the constitutionality review this way shifts the question of the countermajoritarian difficulty to the higher level, as it forces us to face the tension between a supposedly immutable meta-democratic constitution on one hand and a primarily democratic procedure for determining what the Constitution means on the other hand. Then, the trouble is no longer the seemingly apparent anomaly of allowing non-elected justices the power to invalidate majoritarian statutes. Instead, the trouble has become the practice of subjecting the Constitution, which is a document of meta-democratic commitment, supposedly immune to the vagaries of simply majoritarian democracy, to interpretation by a process that is itself significantly democratic. Adjudication as representation might thus be seen as a challenge to the constitutional supremacy. However, subjecting the

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<sup>39</sup> On this point, see R. L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 *Boston University Law Review* 807, 816–17 (1977).

Constitution to interpretation through a normatively democratic process of participation by those affected is at least a preferable alternative to interpretation at the unfettered discretion of a panel of justices.

Here, it is useful to note that there are at least a few reasons for which the practices necessary for constructing a democratic sovereign also open up deficits in democratic legitimacy – that is, departures from the sovereign will. First, democratic deficits can arise because the very same procedures needed to generate a sovereign will are open to manipulation and abuse by special interests. These procedures encourage political engagement by requiring deliberation and compromise among both citizens and elected officials. At the popular level, a candidate cannot get elected out of a single-member district unless she or he can persuade a broad coalition of voters, with initially very different preferences, to join together in support of her or his campaign. Also, at the representative level, a legislator cannot enact a bill into law unless she or he can persuade a broad coalition of legislators who may be controlled by different political parties, to join together in support of her or his proposal. Such deliberation and compromise is necessary for democratic sovereignty. However, persons who have no interest in deliberation or compromise, who refuse to engage others politically, can use the same inertial institutions and processes that generally foster coalition building and political engagement to block proposals around which the sovereign will could coalesce under slightly different factual circumstances and institutional arrangements. This is a familiar form of distortion in democratic politics, at both the popular and representative levels.<sup>40</sup>

In this context, review over the constitutionality of the statute that is performed by the Constitutional Court involves a group of people who seemingly enjoy no democratic legitimacy – certainly no democratic legitimacy to impose their preferences on citizens generally – but who nevertheless thwart the policies of democratic branches of government. This type of constitutionality review, after all, invalidates democratically enacted – from both proceduralist and functionalist views – laws. Here, the liberal defense against

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<sup>40</sup> To predicate in a more specific fashion, at the popular level, a well-organized faction of citizens that requires candidates to see some issue its way as a condition of its support can, if the balance of allegiance among the remaining citizenry renders the faction's support essential to electoral success, control policy on this issue and in effect remove it from democratic deliberation. At the representative level, a determined faction that gains control of a key legislative committee or sub-committee can similarly impose its preferences without regard to the preferences of others, in a way that once again removes issues from democratic deliberation. Democratic deficits that arise when special interests subvert the democratic process are practically important as they plague republican theories of democracy that raise the democratic process itself into a condition of democratic authority.

charges that such constitutional adjudication is antidemocratic proposes that constitutionality review enforces the limits of democratic authority against overreaching by the democratic branches of government. Constitutionality review of this type thus prevents the political branches of government from imposing illiberal policies, specifically from violating fundamental rights to equal treatment and to individual liberties, in ways that they have no legitimate authority to do.

As Dworkin says on this theory, the practice of constitutionality review of this type 'assumes that the majority has no right to act unjustly, to abuse the power it holds by serving its own interests at the expense of a minority's rights.'<sup>41</sup> Dworkin states: '[J]udicial review rests on a qualification to the principle of majority rule – the qualification that the majority can be forced to be just, against its will.'<sup>42</sup> Thus, the liberal theory in principle justifies constitutionality review of all matters that invoke liberal ideals of equality and liberty,<sup>43</sup> and places the Constitutional Court in a competitive rather than a cooperative relationship with the more straightforwardly democratic branches of government. Yet, it should also be noted that, if a subject is suited to adjudicative resolution on the liberal view, then it must involve fundamental rights, in which case it is beyond the authority of democratic politics.

An alternative theory of democratic legitimacy of the constitutionality review conducted by the Constitutional Court over the statute enacted by the legislature observes that, because a statute is hard to revise once it is passed, laws that currently govern us would not and could not be enacted today, and that some of these laws not only could not be reenacted but also do not fit within our whole legal landscape. It observes, in other words, that the statute may, and on some occasions inevitably does, suffer democratic deficits of the very sorts that the republican account of democratic sovereignty articulates, and that constitutionality review over this type of statutes can help address these democratic deficits, not by irreversibly striking down such laws and replacing them with the alternatives approvable by the Constitutional Court, which would repeat the failures of the liberal view, but rather by triggering the democratic engagement that the status quo lacks, by intervening in the political process in ways that induce the legislature to reconsider statutes that are out of date, out of phase, or ill-adapted to the legal topography.<sup>44</sup> This democratic approach to constitutionality review over statute therefore avoids the

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<sup>41</sup> Ronald Dworkin, *A Matter of Principle* 111 (reprint edition, Harvard University Press, 1986).

<sup>42</sup> *Id.*

<sup>43</sup> Ronald Dworkin, *Sovereign Virtue*, *supra* note 13, at 204.

<sup>44</sup> On this view, see generally Robert A. Burt, *The Constitution in Conflict* (Belknap Press, 1992).

claims that cast doubt on the liberal view. Its account of the consequences of constitutionality review over statute that there should be a reciprocal act between the Constitutional Court and the National Assembly all in the service of democratic engagement avoids the implication that the Constitutional Court should take over entirely any area of law that it touches. Thus, the democratic theory places constitutionality review over statutes by the Constitutional Court inside rather than outside the democratic political process and casts it as completing rather than limiting democracy.

### III. CLOSING REMARKS: FURTHER CONSTITUTIONAL RAMIFICATIONS OF THE LEGISLATIVE FUNCTION OF THE CONSTITUTIONALITY REVIEW BY THE CONSTITUTIONAL COURT IN THE REPUBLIC OF KOREA

As discussed above, the constitutional adjudication of constitutionality review over the statute conducted by the Constitutional Court of the Republic of Korea should and may by its nature be justified in terms of democratic as well as constitutional legitimacy. The mandates of the Constitution of the Republic of Korea are the intentions and wishes of the sovereign constituents, thus the constitutional adjudication as a means to confirm and implement them should be justified based upon the people in their entirety, reflecting diverse perspectives and values. As long as we adopt a system of constitutionality review over the statute by an independent constitutional institution, such as the Constitutional Court in the South Korean case, it is unavoidable that in certain circumstances the Constitutional Court holds a statute or its provisions unconstitutional, notwithstanding the fact that such statute or statutory provisions are the outcome produced through ample deliberation by the National Assembly, the national legislature, including the conformity to the Constitution thereof along adequate legislative proceedings. In these cases, the constitutional interpretation by the National Assembly in a sense clashes with the constitutional interpretation by the Constitutional Court.

At the same time, as far as the Constitution adopts the system of constitutional adjudication by the independent constitutional institution of the Constitutional Court, the interpretation of the Constitution by the Constitutional Court is final with its binding force, and the interpretation of the Constitution by the National Assembly involved during the legislative process may not preempt that performed by the Constitutional Court in the constitutional adjudication. Yet, the question of whether or not or just how far the Constitutional Court's decision of unconstitutionality binds the legislative

power of the National Assembly remains an open question.<sup>45</sup> At least, should the Constitutional Court lack democratic legitimacy, the notion of constitutionalism standing alone would not be persuasive as the ground for justifying the priority of the Constitutional Court's interpretation of the Constitution over that of the National Assembly with strong democratic legitimacy, in light of the principles of democracy or sovereignty of the people. Constitutionalism serves as the primary justifying factor for the constitutional adjudication by a separate constitutional institution independent of the legislative body, yet, at the same time, this entire enterprise has its core existential value precisely because it functions in and for democracy.

Considering such legislative function of the constitutionality review conducted by the Constitutional Court and the relationship between the National Assembly and the Constitutional Court involved in it, it becomes an urgent request to secure a normative ground for democratic legitimacy of the constitutional adjudication. At the same time, however, it is important to note that such a nature from a functionalist perspective is not a free pass to politicize the constitutional adjudication by de-judicializing the constitutional adjudication. The legislative nature and function of the constitutionality review over the statute conducted by the independent constitutional institution of the Constitutional Court should not be overly emphasized to the extent that it enshrines the Constitutional Court as an overarching legislator, thereby stifling democracy by replacing the democratically constituted National Assembly with the Constitutional Court. More than anything else, it should be noted that even when the constitutional adjudication reviewing the constitutionality of the statute assumes the normatively legislative function, the constitutional adjudication still primarily serves the judicial function by way of adjudicative forum.

Under the traditional notion of a government ruled by the law prior to the advent of the constitutional law as the highest law of the nation, such a notion of a law-governed nation was based upon the superiority of the enacted law or the legislative body over the executive power, and the lawmaking power of the legislature played the most significant part in the adequate and permissible act

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<sup>45</sup> On this issue, there have been ample discussions since the reestablishment of the Constitutional Court in the Republic of Korea in 1988. This issue becomes particularly critical when it comes to the binding force of the Constitutional Court's decision in the form of limited constitutionality or limited unconstitutionality, or of nonconformity with the Constitution, as rendered by the Constitutional Court of the Republic of Korea. For a further discussion on this issue, see, for example, Bok-Hyeon Nam, *The Limited Unconstitutionality Decision and Its Binding Force*, 14 Law and Society 115 (1997) (available only in Korean); and Jae-Hwang Chung, *The Limited Unconstitutionality Decision by the Constitutional Court*, 3 Law and Society 27 (1990) (available only in Korean).

of the government. As a corollary, the execution of and the adjudication under such enacted laws were bound by the legislation within such lawmaking power of the legislature. However, as the values concerning the rights and the liberty under the concept of natural law have gradually become guaranteed in and under the written constitution, the conventional standoff between the natural right and the positive right has incrementally disappeared, thereby subjecting the notion of parliamentary or legislative sovereignty to the notion of constitutionalism. Thus, the legislators are bound by the constitutional law and the constitutional law stands as the highest norm in the structure of the law of a nation. This nature of the constitutional law as the highest positive law of a nation has in turn established the superiority of the constitutional law, and the modern states have turned from the nations ruled by parliamentary laws to the nations governed by the constitutional law.

Under the notion of constitutional state, the Constitutional Court or its equivalent institution thereby binds and controls the exercise of the legislative power by the legislature. The Constitutional Court, as a result, indirectly assumes at least part of the substantive role of the legislator, through adjudication over the constitutionality of the statute enacted by the legislative body. Yet, again, this does not mean that the Constitutional Court may or should be substituted for the legislature in the name of a constitutional state. Constitutional law even in a constitutional state remains to function as the norm that sets the boundaries and the limits of the governmental powers and ordains and declares the fundamental rights of the people. Constitutional law as such remains to be incomplete, abstract and open and is subject to the construction, thereby enabling the community it binds to adapt itself to the changing conditions and circumstances, while establishing a more specific legal order under the mandates of the constitution is primarily left for the legislature that is endowed with democratic legitimacy. This assigns the Constitutional Court and the National Assembly unique functions and arenas respectively, also in the mechanism of constitutional adjudication as a whole. Should the Constitutional Court discern and determine unilaterally and unequivocally the precise content and meaning of the Constitution disregarding the characteristics of the Constitution as the highest and abstract norm, the Constitution would lose its vitality from its openness and abstractness, while, at the same time, such an institutional design would deprive the legislature of its legislative formative power thus subduing the National Assembly under the Constitutional Court.

Notwithstanding the legislative nature of the constitutional adjudication over the constitutionality of the statute, the National Assembly is to be guaranteed therefore, to retain and exercise the legislative formative power, and the control over legislation through the constitutional adjudication should be restricted within the limits of the legislative formative power of the National

Assembly. Here, it should also be noted that the legislative formative power of the legislature and its limits are not set by the decisions of the Constitutional Court, but, instead, are grounded upon and determined by the nature of the matter that has become the object of the legislation, within the purview of the constitutional law.<sup>46</sup> Thus, despite the legislative nature of the constitutional adjudication, its limits are clear, and such delineation to a certain extent imbues life into the notions of people's sovereignty and democracy, and also enables the mechanism of democratic legitimacy of the acts of the nation to properly function. The relationship between the constitutional adjudication by the Constitutional Court and the legislative power of the National Assembly understood as such may serve consistently and effectively when faced with more specific challenges pertaining to, for example: the extent of the binding power of the unconstitutionality decision of the Constitutional Court over the National Assembly in its legislation on identical or relevant matters; the appropriate balance between the independent constitutional institutions or governmental branches including the matter of judicial activism and self-restraint; the permissibility of special forms of decisions in the constitutionality review by the Constitutional Court over the statute such as limited constitutionality or limited unconstitutionality decisions; and the extent of their binding force over the National Assembly's legislation.

Ultimately, the proper role and institutionally permitted powers of the National Assembly and the Constitutional Court in their functionally legislative role should be understood both as and in the context of the process in which the Constitution adjusts and harmonizes society's diverse and multifaceted interests, perspectives and positions.<sup>47</sup> Constitutionalism that permits, adopts and implements a pluralist allocation of powers for legislation seeks to represent diverse interests, wishes and positions through legislation. The concern of the Constitution lies in the possibility of extracting an agreement out of such diversified interests, wishes and positions, which may be deemed to be legitimate and therefore persuasive even by the dissenters. In this process, the primary role of the National Assembly is to take initiatives in recognizing diverse political segments and powers within the community from a pluralist perspective and to determine whether to set for procedures by law to adjust their interests, wishes and positions, whereas the primary role of the Constitutional Court is to review and assess whether the outcome of such adjustment by the legislature is justified by and under the Constitution.<sup>48</sup> Thus,

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<sup>46</sup> Jong-Sup Chong, *supra* note 6, at 14.

<sup>47</sup> This view is also presented by Jin-Wan Park, *supra* note 8, at 82.

<sup>48</sup> For an analysis in this context of the perception upon the legitimacy of the decisions rendered by the Constitutional Court, with a focus on the perception held by the members of the National Assembly, see Jong Ik Chon, *Perception of Legitimacy of the*

ultimately, discussions over the legislative function of the constitutional adjudication and the relationship between the constitutional institutions engaged in this process should be analyzed in the context of the implementation of the Constitution. Among different characteristics and functions of the constitutional law, its nature as the outcome of political compromises is implemented by and through the National Assembly as the legislature, while its nature as regulatory norms is implemented by and through the constitutional adjudication conducted by the Constitutional Court, under the structural design of the Constitution of the Republic of Korea. What is the basic premise and the ultimate goal at the same time is that the National Assembly and the Constitutional Court are both bound by the constitutional law of the Republic of Korea.

## 8. Korean Constitutional Court and the due process clause

**Jibong Lim**

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### I. INTRODUCTION

The principle of due process of law is usually praised as ‘the most important constitutional principle for human rights protection’ (Hu 1990: 349). It was not invented by the U.S. but originated from the Magna Carta in England in 1215. This legal principle had gradually developed in England and was included in the U.S. Constitution in the 5th and 14th Amendments. In addition, the Japanese Constitution also adopted a due process clause in Art. 31 after the 2nd World War. Article 31 of the Japanese Constitution provides, ‘No one shall be deprived of life and liberty, or punished with other penalties without due process of law.’

The Civil War (1861–1865) in the States stemmed from conflicts of interests between the north and the south and three Post-War Amendments were introduced to the U.S. Constitution in 1865 (13th Amendment), 1868 (14th Amendment), and 1870 (15th Amendment), the common spirit of which was the prohibition of racial discrimination. Originally, the 5th Amendment, which was added to the U.S. Constitution in 1791, had prescribed that, ‘No person shall ... be deprived of life, liberty or property without due process of law...’ And among the three Post-War Amendments, Section 1 of the 14th Amendment provided, ‘... nor shall any state deprive any person of life, liberty or property without due process of law.’ These two clauses collectively represent due process principles in the U.S. Constitution. The due process principle has been developed mainly by the various interpretations of the due process clause by the U.S. Supreme Court. The due process clause has been used frequently by the U.S. Supreme Court in reviewing the constitutionality of a statute or actions of state and federal governments.

This chapter will briefly survey the development of the due process principle through the analyses of the Supreme Court’s decisions focusing on substantive due process and procedural due process. After that, it will examine the adoption of due process in the Korean Constitution in 1987 and the development of due process principles in Korea by analyzing the Korean

Constitutional Court's decisions. In the end, this study aims to explore some issues about the climate for continuous development of the due process principle in Korea.

## II. DEVELOPMENT OF THE DUE PROCESS PRINCIPLE IN THE UNITED STATES

### 1. The 14th Amendment as an Incorporation Clause

The original U.S. Constitution of 1787 had no provisions on constitutional rights. Hence, ten amendments, including the 5th Amendment, were added to the U.S. Constitution and came to be referred to as the 'Bill of Rights.' However, these ten amendments initially could not be applied to state governments because the articles prescribed 'person' as a subject of the rights but did not designate against whom the rights could be asserted.

The 14th Amendment, added to the U.S. Constitution in 1868, solved this problem; the state became the object against whom rights could be asserted by prescribing that no state could deprive life, liberty or property without due process of law. And by incorporating constitutional rights in the Bill of Rights into the term 'liberty,' in the 14th Amendment, many constitutional rights in the Bill of Rights came to apply to the state government as well as federal government. In this sense, the due process clause in the 14th Amendment has been called 'the Incorporation Clause' (Nowak and Rotunda 2000: 368–70).

When understanding the due process clause as demanding of the state and federal government 'fundamental fairness', in their behaviours we can see both substantive and the procedural demands.

### 2. Birth and Development of Substantive Due Process

Due process in substantive matters essentially means that states and federal government should not be allowed to take certain actions even though procedures are fair and the Constitution does not contain a specific prohibition against the activity. The idea of natural rights informs the thinking that there exists a nest in the due process clause where 'fundamental rights' exist which a state or the federal government cannot restrict without the logic of higher justifications. The fatal weakness of substantive due process is its indeterminateness.

#### A. Regulations on the economy and social welfare

In its early years, the notion of substantive due process was developed within the sphere of economic rights. For this reason, freedom of contract was

derived from substantive due process like in the *Lochner* case<sup>1</sup> in 1905. Many regulatory laws on the economy and social welfare were declared unconstitutional in that they infringed upon freedom of contract stemming from substantive due process. But, starting in the mid-1930s, the U.S. Supreme Court started to apply a ‘mere rational basis’ standard to the regulatory laws on the economy and social welfare and declared the regulatory laws on the economy and social welfare constitutional as long as they were minimally rational.

### **B. Non-economic regulations concerning fundamental rights**

When regulations by the federal or state governments restrict fundamental rights in a non-economic area, the U.S. Supreme Court has adopted a strict scrutiny test of constitutionality. To pass the strict scrutiny test, the aim of the regulation should be ‘compelling’ and the regulation should be necessary to accomplish the compelling governmental interest. The government has the burden of proof in showing that the regulation is constitutional.

The fundamental rights that derive from substantive due process principles relates to the right of privacy. The right to use contraceptive measures<sup>2</sup> and the right of abortion<sup>3</sup> belong to this category. Rights related to family life, such as the right to live together<sup>4</sup> and the right to educate one’s children,<sup>5</sup> are usually fundamental rights. And certain newly-emerging rights including the right to die,<sup>6</sup> the right to decline unwanted medical procedures and the right to read<sup>7</sup> belong to the category of ‘fundamental rights’ stemming from substantive due process.

## **3. The Birth and Development of Procedural Due Process**

Procedural due process refers to the notion that the government should behave according to proper and fair procedures in depriving any person of life, liberty or property. In other words, procedural due process focuses on whether proper and fair processes have been supplied before the making of any disadvantageous decision. The U.S. Supreme Court has established a two-step analysis in applying procedural due process. The first step decides whether the concerned interest belongs to ‘life, liberty or property’ as found in the due process clause. If so, the second step focuses on the question of what process is due.

<sup>1</sup> *Lochner v. New York* 198 US 45 (1905).

<sup>2</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 US 833 (1992).

<sup>3</sup> *Roe v. Wade* 410 US 113 (1973).

<sup>4</sup> *Moore v. East Cleveland* 431 US 494 (1977).

<sup>5</sup> *Pierce v. Society of Sisters* 268 US 510 (1925).

<sup>6</sup> *Cruzan v. Director, Mo. Dept. of Health* 497 US 261 (1990).

<sup>7</sup> *Stanley v. Georgia* 394 US 557 (1969).

As for the first step, the U.S. Supreme Court has held that physical liberty, the right to drive, right of occupation, and the right to the care of one's baby belong to 'liberty' in the due process clause while the interest to maintain good reputation does not.<sup>8</sup> As to 'property' in the due process clause, the Court declared welfare grant-in-aid<sup>9</sup> and certain jobs<sup>10</sup> as well as conventional property belong to 'property.'

As to the second step, in deciding what process is due, the criteria could be different depending on whether the procedure at issue is a judicial process or a non-judicial process. When a person is one of the parties in a judicial process, various procedural protections are prescribed in the Constitution including the right to a hearing, the right to call witnesses, the right to counsel, the right to a fair and objective trial and the right to an appeal. At this time, except for the due process clause, additional procedural protection devices are supplied by other constitutional provisions including the right to jury trial, the right to confront a witness against oneself and the right to have the assistance of counsel for the purposes of defending against criminal prosecution. When it comes to non-judicial processes, the government does not need to supply the various procedural protections constitutionally required in judicial processes. The Court employs a balancing test when a person alleges that certain procedural protections are required in specific contexts. At this stage, the private interest of the person in having the procedural protection and the governmental interest in not having additional burdens from being required to supply such procedural protections are balanced.<sup>11</sup>

### III. ADOPTION OF DUE PROCESS CLAUSE IN THE KOREAN CONSTITUTION AND THE DEVELOPMENT OF THE PRINCIPLE

In England, the Magna Carta of 1215 provided that no one shall be deprived of life, property, or other individual rights except 'by the law of the land' (Art. 39 of Magna Carta in 1215). The power struggle between the King and feudal lords led to the Magna Carta being revised more than 30 times for the 20 years after its enactment (Miller 1990: 5–6). After this period, the term, 'due process of law' appeared in the Magna Carta replacing the phrase, 'by the law of the

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<sup>8</sup> *Paul v. Davis* 424 US 693 (1976).

<sup>9</sup> *Goldberg v. Kelly* 397 US 254 (1970).

<sup>10</sup> *Perry v. Sindermann* 408 US 593 (1972).

<sup>11</sup> For examples of balancing tests in non-judicial processes, see *Goldberg v. Kelly* 397 US 254 (1970); *Cleveland Board of Education v. Loudermill* 470 US 532 (1985).

land', in 1355 under the reign of Edward III. The due process clause was located in the general provisions applying to all the restrictions of constitutional rights in England and the United States. However, in the Japanese Constitution, it was located in Art. 31 dealing with the provision of a specific right – freedom of the body. The Japanese Constitution prescribes that freedom of the body shall not be restricted without going through 'the process by law.' In this context, the notion of 'due' does not appear in the text since it prescribes 'the process by law' rather than 'due process of law.' However, the majority of Japanese public law scholars understand this to comprise a comprehensive due process doctrine. Imitating Art. 31 of the Japanese Constitution, the Korean Constitution as revised in 1987 incorporated a due process clause in Art. 12 Sec. 1 and Art. 12 Sec. 3, which relate to freedom of the body. Article 12. Sec. 1 provides that:

All citizens shall enjoy freedom of body. No person shall be arrested, detained, searched, seized or interrogated unless it is so authorized pursuant to statute. No person shall be punished, subject to preventive restrictions or forced to labor unless it is so authorized by a statute and due process of law.

And Art. 12 Sec. 3 prescribes, 'For arrest, detention, seizure or search a warrant issued by a judge in due process of law upon request of a prosecutor shall be presented ...'.

### **1. The Background to the Korean Constitution's Adoption of the Due Process Clause in 1987**

The Korean people's demand for direct election of the President that began in 1983 reached its climax in the June Struggle of 1987, and the then majority party was obliged to surrender to the people's demand by announcing the June 29 Declaration read by Tae-woo Roh, by then the presidential candidate of the majority party. Since that time, the representatives of the majority and the minority parties had drafted and embellished the new Constitutional amendment by mutual consent that introduced a direct election system for the presidency.<sup>12</sup> The new amendment was ultimately presented to the Korean Congress on the 18th of September. At that time, the minority party as well as the majority party had conflicting political interests and were both confident that they could take the helm of state affairs. The short negotiation period between the representatives of the majority and minority parties, which lasted

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<sup>12</sup> For details on the negotiating agendas between the majority and minority parties, see Cheol-Soo Kim, *Hunbubhakaeron (An Introduction to Korean Constitution)* 77–8 (Seoul: Pakyoung Press, 2005).

for several months, led to hasty compromises in many important issues of constitutional revision, and, initially, the adoption of the due process clause was one such compromise. Due to pressure from many and various political forces, hasty political compromises were made between the contending parties without having any expert review by constitutional law scholars.

At that time, the majority and minority parties differed as to whether the Korean Constitution should have a constitutional provision on the probation prescribed in the Social Security Act, one of the most sensitive issues of the time. The draft from the minority party prescribed that probation could be ordered only 'by the decision of the court' while the majority party fiercely opposed the text, 'by the decision of the court.' Article 12 of the Korean Constitution, including the due process clause, resulted from a dramatic last-minute compromise during negotiations regarding constitutional revision.<sup>13</sup> Owing to this compromise, the majority party was able to avoid having a constitutional provision which provided that only a court decision could order probation. At the same time, the minority party could insert the due process clause into the Constitution and have the same effect as if they had successfully inserted the text, 'Probation shall be possible only by the decision of the court,' because, as the minority party surmised at the time, constitutional interpretation of the due process clause would produce the same effect that the minority party had sought. What attracts our attention is the fact that probation was the main issue of party negotiation at the time the due process clause was utilized as a tool of compromise and that the clause came to apply to the issuance of many kinds of warrants, such as arrest warrants, detention warrants, seizure warrants, and search warrants.

Such a rough-and-ready compromise resulted in the insertion of the term 'due process' in Art. 12 Sec. 1 and Art. 12 Sec. 3 of the Korean Constitution. Due to the various limitations that necessarily resulted from the nature of the hasty compromise, the due process clause could not help but reveal some loopholes in the text itself. For instance, Art. 12 Sec. 1 of Korean Constitution made arrest, detention, seizure, search, and interrogation possible only by 'statute' while punishment, preventive restriction, and forced labor were possible by 'statute and due process of law.' In this sense, the Korean Constitution seems to distinguish arrest, detention, seizure, search, and interrogation from punishment, preventive restriction, and forced labor. Article 12 Sec. 3 provides that 'a warrant issued by a judge in due process of law' should be presented for arrest, detention, seizure, and search, and this provided room to interpret

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<sup>13</sup> For details on the negotiation process between the contending parties concerning the due process clause, refer to Sang-cheol Kim, *Hunbub Je 12 Jo, jeog-bubjeolchajohang* (Due Process Clause in Art. 12 of Korean Constitution), Korean Bar Journal vol. 146 (Seoul: Korean Bar Association, 1988) at 67-78.

the due process clause not as a prerequisite for arrest, detention, seizure, and search but as a narrow requirement for issuing a warrant. In order to prevent confusion in the application of due process principles, Article 12 Sec. 1 should have been drafted such that 'No person shall be arrested, detained, searched, seized, interrogated, punished, preventively restricted, or forcibly labored without the statute and due process of law.'<sup>14</sup>

## 2. Theories by Korean Scholars on the Due Process Clause

### A. Theories before the adoption of the due process clause

Before the adoption of the due process clause in 1987, Art. 11. Sec.1 of the old Korean Constitution relating to freedom of the body provided that 'No person shall be arrested, detained, searched, seized, interrogated, punished, preventively restricted, or forcibly labored without the statute.'

At that time, the majority of commentators posited that the phrase, 'without the statute' already implied a due process doctrine and, for this reason, that the due process clause from England and the U.S. had already been adopted in the Korean Constitution.<sup>15</sup> This position was based on the fact that the phrase, 'not by state law' in the Magna Carta was very similar to the related phrase of the Korean Constitution and that the phrase in the Magna Carta was regarded as the origin of the due process clause by jurists all over the world.

However, a small number of constitutional law scholars asserted that the phrase, 'without the statute' in the old Korean Constitution, could not be regarded as a due process doctrine considering that the corollary phrase in the Magna Carta was later substituted with the phrase, 'due process of law' as well as the constitutional structures in Roman civil law countries where legalism was selected as a base of formal *Rechtsstaat* principle.<sup>16</sup>

In my opinion, although the then majority opinion posited that due process principles stemmed from the phrase, 'without the statute', in Art. 11 Sec. 1 of the old Korean Constitution, Korean constitutional law scholars asserted concretely the contents of due process or what kinds of restrictions the due process doctrine could have imposed. The situation was the same in judicial

<sup>14</sup> For the same opinion, Id at 67.

<sup>15</sup> For details on the opinions of the commentators before the express adoption of the due process clause in the Korean Constitution, refer to Young-Sung Kwon, *Hunbubhagwonron* (Constitutional Law: a Textbook) 315 (Seoul: Bobmun Sa, 1981); Cheol-Soo Kim, *Hunbubhakgaeron* (An Introduction to Korean Constitution) 142-43 (Seoul: Pakyoung Press, 1987); Sang-Bum Han, *Hankukhunbub* (Korean Constitution) 212 (Seoul: Yemoon Press, 1973).

<sup>16</sup> For example, Myong-sun Yoon, *Jeogbubjeorchauui Bubri* (The doctrine of due process of law) in *Kyunghee University Law Journal* vol. 26-1 (Kyunghee University Legal Research Institute, 1992) at 75-6.

opinions given that the courts, including the Korean Supreme Court, could not apply due process principles in real cases.

### **B. Theories immediately after the adoption of the due process clause**

Although the majority of constitutional law commentators argued that due process doctrine stemmed from the phrase 'without the statute', the fact that the due process clause was subsequently adopted and guaranteed in the Korean Constitution lends credence to the view that the due process doctrine only now has its base in the text of the Constitution while it existed merely in the interpretations of the Constitution in the past.

(1) *Confirmative provision theory* Now, the majority opinion of scholars before the express constitutional adoption of the due process clause has become a minority view. This minority opinion still asserts that the phrase, 'without the statute', already implied limitations related to due process principles. It also asserts that the express constitutional adoption of the due process clause represents a kind of confirmative rather than a new or revolutionary principle.<sup>17</sup>

(2) *Bisectional theory* This theory premises on the fact that Korea belongs to the Roman Civil Law tradition and, hence, the Korean Constitution is different from that of Anglo-Saxon Law countries in terms of structures of constitutionalist logics. For this reason, this minority position asserts that the interpretation and the specific meaning of the due process clause should be different from that of England and the U.S. even after the express constitutional adoption of a due process clause. In other words, the phrase, 'due process of law' from Art. 12 Sec. 1 of the Korean Constitution means that the process should be proper and prescribed by law which prescribes just processes because the Korean Constitution has a separate provision for the principle of '*nulla poena nullum crimen sine lege*'. In the meantime, the phrase, 'due process of law' in Art. 12 Sec. 3 of the Korean Constitution means that not only the process but also the substance should be provided by law with proper contents.<sup>18</sup>

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<sup>17</sup> For details on this opinion, refer to Sang-bum Han, *Gaejungdoyen Sincheui Jayoogyujeonggwa gui moonjejeom* (The revised constitutional provision on the freedom of body and its problems) in Wargankosi (Weekly National Exam Magazine) (Seoul: Wargankosi Press, December, 1987) at 125; Kun Yang, *Sae hunbubui Kibonkwonjohang* (Constitutional Rights in New Korean Constitution) in Gosigae (National Exam Magazine) (Seoul: Gosigaw Press, November, 1987) at 36.

<sup>18</sup> For details on this opinion, refer to Young-Sung Kwon, *Hunbubhagwonron* (Constitutional Law: a Textbook) 344 (Seoul: Bobmun Sa, 1981).

(3) *Process and substance based on proper law theory* This theory fully accepted due process doctrines in England and the U.S. and interpreted 'due process of law' from Art. 12 Sec. 1 and Sec. 3 to require that the contents of the laws be proper not only in process but also in substance. This position was based on the fact that the due process clause in the Korean Constitution requires propriety as well as the legality that Roman Civil Law countries require. This was the majority opinion.<sup>19</sup>

However, most of the scholars who supported this theory understood due process to be a narrow principle applying only to restrictions on freedom of the body in Art. 12 of the Korean Constitution, paying attention to the location of the clause. This theory also covers the position that the constitutional due process clause only applies to the criminal and probation process, generally applies to restrictions on freedom of the body, and guarantees only the right to a trial in administrative and civil procedures.<sup>20</sup>

### 3. The Positions of the Korean Constitutional Court and Recent Scholarly Theories

#### A. Korean Constitutional Court's position on the due process clause

The Korean Constitutional Court has a similar position to the third theory mentioned above as evidenced by its announcement in several decisions that 'The due process clause has been accepted as an independent constitutional principle in Korea and its meaning has been extended not only to the formal process but also to the substantial contents that the substance of the law should have legitimacy as well as rationality.'<sup>21</sup> In other words, the court has adopted substantive due process as well as procedural due process.

As for the scope and object of application, the court held in many decisions that the due process clause applies not only to restrictions on freedom of the body but also to all other constitutional rights<sup>22</sup> and that it applies not

<sup>19</sup> For details on this opinion, refer to Cheol-Soo Kim, *Hunbubhakgaeron* (An Introduction to Korean Constitution) 358 (Seoul: Pakyoung Press, 1989); Young Hu, *Hankukhunbubron* (Korean Constitutional Law) 345 (Seoul: Pakyoung Sa, 1990); Myong-sun Yoon, *supra*, at 80.

<sup>20</sup> For details on this position, see Sang-Cheol Kim, *supra*, at 69.

<sup>21</sup> Decision of 24 December 1992, 92 *Hun-Ga* 8 (Korean Constitutional Court (KCC)). For foreign readers' convenience, '*Hun-Ga* (constitutional case in file 'a')' means a case dealing with the constitutionality of a law or a legal provision referred by general courts, and '*Hun-Ma* (constitutional case in file 'e')' and '*Hun-Ba* (constitutional case in file 'f')' represents a case of constitutional complaint.

<sup>22</sup> For instance, Art. 33 and Art. 34 of Congressman Election Act were declared unconstitutional because they discriminate against a non-partisan candidate and not a partisan one by demanding more trust money, thus infringing upon the political rights

only to the criminal process but also to all other processes including administrative<sup>23</sup> and legislative processes.<sup>24</sup> Further, the court announced that the due process doctrine is 'one of the most important basic principles'<sup>25</sup> in the Korean Constitution controlling all kinds of governmental actions.

In the following section, we will examine the Korean Constitutional Court's decisions on due process of law and divide them into two categories; the first including cases declaring unconstitutionality due to irrationality or illegitimacy of contents of law, similar to substantive due process in the U.S., and the second including cases declaring unconstitutionality on procedural aspects, similar to procedural due process in the United States.

(1) *Cases declaring unconstitutionality due to irrationality or illegitimacy of the contents of law* The decisions by the Korean Constitutional Court declaring unconstitutionality due not to the lack of legality of process and substance but the lack of rationality or legitimacy of the contents of law are similar to substantive due process in that they emphasize the propriety – rationality and legitimacy – of law as a basis for finding a violation of due process of law.

For example, Art. 221-2 of the Korean Criminal Procedure Act, which provided that the participation of a defendant in the pre-trial witness examination was to be left to a judge's discretion, was declared unconstitutional in that it violated due process as well as the right to a fair trial because the right of attack and defense of the defendant was exceedingly restricted and the rationality and legitimacy of the means to accomplish the aim of the legislation were lacking.<sup>26</sup> The default judgment provision in Art. 23 of the Special Act to Expedite Lawsuit, which enabled the court to declare guilty a defendant who was absent for reasons unattributable to the defendant, was declared unconstitutional because it violated due process of law in an exceedingly improper manner.<sup>27</sup> Art. 21-3 of the Government-Vested Property Act, which automatically cancelled the sale contract of government-vested property when the sales amount was not fully paid within a certain period of time, was declared unconstitutional because it violated due process without rationality

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of the non-partisan candidate and violating due process principles. Decision of 8 September 1989, 88 *Hun-Ga* 1 (KCC).

<sup>23</sup> For instance, Art. 15 of the Lawyers Act was declared unconstitutional for violating due process principles which enabled the Minister of Justice to order the suspension of a lawyer's business when he became a defendant in a criminal case until a judicial decision was made. Decision of 19 November 1990, 90 *Hun-Ga* 48 (KCC).

<sup>24</sup> Decision of 8 September 1989, 88 *Hun-Ga* 1 (KCC).

<sup>25</sup> Decision of 26 December 94 *Hun-Ba* 1 (KCC); Decision of 24 December 92 *Hun-Ga* 8 (KCC).

<sup>26</sup> Decision of 26 December 1996, 94 *Hun-Ba* 1 (KCC).

<sup>27</sup> Decision of 16 July 1998, 97 *Hun-Ba* 21 (KCC).

and legitimacy by canceling sales contracts even where the purchaser did not pay the sales amount on justifiable grounds.<sup>28</sup>

(2) *Cases declaring unconstitutionality due to the violation of procedural due process* Among the decisions by the Korean Constitutional Court applying and interpreting due process, there are many cases that have found a violation of due process when prior notice and evidentiary hearings for the defense were not given before probation, punishment, or forced labor was ordered. For instance, Art. 15 of the Lawyers Act provided that the Minister of Justice could order the suspension of a lawyer's business when he became a defendant in a criminal case until a judicial decision was made in his case. The court declared it unconstitutional in that it violated due process by omitting the chance of an evidentiary hearing before the issuance of the order.<sup>29</sup> The proviso of Art. 58-2 Sec. 1 in the Private School Act stipulated that any teacher in a private school indicted in a criminal lawsuit should be removed from office. The court declared it unconstitutional for violating due process because the proviso did not offer a chance for any evidentiary hearing, such as an open disciplinary committee where the teacher in question could make a statement and submit necessary evidence.<sup>30</sup> Article 7 Sec. 5 of the Special Act for the Punishment of Antinational Activists provided that a defendant could simply pay a heavy penalty with no opportunity to defend himself by appearing in court. It also enabled the court to render default judgment in the event that the defendant's absence was not his own fault. The court declared it unconstitutional because of violations of due process.<sup>31</sup> Article 215 and Art. 181 of the Customs Act provided that confiscated goods should be reverted to the national treasury when the offender fled or failed to appear within four months after the confiscation. The court held that the provision was violative of the Constitution's due process guarantees because it deprived the suspect of her property with neither a formal trial nor an evidentiary hearing.<sup>32</sup> The court declared it unconstitutional that the prosecutor called a witness into his office and kept the witness in custody. The court held that this violated due process because the prosecutor monopolized contact with the witness by preventing the other party from seeing the witness. In that situation, the defendant could not prepare for an adequate defense because the defendant had no way of knowing what testimony the witness in custody would give, and could not help exposing herself to unforeseen attack from the prosecutor.<sup>33</sup>

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<sup>28</sup> Decision of 1 June 2000, 98 *Hun-Ga* 13 (KCC).

<sup>29</sup> Decision of 19 November 1990, 90 *Hun-Ga* 48 (KCC).

<sup>30</sup> Decision of 29 July 1994, 93 *Hun-Ga* 3 (KCC).

<sup>31</sup> Decision of 25 January 1996, 96 *Hun-Ga* 5 (KCC).

<sup>32</sup> Decision of 29 May 1997, 96 *Hun-Ga* 17 (KCC).

<sup>33</sup> Decision of 30 August 2001, 99 *Hun-Ma* 496 (KCC).

## B. Recent positions of Korean constitutional law scholars

As for the due process doctrine, the majority of Korean constitutional law scholars have supported the position of the Korean Constitutional Court since the court began issuing case law on the due process clause. Now they understand the due process doctrine to require that all kinds of governmental actions have procedural legality and that the substantive contents of laws themselves should have rationality and legitimacy. When it comes to the object and scope of the due process clause, the majority of Korean constitutional law scholars also regard 'punished, subject to preventive restriction or to forced labor' of Art. 12 Sec. 1 of the Korean Constitution as being not enumerated but exemplified. Hence, they regard the due process clause as one of the most important basic principles in the Korean Constitution that applies to restrictions of all constitutional rights and to all the governmental processes that disadvantage Korean people in any way.<sup>34</sup>

## 4. Lessons from the United States

However, for such an important basic principle of Constitution (due process of law), Korean academics and legal practitioners have not advanced a perfect theory with systematic and elaborate logic. Since its adoption in 1987, less than 20 years has passed, a relatively short period in the grand scheme of things. Hence, it is our urgent and crucial task that we examine the related theories and judicial precedents in the U.S. where due process has developed and connect this to our own due process clause. Of course, as the Korean Constitution is different from that of the U.S. or England, the structure of human rights protection, legal culture and tradition, the meaning and the role of the due process clause cannot be exactly the same as those in these two countries. In the realm of universality that we share in common with those two countries, the implications of due process theories and precedents from the U.S. would give us valuable lessons to develop our own theories and judicial decisions in Korea.

The due process principle is an abstract and comprehensive principle and its specific application could be and should be different according to concrete cases. Therefore, there is much room for future development through the accumulation of relevant judicial decisions and the development of relevant theories. Particularly, I believe our due process principle has more room for development in the field of procedural due process. We do not apply the due process principle differently depending on whether the case is about judicial

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<sup>34</sup> For example, see Young-Sung Kwon, *Hunbubhagwonron* (Constitutional Law: a Textbook) 423-24 (Seoul: Bobmun Sa, 2005)

or non-judicial processes. Besides, we seldom employ a balancing test to decide whether to offer the opportunity for an evidentiary hearing in non-judicial processes while the U.S. Supreme Court does employ such a balancing test. If theories on balancing tests by the judiciary are developed in the application of due process principles in non-judicial processes, due process theories can be more elaborated upon in Korea with the accumulation of the relevant judicial decisions. For example, depending on the case, a post-deprivation hearing rather than a pre-deprivation hearing could be sufficient, and an evidentiary hearing could even be omitted if sufficient other procedural protection devices exist.

#### IV. SOME ISSUES TO CONSIDER IN THE CONTINUOUS DEVELOPMENT OF DUE PROCESS PRINCIPLES IN KOREA

For the continuous development of due process principles in Korea, I believe there are some issues to consider.

First, substantive due process has been developed in the States as part and parcel of the due process doctrine. Fundamental rights, such as the right of privacy, that are not enumerated in the U.S. Constitution derive from substantive due process. In this sense, the due process clause in the U.S. Constitution has been playing an important role as 'a comprehensive and general clause.' I have argued elsewhere that the pursuit of happiness as set forth in Art. 10 of the Korean Constitution should be understood neither as a constitutional provision with a specific and concrete right nor as a comprehensive and general clause from which various constitutional rights can be derived. Article 10 of the Korean Constitution provides, 'All citizens shall be assured of human dignity and worth and have the right to pursue happiness ...'. I have argued that the pursuit of happiness clause is a declaratory provision showing the idea and principle that each and every constitutional right should pursue on its interpretation and enactment.<sup>35</sup> The Korean Constitutional Court acknowledges the pursuit of happiness as a comprehensive constitutional right and derives the general right to free behavior and the right to free expression of one's personality from this clause. I think the due process clause should be used as a comprehensive and general clause deriving new constitutional rights

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<sup>35</sup> For details on this assertion, refer to Jibong Lim, *Hunjaeui Dongsungdongbonkyorjungkwa Hangbogchugujohang* (Korean Constitutional Court's decision on the marriage limitation between the ones with same surname and family origin), Public Law Journal, vol. 29-1 (Korean Public Law Association, November, 2000) at 123-42.

rather than the pursuit of happiness clause in which the meaning of 'happiness' is so vague and which we become hesitant to acknowledge as having a specific right considering the history and use of the clause in other countries. The U.S. derived substantive due process from the due process clause and fully used it as a comprehensive and general clause from which new constitutional rights originated. This fact enhances the possibility of using the due process clause in the Korean Constitution as a comprehensive and general clause from which we could derive new constitutional rights.

Secondly, the fact that procedural due process applies to administrative processes and controls them in a democratic way suggests many things to Korea. Although the Korean Constitutional Court extended the scope of due process to administrative processes, the court has not developed the logic on which the contents of due process applies to administrative processes. Particularly, the fact that American procedural protection devices such as prior notice and evidentiary hearing could be applied to administrative processes through procedural due process principles and the fact that the scope of the procedural protection devices could be different depending on the balancing test between private interests of the people and governmental interests really shows us that we have yet to develop the concrete content and criteria of procedural due process in this field

## V. CONCLUSION

The notion of due process produced 'procedural justice' in Anglo-Saxon legal regimes and prevents us from being tripped up by arrogance, as lawyers in Roman Civil Law countries could easily be by thinking that 'Justice lies in the codes and lawyers perfectly know about it.' The fact that the Korean Constitution in 1987 expressly adopted a due process clause implies that we reflected upon the dark history of misuse and overuse of law and suppression of human rights in the name of 'law' under military regimes for a quarter of a century. For this reason, the due process clause in the Korean Constitution is one of the most crucial constitutional provisions in terms of human rights protection. Its importance cannot be overemphasized. We should continuously focus on developing the theories and precedents of the due process clause to make it a kernel provision for 'human rights protection' much as it functions in countries following Anglo-Saxon legal traditions, including the United States.

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## 9. Administrative litigation in Korea: structures and roles in judicial review

**Hee-Jung Lee**

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### I. INTRODUCTION

The institution of 'administrative litigation' of a country reflects the country's constitutionally defined separation of powers and the checks and balances among the various branches of its government. Thus, an examination of the actual practice of administrative litigation in a country reveals how power is allocated within that country and gives insight into the role of each branch in realizing the rule of law. Further, such an examination can also reveal the status and role of the 'citizen' in the political community, both in normative and descriptive dimensions. Through administrative litigation, a citizen can be a defensive claimant for his legal rights and an aggressive participant in legal control of administrative power.

Generally, the above issues are crystallized in the legal doctrines of judicial reviewability and scope of review in administrative litigation. Judicial reviewability decisions are based on the following questions: what type of administrative acts will be subject to judicial review?; who is entitled to request judicial review of administrative decisions?; what kind of judicial intervention is allowed? Issues relating to scope of review mainly concern 'to what extent courts should respect administrative decisions.' Another important issue concerns 'who is to decide the above issues in concrete cases.' Though courts will have the final say, Congress also has the power and ability to decide the limit of judicial review if it so chooses.

One of the distinctions of practices and theories of administrative litigation in Korea is that much more weight has been given to issues of reviewability than to those of the scope of review on the merits. It is because the door to court has been so narrow that the social issues which deserve judicial scrutiny could not be brought before the judges for the merits and the social consensus has not been reached on how broadly the judiciary should intervene to control administrative power. During the past 20 years, since civilian government was restored in 1988 under the present Constitution, the advance of democratization and legalization has affected the attitudes of the general public toward

public power and the attitudes of courts toward the executive branch. As a result, the threshold for judicial intervention in administrative power has been lowered constantly and gradually. There were also two unsuccessful attempts to reform the Administrative Litigation Act. In 2004 the Supreme Court published its own amendment proposal which broadened dramatically the administrative activities subject to judicial review and the standing. Then, in 2006, the Department of Justice prepared and sent to Congress a separate government reform bill of the Act, which didn't include any change to expand reviewable activities and standing. The Department of Justice, representing the administrative branch, preferred a gradual expanding of judicial review through courts' case law to a clear legislative calling for change.

In providing an overview of administrative litigation, it should be noted that there are multiple fora for and remedies of judicial review over the public administration. The principal one is an 'appeal suit' (*hang-go so song*) under the Administrative Litigation Act. When it is not available, a 'constitutional complaint' against unconstitutional exercise of public power at the Constitutional Court, pursuant to the Constitutional Court Act, can be a last resort. To seek money damages against the state or local government in civil court can be an effective ex-post remedy. As an example of this, I will focus on the judicial review system under the Administrative Litigation Act. But the influence of constitutional complaints at the Constitutional Court on the recent dynamics of judicial review is so important that it will also be discussed. In addition, tort suits against the State will be briefly mentioned as well.

## II. THE HISTORY AND LEGAL SOURCES OF ADMINISTRATIVE LITIGATION

### 1. A Brief History of the Administrative Litigation Act

Following the establishment of the independent government of the Republic of Korea in 1948, the 'drafting committee of a statute for judicial relief from administrative infringement' was organized at the Ministry of Government Legislation on 26 December 1948. The first Administrative Litigation Act was enacted in 1951 during the Korean War. The Act, which consisted of 14 clauses, was modelled on the 1948 Act for Special Provisions concerning the Procedure of Administrative Suits in Japan.<sup>1</sup>

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<sup>1</sup> In Japan, the Act was repealed and the Administrative Case Suit Act was enacted in 1962. But in Korea the first Act was valid until the early 1980s.

The 18 years of authoritarian presidency under President Park Chung Hee (1961–1979) obstructed the institutional development of administrative litigation. The government had adopted as its national strategy economic development, driven by strong initiatives of a centralized government, which conferred on the President and his administration powers superior to those of the legislative and judicial bodies. Naturally, the need for legal control over administrative power was raised, but actual judicial review remained focused on relatively narrow areas of administrative acts to protect a relatively narrow scope of individuals' rights.

Since the end of President Park's presidency in 1979, Korean society has gone through rapid changes in terms of democracy and the rule of law. The role of judicial review has also constantly expanded. In 1984, the Administrative Litigation Act was amended and the basic structure of the current administrative litigation system was established. It adopted administrative appeal procedures as a prerequisite to judicial review in court. The administrative cases where a claimant did not receive a satisfactory remedy through administrative appeal procedures had to be brought directly to the High Court (appellate court in Korea), not the District Court. That is, only two opportunities for judicial review were permitted for administrative litigation, unlike civil or criminal litigations where three opportunities are permitted.

In 1994, as a part of general judicial reform, the Act was amended to bring important changes to the administrative litigation system. The 1994 Act repealed the requirement of exhaustion of the administrative appeal procedure so that the aggrieved person could choose to go directly to the court without first trying an administrative appeal.<sup>2</sup> Under the Act, the Administrative Court was established as a first instance special court for administrative litigation.

## **2. The Legal Sources of Administrative Litigation**

### **A. Constitution**

According to Article 107(2) of the Constitution, the Supreme Court has the power to make final decisions on the constitutionality or legality of administrative decrees, regulations or actions. In that the primary power of judicial review of administrative acts is conferred on the ordinary court system rather than a separate administrative court system (e.g., the Conseil d'Etat of France), it is similar to the Anglo-American judicial system. Though the jurisdiction of first instance of administrative litigation had belonged to the 'administrative court' since 1994, it is still a part of the universal judiciary

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<sup>2</sup> Paradoxically, after becoming an optional procedure, the administrative appeal is becoming a more attractive procedure, as it is cheaper, faster, and gives broader remedies to the complainant.

system under the High Court and the Supreme Court. General courts, not the Constitutional Court, have the power to decide issues of constitutionality as far as administrative acts are concerned.

## **B. Statutes**

The Administrative Litigation Act (The Act) applies as a general law unless other statutes state otherwise. It consists of 46 sections, prescribing special provisions about the forms of action, parties, procedures, and legal effect of judgments of administrative litigation. The Act is not a self-sufficient law for administrative litigation. According to section 8 of the Act, the Civil Litigation Act, the Civil Enforcement Act, and the Court Organization Act can also be applicable in administrative litigation.<sup>3</sup>

Sometimes, individual statutes that regulate specific administrative programs have special provisions concerning administrative litigation. For example, under the Act, in principle, the administrative appeal is an optional procedure for the claimant. However, section 56(2) of the Framework Act on National Taxes provides that a person who seeks remedy against unlawful taxation has to exhaust the tax authority's appeal procedure before going to court making it a compulsory prerequisite procedure. Some statutes have specific provisions regarding reviewability or procedures. Section 20 of the Official Information Disclosure Act provides that anyone whose application for disclosure of official information is denied can seek judicial review without showing further legal interest. It also provides closed court procedure to decide on disclosing confidential information.

## **C. Administrative law cases**

Because many issues surrounding administrative litigation concern judicial power of statutory interpretation, such issues must ultimately be resolved by the courts. The applicable provisions of the Act are phrased in very broad and abstract terms and, as such, require judicial interpretation. Doctrines related to the availability of judicial review, standing, and appropriateness of various remedies are formulated by court decisions. Therefore, administrative law cases are important sources of law.

## **D. Legal theories and doctrines**

Unfortunately, Korea did not have the luck of developing its own legal systems or theories in a gradual and natural fashion. The initial development

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<sup>3</sup> Depending on its nature, the provisions about exclusion of judge, the competency of parties, the cost of litigation, service on parties, inspection of proof, appeal to the upper courts etc. are applied to administrative litigation, but provisions about waiving, settlement, preliminary injunction etc. cannot be applied.

of Korean legal institutions and theories necessarily relied on the import of ideas from other countries, such as Japan and those in the West (especially Germany). Now, such dependency on foreign legal sources seems to be transforming more into a sort of global assimilation of Korean and foreign law. Immediately after colonial independence, administrative litigation theories were strongly influenced by those of Japan. In subsequent years, the next generation of Korean legal academics were strongly influenced by German legal theories. The influence of Japanese and German legal theories contributed to the orientation of Korean administrative litigation toward the protection of individual rights rather than a judicial check on administrative power. Further, many legal doctrines found in the German system of administrative litigation are referred to in interpreting important legal concepts of the Act (for example, standing, reviewable acts). Many scholars have pointed out that the discrepancy between the Act's plain text and the legal doctrines rooted in German law poses difficult questions in the interpretation of the Act, though the solutions they suggest to rectify these questions vary widely. Some see hope in revising the Act to make it more like the German Act. Others insist that the Act should be interpreted based on the legislative intentions of our own legislature.

Deepening democracy seems to also encourage the academic endeavor to develop new and original models of administrative litigation in light of both legal institution and theories, which can accommodate the social changes and the legal culture of Korea. Some administrative scholars suggest that broader and far-reaching judicial review against administrative agencies is desirable, but others skeptical of courts' role emphasize a heightened role of the legislative body. Recently in Korea, serious and concrete discussions have taken place concerning the role of each branch of government under the principle of separation of powers. The future administrative litigation of Korea will be formulated through such discussions. It is noteworthy that such endeavors have also galvanized the comparative study of administrative litigation of other countries, such as France, Great Britain, and the United States.<sup>4</sup>

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<sup>4</sup> Prof. Park Jeong Hoon, a representative scholar who supports such an extensive comparative law approach for administrative law jurisprudence, calls it 'methods of plural legal comparison.'

### III. FORMS AND AVAILABILITY OF LITIGATION

#### 1. Forms of Litigation under the Act

##### A. An overview

The Administrative Litigation Act provides for four forms of administrative litigation:

- *appeal action*: an appeal against an administrative agency's disposition or inaction.
- *party action*: a suit, the defendant of which is a party to legal relation that is created by agency action or other public law relations.
- *public action*: a suit instituted by a person without his or her own legal interest to seek the correction of illegal acts by the state or a public entity in the public interest.
- *agency action*: a suit to resolve a competence dispute between public agencies.

(1) *Appeal action* The appeal litigation is the core form of judicial review over 'administrative dispositions.' There are three types of appeal actions depending on the remedies sought:

- an action to set aside or alter an administrative disposition (rescissory action);
- an action to declare the nullity or inexistence of an administrative disposition (nullity-confirming action);
- an action to declare the illegality of an administrative inaction (inaction's illegality-confirming action).

To bring an appeal action, the disputed administrative act should fall under the 'administrative disposition' pursuant to section 2(1)1 of the Act. This section of the statute defines the administrative disposition as 'the exercise of, or the refusal to exercise public power by an administrative agency to execute law on a specific case.' Decisions by administrative agencies to impose income tax on a person, to permit the construction of a building, to license the provision of telecommunication services, or to revoke a driver's license for drunk driving all constitute 'administrative dispositions.' But administrative rulemaking and factual actions without direct legal effect, including cleaning up the street or just entering to investigate the workplace, are not administrative dispositions. The defendant of an appeal action is the administrative agency that was in charge of the administrative disposition, not the State.

The essential element of 'administrative disposition' is the legal effect to

bring changes to the legal status, i.e. legal right or obligation, of a person. Actions for rescission or declaration of nullity of an administrative disposition seek to eliminate or confirm the inexistence of the legal effect. The ultimate purpose of the two forms of action is the same: to set the person free from the legal effect of the illegal administrative act. But there are important differences between the two. First, one has to bring a rescissory action within a limited period – 90 days after notice of the disposition or 180 days after the disposition – while there is no time limitation for an action for declaration of nullity. Secondly, to obtain a rescissory judgment, one has to assure the judge only that the administrative disposition is illegal, while to get the declaratory judgment of nullity one has to persuade the judge that the illegality is ‘serious and clear.’ In sum, when an administrative disposition has ‘serious and clear’ illegality, it can be annulled at any time. But when the illegality is not so serious or clear, the illegal administrative disposition will become conclusively valid unless the claimant brings successful rescissory suit within the specified statutory time limit. (However, the agency itself can invalidate the disposition even after the time limit.)

Such a distinction between rescissory action and nullity-confirming action is based on the theoretic dogma that when an administrative disposition is ‘seriously and clearly’ unlawful, anybody can deny the validity of it without special procedure, because such a disposition is supposed to be null from the outset. But practically, it is very difficult for anyone to distinguish serious and clear wrong from simple wrong. The ultimate judgment rests with the judge presiding over the appeal action. Nobody except the judge can officially affirm the nullity of a disposition. That is why there is an action for declaration of nullity of a disposition. In fact, parties frequently choose between an action for rescission and an action for declaration of nullity depending on whether the lawsuit is brought within the appropriate time limits.

(2) *Party action* The party action is employed to solve disputes in public law relations. The question for the judge is ‘what is the final legal status of the parties?’, not ‘whether the administrative power is executed in a manner consistent with legal standards?’ The legal relations are of a public law nature when they are created by administrative disposition, administrative contracts, eminent domain, or breach of public duty by a public officer. While an appeal action is a peculiar form of action for judicial review, a party litigation is more similar to general civil action.

Because the merit of party actions depends upon the legal rights or obligations of the parties, the defendant of a party action has to be the state or a local government that has legal personality, not an administrative agency. Courts can potentially award various final remedies: declaratory judgment of legal right or status, money damages, just compensation, or possibly even mandatory orders

to the state. The illegality of administrative acts is reviewed as a collateral issue to decide the legal status of parties. The court presiding over a party action cannot rescind a disposition unless the illegality involved is serious and clear.

Many commentators have attended to the potential utility of the party action as a comprehensive and flexible procedure for judicial protection of citizens' rights. However, until now, it has been used only in limited types of cases, for example, contractual disputes between local government and its public employees. One reason for this is the preemptive role of the appeal action. Another important reason is that courts have been using civil procedures instead of the party action in state liability cases, unjust enrichment actions against the state (where a person may have overpaid tax), and actions concerning governmental procurement contracts. Many scholars have argued that these cases should be solved through party litigation. Further, some scholars are considering the possibility that party litigation can be a supplementary procedure for judicial review over the areas of administration which are not subject to an appeal litigation, like administrative rulemaking, or can provide new remedies other than appeal actions, like prohibitory or mandatory injunctions.<sup>5</sup> But at present the party action is an underestimated procedure with plenty of potential.

(3) *Public action* The 'public action' is a type of public interest lawsuit. It can be used by citizens of Korea or residents of local government to seek the correction of illegal acts of the state or organs of public entities. The citizen or resident need not have her own legal interest at stake to have standing to sue. But one can file a public action only when a statute other than the Act provides for a specific type of public action. At present, examples of such suits include a suit for nullifying the national referendum under the National Referendum Act, a suit for nullifying an election or a candidate elected under the Public Official Election Act, and a newly introduced 'Local Residents Suit' against the head of local government under the Local Autonomy Act.

(4) *Agency action* The 'agency action' is employed to solve competence disputes between organs of the state, local governments, or other public legal entities. It deals with disputes over the existence or non-existence of administrative authority or power. Like a public action, the agency action can be instituted only when a statute other than the Act specifically authorizes a competence lawsuit.

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<sup>5</sup> Responding to such calls for party litigation, the Supreme Court's proposal of amendment of the Act in 2004 has specified exemplary usages for it (i.e. compensation for public taking, damages for illegal administrative acts, restitution for unjust enrichment, etc.).

There is also a competence dispute procedure at the Constitutional Court. According to section 2 of the Constitutional Court Act, the Constitutional Court has exclusive jurisdiction over competence controversies between organs of the state, between an organ of the state and local governments, and between local governments. Beyond this, individual statutes can establish new agency actions only for internal disputes between the organs of same local government (the head and the local council of local government). Under the Local Autonomy Act, the head of a local government can seek to annul the local council's resolution at the Supreme Court. The resolutions include one to enact local government ordinances. And the Secretary of the central government can also bring suit against the local council to annul its resolutions.<sup>6</sup>

### **B. Permissibility of unspecified forms of action**

Is it possible to bring suit against an administrative agency or the state for judicial review other than under the above listed forms of action, on the constitutional grounds of administrative litigation or judicial power?<sup>7</sup> For example, can one bring suit to seek a court order to execute or not execute a specific disposition (similar to mandamus or prohibitory injunction) directed at an administrative agency even though such a suit is not specifically authorized in the Act? Various viewpoints exist on the interpretation of the related provisions of the Constitution and the Act. The underlying question is who decides the purview of judicial review, the Congress or the courts?

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<sup>6</sup> Local Government Act, section 98 (Request for Reconsideration and Institution of Lawsuit of Local Council's Resolution):

(1) If a resolution of the local council is deemed to exceed its powers, to violate the Acts and subordinate statutes, or to be greatly detrimental to the public interest, the head of the local government may request reconsideration, specifying the reasons therefor, within 20 days from the date when the matters subject to a resolution were transferred.

(2) If the same resolution as the preceding one is adopted with attendance of a majority of all the registered members of the local council and by an affirmative vote of two-thirds of the members of the local council present as a result of reconsideration in response to a request as referred to in paragraph (1), such matters subject to a resolution shall become final.

(3) If the head of the local government finds the matters decided again under paragraph (2) are contrary to Acts and subordinate statutes, he may institute a lawsuit to the Supreme Court. In this case, the provisions of Article 159 (3) shall be applied *mutatis mutandis*.

<sup>7</sup> The Korean Constitution Article 101(1): Judicial power shall be vested in courts composed of judges. (2) The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

Some administrative law scholars argue that such a lawsuit is permissible. The practical justification for this argument is that if an unspecified appeal suit were available, citizens could get more effective and efficient remedies such as mandamus or prohibitory injunction without amending the Act. Logically they interpret that Article 27(1) of the Constitution<sup>8</sup> requires the protection of individuals' rights without exception and that the forms of action listed in the Act are just exemplary, not exhaustive; further finding no problems regarding separation of powers to grant courts the power to mandate administrative action or inaction. They call such a lawsuit a 'no-named appeal suit.' Opposing this argument, others have stated that a suit for mandamus or prohibitory injunction is not permissible without amending the Act. The rationale behind this argument is that if courts are granted the power to order agency an action or inaction, it means that the courts do not 'review' but 'perform' the first instance administrative decision-making power that is granted to the administrative agency by Congress. Such behavior exceeds the limit of judicial power under separation of powers and administrative expertise theory. Therefore, the Act's list of forms of action must be an exhaustive one.

Courts have denied the possibility of litigation for mandamus or prohibitory injunction.<sup>9</sup> The reason for this is not entirely obvious from the text of related judgments, whether they interpret the Constitution as empowering them only to conduct judicial review to the extent that the legislature has clearly defined (court's deference to legislative intention) or whether just the specific forms of remedy sought (mandamus, injunction) are not permitted by the Constitution under separation of powers considerations. Considering that suits for mandatory orders and prohibitory orders are included in both the 2004 Supreme Court proposal and the 2006 Department of Justice bill for amendment of the Act, it would not be wise to interpret the Constitution as disallowing those remedies. But at present it is evident that a complainant cannot get such remedies unless the Act is amended to establish new forms of action.

## **2. The Availability of Administrative Litigation**

To decide the availability of administrative litigation is to define the scope of protection of individuals' legal interests as well as the scope of judicial intervention into administrative activities. To find the proper balance, various

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<sup>8</sup> The Korean Constitution, Article 27(1): All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act.

<sup>9</sup> Supreme Court Decision 23 October 1990, 90 Nu 5467, Supreme Court Decision 19 August 1992, 86 Nu 223, Supreme Court Decision 24 March 1987, 86 Nu 1182.

values and principles should be considered, including the nature of judicial power, proper distribution of powers among the legislative, judicial, and administrative branches under separation of powers, and the cost-benefit efficiency of controlling administrative power through litigation. These considerations are embodied in 'conditions of litigation', that is, the prerequisites for a court to decide upon the merits of the case. In the Act, the special conditions reflecting the nature of appeal litigation are prescribed. Most of the provisions relate to rescissory litigation. Issues remain, however, concerning how to interpret the provisions of the Act. For appeal litigation, the interest of a lawsuit is scrutinized as the three conditions of litigation: reviewability of administrative activities, standing of a complainant, and overall interest of the lawsuit. But these three conditions are substantially intertwined with each other so that strict distinctions are not so easy to make.

### **A. Administrative acts subject to appeal action**

The courts have interpreted 'administrative disposition' narrowly. According to section 2(1)1 of the Act, 'disposition' refers to 'the exercise of or the refusal to exercise public power by an administrative agency as function of law execution in relation to specific facts, other similar administrative actions.' The Supreme Court has interpreted this provision as 'an administrative agency's act of a public law nature which is directly related to the concrete legal right or duty of a citizen in a way to give a legal right or impose a legal duty to a citizen in a specific situation based on the statutes or otherwise to give direct legal effect.'<sup>10</sup> There are differences between the Act's definition and the Supreme Court's interpretation. For an agency's activity to be a 'disposition', the Supreme Court requires it to be 'directly related to the concrete legal right or duty of a citizen in a way to give a legal right or impose a legal duty to a citizen', but this is not required by the text of the Act. To understand the Supreme Court's interpretation and the standards it sets forth, one needs to read it in conjunction with the administrative law theories concerning the nature of the 'appeal action' and its place in the typology of administrative activities.

Administrative activities are classified into four basic categories: administrative rulemaking, administrative act, administrative contract, and acts only with factual effect (factual act). There are some special legal rules and remedial procedures for each category.<sup>11</sup> The appeal suit is supposed to be specially designed for application to 'administrative acts.' In administrative law theory, the concept of 'administrative act' is defined as 'an authoritative public law act

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<sup>10</sup> Supreme Court Decision 20 August 1999, 97 Nu 6889.

<sup>11</sup> Besides, there are special categories of administrative acts, such as administrative planning, administrative guidance, and administrative investigation.

which has direct legal effect on a person by applying legal rules to specific facts.’<sup>12</sup> An administrative legal decision that applies to a specific person in a specific case is an ‘administrative act.’<sup>13</sup> The administrative act has special legal effect which is not endowed with administrative rulemaking or ‘activities with only factual effect.’

According to the administrative law theory, when an administrative act is illegal, unless the illegality is serious and clear, the act is treated as legally effective until a court revokes it through rescissory litigation within the specified time period.<sup>14</sup> ‘Being treated as legally effective’ means that the administrative agency can enforce the administrative decision using its powers of self-enforcement without court judgment.<sup>15</sup> Thus, one can say that an illegal ‘administrative act’ has tentative validity until it is set aside by a court with

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<sup>12</sup> Park Kyun-sung, *Administrative Law (I)*, Pakyoungsa, 2008, p. 257, Kim Nam-jin, Kim Yeon-tae, *Administrative Law I*, Bupmunsa, p. 177. The concept of an ‘administrative act’ has its roots in the German administrative litigation law. ‘Administrative act (*Verwaltungsakt*)’ is a core concept of the German administrative law. Section 35 of the Law of Administrative Procedure of 1976 stated that an: ‘Administrative act is every order, decision or other sovereign measure taken by an authority for the regulations of a particular case in the sphere of public law and directed at immediate external legal consequences.’ Mahendra P. Singh, *German Administrative Law: In Common Law Perspective*, Springer-Verlag, 1985 p.32. The Federal Administrative Courts Act of Germany prescribes that the object of appeal litigation is limited to ‘administrative act.’ Therefore, in the German legal system, ‘administrative act’ is a theoretic concept as well as a positive legal term. This is an important difference with Korea in that in Korea it is a just a theoretic concept and a different concept (disposition) is used in the statutory text.

<sup>13</sup> That is, a decision to impose income tax for a specific year to a specific person and a decision not to issue a specific construction permit both constitute an ‘administrative act’ but delegated rulemaking of standards to calculate the amount of tax or to permit construction do not qualify as an ‘administrative act.’

<sup>14</sup> Section 20 of the Act: ‘a revocation litigation shall be instituted within 90 days from the date a disposition is known to the person and shall not be instituted after the lapse of one year from the date the disposition is made though there are a few statutory exceptions. It is not applied to the nullity affirmation litigation.’

<sup>15</sup> When the illegality of a disposition is determined to be simply illegal, the action is just ‘revocable.’ ‘Revocable’ can be defined as:

- to make the illegal action lose its ultimate validity, it needs to be revoked by authorities powered to revoke it (i.e. the court having jurisdiction over revocation litigation or the public authorities who issued the action and have the general power to revoke it);
- nobody except the court of revocation litigation and the disposition issuer (public authority) can deny the legal effect of the disposition on the ground that it is simply illegal (this means that citizens are subject to the disposition during the period that it is illegal but not yet authoritatively cancelled);
- without such a revocation, the action will be perpetually valid if nobody files a

proper jurisdiction.<sup>16</sup> And if one fails to bring a rescissory suit within the statutorily allotted time period, the illegal act remains perpetually valid.<sup>17</sup> This final validity is called the 'Effect of undisputability.' The nature of revocation litigation is derived from these propositions.

Revocation litigation is regarded as the only judicial means of removing the tentative validity of an administrative act so as to make it retrospectively null. So the judgment of rescission is deemed to have 'formative effect' which removes the tentative validity of the relevant administrative act. The problem is that defining the nature of the revocation litigation as such has resulted in the narrowing of the sphere of administrative actions subject to appeal action. The proposition that 'the nature of revocation judgment is to remove the special legal effect of an activity' gives rise to another proposition that 'an activity without individualized legal effect cannot be an object of revocation litigation.' As a result, the other types of administrative activities, such as administrative rulemaking and acts only with factual effect, are excluded from the scope of activities reviewable through revocation litigation.

In sum, for an administrative decision or act to be a 'disposition' subject to appeal litigation, the following standards have to be met. First, pursuant to the text of the Act, it has to be an act of an administrative agency; involve 'exercising public power' (i.e. non-authoritative actions); involve the execution of a function of law; and be an application of law to specific facts. Additionally, courts require that there be a 'direct legal effect on one's legal right or duty.' This last element contributes to a narrow range of administrative acts being subject to judicial review.<sup>18</sup>

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revocation suit within the time-limit (statute of limitations) allowed by the Act, regardless of its legality; and

- from the issue date until a final revocation or the completion of statute of limitations the action is tentatively valid.

<sup>16</sup> The 'tentative validity' is called the 'Effect of officially decided matter.'

<sup>17</sup> A more fundamental justification of such a special treatment of illegal activity of administrative agencies can be found in Socrates's argument in *Crito*, that a citizen who voluntarily accepted the membership of a polity has an unqualified obligation to obey its law for the preservation of the polity even though he considers the law to be unjust and contradictory to his interests. To keep order in a society under the rule of law, members need to respect the law as it is. An administrative disposition is a legal decision, what is the law in the specific case. Then, citizens are obliged to respect the administrative disposition before it is invalidated by a proper authority. For a summary of Plato's idea about the law see Shirley Robin Letwin, *On the History of the Idea of Law*, Cambridge University Press, 2005 pp.10–12.

<sup>18</sup> Substantially, the element of the 'disposition' functions as a combination of multiple standards. First, the standard of redressability applies through it. Administrative activities against which the remedy of revocation litigation is meaningless are excluded. The prototype of a 'disposition' is a legal decision that affects the

When applying the above standards, a procurement contract with governmental entities and administrative guidance is not reviewable because it is a non-authoritative or non-enforceable action. The choosing of a contractor to fulfill a government procurement contract cannot be reviewed by appeal litigation but can only be reviewed by civil litigation.<sup>19</sup> The Supreme Court denied judicial review of the Minister of Construction's refusal to give its required agreement to a change of land use planning suggested by the local government, which is the ultimate authority for land use planning, even though the local government denied the change to the applicant on the ground of the Minister's refusal.<sup>20</sup> Similarly, it also denied judicial review of changes to a sewer system rehabilitation program, which included a decision to locate a new sewage treatment plant in a specific area,<sup>21</sup> and an administrative rulemaking by the Minister of Health and Welfare concerning the regulation of a signboard at a doctor's office.<sup>22</sup> The common basis of these judgments was that the disputed acts did not have direct legal effects on the individuals in question.

A new point of view that has emerged recently regarding the nature of revocation litigation deserves mentioning. It argues that illegal administrative acts are always void from the time of issuance and that, thus, the nature of revocation litigation is to find the illegality and declare the act void. Therefore, rescissory action is not a 'formative one,' but a 'declaratory one.'

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rights or duties of a private entity. And the appropriate remedy is to remove the binding force in whole or in part retroactively. Therefore, activities with only factual results and no legal effect removable by a revocation judgment (e.g. a reply to the question about the interpretation of legal rules, advisory opinions, and recording in the public register, without any legal effect, by a public officer, etc.) are excluded from the subject of appeal suit.

Secondly, the concept of 'disposition' decides the timing of when the judiciary may intervene with administration. In a series of decision-making processes, a 'disposition' comes up when a decision is finalized and notice of it is given to the addressee. By making only 'dispositions' litigable, the legislature fixed the timing of judicial intervention as 'after the internal decision-making process is done'. It also shrinks the opportunities for courts' scrutiny of each step of the decision-making process. This is a separation of powers consideration. It also contributes to the efficient use of judicial resources. It is similar to the issue of 'ripeness' in U.S. judicial review jurisprudence, wherein the court will not hear a case unless there is a live controversy. Ripeness bars consideration of claims before they have been developed. This issue does not apply to party litigation.

<sup>19</sup> In case where one paid custom duties under a self-assessment system (Supreme Court Decision 22 July 1997, 96 Du 8321), and in a case where a public official was given 'admonition', which is not a statutory disciplinary measure (Supreme Court Decision 23 April 2004, 2003 Du 13687), the Supreme Court decided that they were not 'administrative disposition' subject to appeal litigation.

<sup>20</sup> Supreme Court Decision 15 May 2008, 2008 Du 2538.

<sup>21</sup> Supreme Court Decision 17 May 2001, 2001 Du10578.

<sup>22</sup> Supreme Court Decision 12 April 2005, 2005 Du15168.

The tentative validity of an 'administrative act' is not substantively legal in effect but rather a legal fiction as a reflection of the statutory time-limits of administrative litigation. In other words, it is merely a factual presumption that an administrative activity is legal and valid, simply put in place for the stability and efficiency of public administration. And the nature of 'revocation judgment' is to affirm the nullity of the action rebutting the presumption.<sup>23</sup> This kind of approach enables almost all potentially illegal activities which fit under the definition of 'disposition' of the Act to be litigable by revocation litigation.<sup>24</sup>

General courts have jurisdiction over the legality and constitutionality of administrative rule-making when it is collateral to merit-related issues in a trial under Article 107(2) of the Constitution. It is not clear whether this means that this is the exclusive means of judicial intervention with administrative rule-making or whether this is merely a restriction on general courts' jurisdiction over administrative rulemaking. Pursuant to this latter view, the Constitutional Court's review of administrative rule-making when its constitutionality is not merely a collateral issue but the substantive issue of the case will be justified as Article 107(2) does not apply. Indeed, the Constitutional Court has ruled consistently with this interpretation. The Supreme Court, however, has a different view. It sees Article 107(2) as providing the only means of judicial review of rule-making so that the Supreme Court is the only judicial body which has such jurisdiction. Even from this viewpoint, when a rule directly affects the legal right or duty of a private citizen, it is subject to the revocation litigation as a disposition.

## B. Standing to sue

There is a meaningful theoretical categorization of administrative litigation depending on the purpose of the lawsuit: subjective lawsuit and objective lawsuit. The main purpose of a subjective lawsuit is to protect individuals' rights or interests and provide remedies for the aggrieved person. On the other hand, the purpose of an objective lawsuit is to secure the legality of administrative power and to promote the public interest.<sup>25</sup> Among the four forms of actions in the Act, appeal litigation and party litigation are subjective lawsuits and public litigation and agency litigation are objective lawsuits.

Practically speaking, every form of administrative litigation contributes to

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<sup>23</sup> Park Jeong Hoon, *Structure and Functions of Judicial Review of Administrative Action*, pp. 165–73

<sup>24</sup> This type of approach became the theoretic basis of the Proposal Amending the Administrative Litigation Act in 2004 which was sent to Congress by the Supreme Court.

<sup>25</sup> Public interest lawsuits in the U.S. are a similar example of objective lawsuits.

subjective and objective goals at the same time. When a person appeals an administrative order for his self-interest, it provides an opportunity not only to review the questioned activities but also to prevent similar illegal activities from occurring in the future, thereby improving the general quality of administrative activities. In a suit to invalidate an election for the public interest, a candidate who lost in the illegal process might seek to realize his self-interest in the election. So these two functions are actually two sides of the same coin. The distinction between objective lawsuits and subjective lawsuits might simply be a matter of emphasizing one of them over the other. Then what is the ultimate purpose of having such a distinction at all?

Defining the major goal of administrative litigation can influence the nature and the span of administrative litigation. It can help influence the remit of judicial intervention in the execution of administrative power, or in other words, the relationship between the administrative power and the judicial power under separation of powers principles. If the role of appeal litigation is to protect an individual's legal rights, the intervention of judicial bodies through appeal litigation could be banned when the rights are aggrieved by new types of administrative acts (like 'administrative guidance') or when interests aggrieved are not recognized as rights in spite of the fact that the substantial impact on people is becoming significant. Recently, arguments that emphasize the objective function of appeal litigation have been gaining in prominence and proponents.<sup>26</sup>

Revocation litigation may be instituted by a person having 'statutory interests' to seek the revocation of a disposition, etc. There are various viewpoints concerning the interpretation of 'statutory interests.' Some argue that 'statutory interest' is nothing more than the 'right in a strict sense', but others argue that it constitutes 'interest deserving of protection by litigation' or just 'the legality of administration' itself. As seen above, one who sees the revocation suit as subjective litigation tends to interpret it as having the same meaning as the 'legal right' while one who sees it as an objective suit tends to interpret the 'statutory interest' as 'interest deserving of protection', 'just interest', or nearer to 'the judicial control of administration.' The courts have been expanding standing gradually and consistently through interpretation. At present, when an interest at stake is protected by statute, which is the legal ground of the disposition or the related statutes, the standing is recognized.

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<sup>26</sup> Park Jeong Hoon, *Structure and Functions of Judicial Review of Administrative Action*, pp. 140-1, 160-5.

### C. Interests of suit: residual concept

'No interest, no lawsuit' is a general principle that applies to all judicial actions. The 'interest' in this phrase refers to the public value deserving of the allocation of judicial resources as well as the interest of plaintiffs redressible by lawsuit. There may be various situations where judicial resources need not be expended even though other requirements (i.e. reviewability of administrative act and standing) are met. The Act specifically speaks to the situation when the disposition is no more effective due to the lapse of time, the enforcement of disposition, or other causes. Though there is no legal effect left to be removed, if the affected person has 'statutory interests' he or she can institute a rescissory suit. For example, an administrative order to suspend a license for a month does not have any more effect when the one month has passed. In such a case, the claimant ordinarily does not have any interest for rescissory action. However, when the record that he got the suspension order in the past can be a legal ground for cumulative punishment for the possible future violation, the claimant has 'statutory interests' to seek rescission of the disposition.<sup>27</sup>

### D. Venue

Since 1998, the Administrative Court has had exclusive jurisdiction for first instance trial of appeal litigation unless there is a different provision. A party can appeal to the High Court and subsequently to the Supreme Court. Though the Act anticipated that every appellate jurisdiction would have an administrative court, at present there is only one administrative court jurisdiction, the Seoul Administrative Court. In the rest of the jurisdictions, general district courts have jurisdiction over appeal litigations. There are statutory exceptions, however. For example, for an appeal against antitrust decisions made by the Fair Trade Commission, a general competition regulator has to be brought directly to the High Court.

### E. Defendants

According to section 13 of the Act, one can bring appeal litigation against an administrative agency that has made the disputed disposition. This is one of the peculiarities of an appeal litigation that is meant to facilitate efficiency and convenience for the parties. As for party litigation, the party has to be a legal entity that has the legal capability for right-and-duty bearing.

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<sup>27</sup> The interest of a lawsuit in such a case has a similar function as 'mootness' requirements in the U.S., wherein a federal court will not hear a case that has become moot; a real, live controversy must exist at all stages of review, not merely when the complaint is filed.

**F. Time-limit to bring a suit**

As already seen above, there is a time-limit to bring a rescissory action. According to section 20, a rescissory litigation shall be instituted within 90 days from the date a disposition is known by the plaintiff. It is a legally determined period that cannot be extended by the court. But if a plaintiff fails to observe the time-limit due to no fault of his own, he is allowed to initiate the suit within two weeks after the condition is removed. At the same time, a revocation litigation is subject to another time-limit – one year from the date a disposition takes effect unless there is legitimate justification for bypassing it. These are functionally similar to statutes of limitations but different in that it is the court's obligation to investigate whether to observe it even when the defendant does not raise such arguments. When the court finds that the plaintiff passed the time-limit the court is required to dismiss the litigation.

As seen above, there is no time-limit for the litigation for affirmation of nullity. The same time-limit is applied to the litigation for affirmation of illegality of an omission according to section 38(2). But it is not clear how to calculate the time period in the case of administrative inaction.

**G. Exhaustion of administrative remedies**

Administrative appeal is a quasi-judicial administrative remedy procedure that is prescribed in the Constitution. Since 1994, this has been an optional procedure rather than a compulsory prerequisite. But there are exceptions where individual statutes provide otherwise.

## IV. REVIEW AND REMEDIES

### 1. The Scope of Review

**A. Adversary system supplemented by inquisitorial power**

In administrative litigation, who is in charge of the inquiry into important facts based on which the court must make a judgment? Section 26 of the Act provides that 'if the court finds that it is necessary, the court has power to investigate evidence on its own initiative and decide on the facts which the parties to the lawsuit have not argued.' The provision itself shows that Congress adopted an inquisitorial system, where the court or a part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system, where the role of the court is solely that of an impartial referee between parties.

The courts, however, have understated the inquisitorial power under the provision. That is, they have stated that the provision should not be interpreted to allow judges to make limitless factual inquiries when the parties did not

argue such facts. Courts can inquire and consider the facts which are revealed on the adjudication record but are not expressly argued by the parties.<sup>28</sup> In the context of administrative litigation, the underlying formulation is the adversary system which is merely supplemented by inquisitorial powers of a judge in cases of necessity.

### **B. Scope of review and administrative discretion**

Section 27 of the Act provides that 'courts have the power to quash an administrative disposition when it exceeds discretionary power or there is an abuse of discretionary power.' The provision confirms the judicial power to control administrative discretion, but it keeps silent about the extent of its inquiry into the merits of the challenged agency action.

The courts have formulated a two-prong standard for scope of review. One is for non-discretionary (or rule-bounded) decisions and the other is for discretionary decisions. The distinction between rule-bounded decisions and discretionary decisions should be made based on comprehensive considerations of the context, form, and text of legal provisions regulating the decision, the main policy goals and characteristics of the area of administration, and distinguishing qualities of the specific decision. For rule-bounded administrative decisions, courts draw their own decision on the basis of facts discovered and the interpretation and application of the related legal rules, and substitute their own decision for the original decision. In the case of a discretionary decision, courts are not allowed to replace the agency's decision with their own decision because the agency has the power to decide independently the issue of public interest. The courts scrutinize whether there was factual error, violation of principle of proportionality and equality, breach of purpose, or improper motive.<sup>29</sup>

### **C. Procedural violations**

There have been controversies about whether an administrative disposition with some procedural violations is unlawful when there are no corresponding substantive violations. However, as the enactment of the Administrative Procedure Act in 1996 demonstrates, the administrative procedure has been increasingly recognized as an essential element for the rule of law. Courts have also confirmed that the procedural violations that taint administrative decisions enough to warrant invalidation may involve a prior notice, hearing and comment or the provision of reasons for the decisions. A disposition with a procedural violation is void or voidable depending on whether such an illegality is serious

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<sup>28</sup> Supreme Court Decision 11 October 1994, 94 Nu 4820; Supreme Court Decision 10 March 1992, 91 Nu 6030; Supreme Court Decision 16 January 2001, 99 Du 8107.

<sup>29</sup> Supreme Court Decision 9 February 2001, 98 Du 17593.

and clear. If it is not, the disposition can be invalidated only through revocation litigation within the time-limit. Courts seem to treat most administrative decisions with procedural violations as just voidable.

## 2. Remedies

If an administrative court finds that an administrative disposition is illegal at the time of issuance, the court will quash it. It declares the administrative decision retrospectively void from the time of issuance against anyone. The judgment to quash an administrative decision is legally binding on the administrative agency and other related agencies. Further, the agencies should not repeat the same decision under the same factual situations against the same parties. If the legal ground for quashing is a procedural violation, the court can issue the same disposition after executing the required procedure.

Under the Act, the only judicial remedy for the refusal to exercise public power is to rescind the disposition of 'refusal.' To make the judgment more remedially effective, the Act prescribes that upon rescission, the agency is obliged to issue a new disposition to the previous request according to the intention of such a judgment.<sup>30</sup> When the agency does not meet this obligation, a requesting party can seek from the first instance court an order for reparation for any loss caused by the delay.<sup>31</sup>

The prescribed remedy for administrative inaction under the Act is a declaratory judgment that it is illegal not to reply properly. Upon such a judgment, the relevant agency has to make a decision and issue a disposition. Because it is not an effective remedy, there are few cases involving this form of action.<sup>32</sup>

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<sup>30</sup> The Administrative Litigation Act, section 30 (Binding Force of Revocation Judgment, etc.) (2) If a disposition revoked by a judgment is involved in the rejection of a request made by the party, the administrative agency that has made such a disposition shall make a new disposition to the request in keeping with the aim of such a judgment.'

<sup>31</sup> The Act, section 34 (Indirect Enforcement of Judgment on Revocation of Refusal Disposition) (1) If an administrative agency fails to make a disposition under section 30(2), the court of the first instance, with which a litigation has been instituted, upon a request of the party, may determine by decision a considerable period for the administrative agency to make the disposition, and when the administrative agency fails to do it within such a period, the court may order the administrative agency to make a certain reparation in proportion to the period of delay, or to compensate immediately for damage.

<sup>32</sup> According to the legislative history of 1984 amendments to the Act, this form of action as a remedy for agency inaction was a legislative compromise of 'litigation for order to do' disposition (specific disposition when there is no discretion exercisable by agency, and non-specific disposition just within the discretionary power when there

Once a court has decided an issue of fact or law necessary to its judgment, the decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Res judicata* applies only to the parties to the prior litigation.

Settlement or mediation of administrative litigation is not officially permitted. The main reasoning behind this is the defendant agency does not have a right to dispose the issue of 'legality' of an administrative activity, which is regarded as the object of the litigation. But in practice, 'settlement or mediation in fact' has been used such that plaintiffs satisfied with the end results have withdrawn their lawsuits.

## V. OTHER FORA OF JUDICIAL REVIEW

### 1. Judicial Review at the Constitutional Court

Since 1988, the present Constitutional Court has performed effective and substantial constitutional review. It has exclusive power to review statutes enacted by Congress as well as power to review the execution of public power through a 'constitutional complaint' procedure. As far as administrative power is concerned, 'constitutional complaint' is designed as a safety net or supplementary remedy procedure that is allowed only when administrative litigation is not available. But the Constitutional Court has been using this supplementary power quite vigorously so that the 'constitutional complaint' has become a very popular redress for grievances caused by all kinds of public power. The active role of the Constitutional Court has affected the attitude of courts toward judicial review. In 2004, the Supreme Court special committee charged with amending the Administrative Litigation Act held a public hearing on its own amendment proposal. The proposal included far-reaching and even radical changes that could lead to a very different model of judicial review. Specifically, it prescribed clearly that administrative rulemaking and acts with only factual effect should also be subject to appeal litigation. And it reformed the provision for standing from 'statutory interest' to 'legitimate legal interest.' Many observers agreed that the motivation behind such a daring reform was organizational competition between the Constitutional Court and general courts having jurisdiction over administrative litigation.<sup>33</sup>

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is discretion exercisable by agency) (similar to *mandamus*). Then, the Justice Department proposed the introduction of 'litigation for order to do' disposition, but the Supreme Court opposed such an expansion of jurisdiction on the grounds that it was too early for courts to exercise such an interventionary power to the administration.

<sup>33</sup> Such an amendment was part of more inclusive judicial reform trials that were

According to section 68 of the Constitutional Court Act, anyone whose fundamental rights guaranteed by the Constitution have been infringed through the exercise or non-exercise of governmental powers (except the judgments of the ordinary courts) may file a constitutional complaint with the Constitutional Court, only after, however, exhausting all the remedial procedures which are available under other statutes. The 'dispositions' subject to administrative litigation also constitute 'the exercise or non-exercise of governmental powers.' Due to the rule of exhaustion of other remedies and the exclusion of courts' judgments from the jurisdiction of constitutional complaint, administrative acts which fall into the category of 'disposition' cannot be reviewed pursuant to the constitutional complaint procedures while administrative acts which do not fall into the category of 'disposition' can be reviewed via constitutional complaint. The latter group of acts includes administrative acts which have no legal effect on the rights or duties of individuals except factual effects (for example, administrative guidance) or administrative rule-making which has only general and abstract effects. Therefore, the judicial review system of administrative acts of Korea is a kind of dual system of administrative litigation and constitutional complaints. And whether the disputed acts fall under the 'disposition' language of the Act is the key question in choosing the correct forum.

There are gray areas where it is difficult to decide whether an administrative act is a 'disposition' or not. The issue is ultimately decided by courts' interpretation of the concept of 'disposition.' While courts interpreted 'disposition' narrowly so as to deny appeal action for administrative rulemaking and various factual acts in spite of actual grievances on the part of private citizens, the Constitutional Court began filling this gap. If administrative rulemaking (including presidential decrees, departmental decrees, ordinances of local governments, etc.) directly infringes upon an individual's fundamental or basic rights, the individual may file a Constitutional Complaint against the rule itself. The Constitutional Court reasoned that it was not a violation of the rule of exhaustion of other remedies because the courts have denied appeal litigation for such factual acts or rule-makings. The Supreme Court argued against this, stating that the Constitution vests the Supreme Court with exclusive power to 'make a final review of the constitutionality or legality of administrative decrees, regulations or actions.' The Constitutional Court responded that the jurisdiction of the courts is limited to collateral issues.

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pursued constantly since the early 1990s. The precedent President also adopted judicial reform as a top-priority agenda. The Presidential Committee on Judicial Reform, which was established by the joint initiatives of the President's Roh's Blue House and the Supreme Court in 2003, produced various reform suggestions until it finished its activities on 31 December 2006.

## 2. Judicial Review in Civil or Criminal Litigation: Prior Question

According to section 11 of the Act, in cases where the validity or the existence of an administrative disposition represents a prior question in civil litigation, the civil court can try and decide the question. In such a case, the civil court can be said to review the legality of the administrative action.<sup>34</sup> Therefore, when a disposition is seriously and evidently illegal, a civil court or a criminal court can rule it to be null and void. This seems to be a natural conclusion of the proposition that serious and evident illegality makes the disposition null from the beginning. If the illegality is evident to every person, a civil or criminal judge can also declare it so. Then, does a civil court have the power to invalidate a disposition on the grounds that it is illegal just like an administrative court does in a rescissory litigation? Courts have held that civil courts can only confirm the disposition invalid when the illegality is so serious and evident that the disposition is null. If a disposition is simply illegal, only courts having jurisdiction over administrative litigation can invalidate it. Though the Act is silent on the issue of criminal courts, courts have held the same with respect to them.

## 3. Judicial Review in Tort Litigation Against the State

Another occasion for judicial review exists when a person seeks damage for the harm caused by a public officer's wrongdoing in the course of their official work. Article 29(1) of the Constitution makes it clear that a person is entitled to be compensated by the state or public organizations for damages caused by an unlawful act committed by a public official. The Constitution also prescribes that in spite of the State's liability, the public official (wrongdoer) is not immune from his own liabilities.<sup>35</sup> The State Tort Liability Act prescribes that the state can seek compensation against the wrongdoer public officer only when his or her intention or gross negligence is proven. But the Act is silent on the issue of whether a complainant can sue the public officers or not. The Supreme Court's majority opinion on this issue was that a complainant can sue the public officers directly only when he or she was

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<sup>34</sup> In this case, the provisions of sections 17, 25, 26 and 33 shall apply in civil litigation.

<sup>35</sup> But it is not clear from the provision of the Constitution how broad a public officer's individual liability is. The controversy over the nature of the state's liability is also related to this. Some think it is the state's own liability much like a principal's liability for its agent's act but others argue that the state performs the public officer's duty to compensate as a kind of subrogation for the strong protection of the injured citizens' interest and the proper incentive to work for public officers.

intentional or grossly negligent, similar to the standard which applies when the state may seek compensation against the public officer.

There is no statutory provision concerning jurisdiction over the state's liability action. The courts have maintained a longstanding practice that a civil court, not an administrative court, has jurisdiction over such actions just as if they were tort actions among private persons. Many administrative law scholars have maintained Party Litigation at an administrative court would be the proper form of action and the proper forum for the tort action against the state. The 2004 Supreme Court amendment proposal prescribed that tort action against the state has to be undertaken as a party litigation at administrative court.

At present, the civil courts presiding over such tort actions must decide if the public officer's act is illegal or not. The scope of 'official acts' which may trigger the State's liability is much broader than that of 'administrative disposition.' The 'wrongfulness' at the tort action is judged on different standards from those for the 'illegality' at the appeal litigation. The courts consider the infringing result of an official act as well as the violation of a specific legal rule or principle. There are several decisions where civil courts at the tort litigation did not find any wrongful official act even though administrative courts invalidated an official decision as illegal.

# 10. Korean administrative cases in ‘law and development’ context

**Daein Kim**

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## I. INTRODUCTION

### 1. ‘Law and Development’ Movement in Korea

‘Law and Development (L&D)’ is a term usually used to describe legal assistance programs for developing countries and related academic work. This movement was initiated by developed countries such as the US, and European countries, followed by Japan. But this movement experienced ups and downs since its launch in the 1960s. Originally scholars sought to develop a theory on the role of law in state and market development that can be integrated into a general modernization theory. Furthermore they thought this modernization theory could be applied to developing countries as well (Trubek 2001: 8443).

However, this theory did not fit squarely with the developing countries’ cultural and political situation. The L&D movement was criticized as ethnocentric and naïve (Trubek/Galanter 1974: 1062–102). This critique was taken by many to be a denunciation of the movement. As a result, L&D lost its momentum. In the 1990s, however, this movement revived at the end of the Cold War and the collapse of communism in Eastern Europe and the former Soviet Union (Trubek 2001: 8443–4).

Recently this ‘law and development’ movement has gained popularity in Korea as well. The reason for that can be explained as follows. Developing or transition countries in Asia are becoming more interested in the Korean experience of economic development and the role of law. Since these countries regard the legal systems of developed countries as inaccessibly advanced, they think those systems are not appropriate for them. But considering the unprecedented rapid economic development of Korea, they think the Korean model of ‘law and development’ suits them better (Kwon 2006: 3–4).

In this movement, Korean scholars and practitioners are determined not to repeat the mistakes of previous L&D movements of developed countries

(Sim 2006: 275–305). Of course, we should not consider Korean experience as a universal model for other developing or transition countries. However, Korean experience gives a good lesson to other developing countries. Hence, it is important to see objectively the relationship between law and development in Korean history.

Many legal fields can be included in the legal system related to economic development. Antitrust law, regulation law, company law, intellectual property law are typical legal areas. Considering the Korean government's critical role in economic development, this paper will focus on the administrative law.

## **2. Administrative Law and Economic Development**

Administrative law deals with many legal areas concerned with public administration, such as industrial regulation, administrative procedure, administrative litigation, and information disclosure. All of these areas can be related to economic development. However, this chapter will mainly deal with two traditional administrative law issues: (1) discretionary power of government and (2) transparency of government.

These two issues are related, because control of discretionary power is often thought to be a critical ingredient of transparent government. This transparency is often considered to be an indispensable basis for economic development. The UN and OECD have repeatedly emphasized 'good governance' for economic development. Transparency is emphasized for two reasons (Kondo, 2002. pp. 7–12).

First, to prevent corruption. When people are left alone, they are more exposed to the temptations of corruption. Enhancing transparency in government means that the performance of public officials is open to the public. In this way, public officials can prevent themselves from being engaged in corruption. Prevention of corruption is closely related with economic development (Ehrlich/Kang, 2002, pp. 6–12). Developing countries receive Official Development Assistance (ODA) from developed countries or international organizations, but these funds are often used inefficiently. One of the main causes of such inefficiency is the corruption of public officials who deal with resources.

Secondly, to increase the predictability of government policies. There are many debates concerning the relationship between government and market. However, there is a consensus that if government's policies are predictable, market participants can rely on governmental policies and consequently will operate more efficiently. Enhancing the transparency of government is indispensable in guaranteeing the predictability of its policies.

But is this theory compatible with Korean experience? Was discretionary

power of government detrimental to economic development in Korea? Was transparency of government the basis of economic development at an early stage?<sup>1</sup>

In my view, the early stage of economic development in Korea (1962–1979) is more closely related with 'efficiency' of government rather than 'transparency' of government. This 'efficiency' is related to discretionary power of government conducted through 'administrative guidance' (*haeng-jeongjido*). Transparency of government became significant only after accomplishing basic economic development.<sup>2</sup>

### 3. Need for Analysis of Administrative Cases

For this argument, administrative cases will be mainly discussed.<sup>3</sup> There are two reasons for this approach. First, the judiciary usually takes a major role in controlling the discretionary powers of government. Thus, administrative case decisions concerned with discretionary power will show the actual degree of discretion used by government.

Secondly, in evaluating the degree of legal development in one country, the degree of gap between legal norm and reality is a critical issue. Case decisions take the role of narrowing this gap. Thus, administrative case decisions will show the actual stage of legal development in Korea.

In relating to discretionary power of government, informal 'administrative guidance' and its related cases will be mainly discussed. Using this informal administrative guidance under broad delegations of authority from the legislature, the state was able to maintain flexibility and achieve its goals without extensive legal procedures (Ginsburg, 2001, p. 586).

Three statutes and related cases will be dealt in relation to transparency: the Administrative Procedure Act, Information Disclosure Act and Government Procurement Act.<sup>4</sup> The Administrative Procedure Act provides the administrative

<sup>1</sup> In this chapter, 'economic development in the early stage' means 'economic development in President Park Chung Hee's regime' (1962–1979). In 1961, GDP per capita of Republic of Korea ranked 101st among 125 countries. In 1979, Korea ranked 49th. In this period, Korea can be evaluated to have accomplished basic economic development.

<sup>2</sup> On the role of state in economic development, see Chang, Ha-Joon, *Kicking Away the Ladder*, Anthem Press, 2002.

<sup>3</sup> In this chapter, 'administrative cases' mean all public administration related cases including constitutional or civil procedure cases.

<sup>4</sup> Of course, the Anti-Corruption Act is also a transparency related statute, but the Administrative Procedure Act and Information Disclosure Act are more closely related to good governance and transparency. So this chapter will mainly deal with those two statutes. On the Anti-Corruption Act in Korea, see Ehrlich Craig P./Kang, Dae Seob, 'Independence and Corruption in Korea', 16 *Colm. J. Asian L.* 1(2002).

interaction process between the people and the government. This process includes hearing, previous notice of administrative disposition, and previous notice of administrative plan, to name a few. The Information Disclosure Act secures people's right to know relevant information held by the government.<sup>5</sup> These two statutes are typical Acts in enhancing transparency. The Government Procurement Act provides the procedure that is needed for procuring goods, services, and works for government. Considering the huge amount of money that these procuring activities are concerned with, enhancing transparency in government procurement is crucial (OECD, pp. 6–12).

## II. DISCRETIONARY POWER – FOCUSING ON ADMINISTRATIVE GUIDANCE

### 1. History

'Administrative Guidance' (*haengjeongjido*) is defined as 'government's de facto exercise of power to induce private people into acting in a certain way to realize certain purposes of public administration'. One of the most crucial merits of administrative guidance is that it can be used flexibly without statutory provision. With this merit, the Korean government has widely used administrative guidance in the course of economic development (Hong, 2007, pp. 457–9).

According to recent research, administrative guidance was widely used for various purposes during President Park Chung Hee's regime (1962–1979) – more than 50 per cent of which were economic purposes. At that time, government provided incentives such as grants and tax breaks to companies which accomplished designated export goals. The government took active industrial policy based on unbalanced growth theory. The government's inducement and regulation of companies was conducted primarily by administrative guidance. In this process, the Economic Planning Board took a critical role (Han, 2006, p. 232).

Administrative guidance was hardly under administrative litigation because of its de facto nature. This is why we cannot easily find administrative guidance related cases during President Park Chung Hee's regime. Consequently, we can see that administrative discretionary power was widely used through

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<sup>5</sup> Professor Ginsburg highlights these two statutes' enactments as a major administrative law reform after 1987. Ginsburg, Tom, *The Politics of Legal Reform in Korea*, in: Tom Ginsburg ed., *Legal Reform in Korea*, RoutledgeCurzon, New York 2004, p. 7.

administrative guidance and the judiciary was reluctant to control this type of discretionary power.<sup>6</sup>

## 2. Current Situation

However, this broad use of administrative guidance was criticized for its authoritarian nature, and many scholars advocated the need for judicial control. In this context, the Constitutional Court intervened in an administrative guidance related case, the so call 'Kukje Group Dissolution Case'.<sup>7</sup>

In 1985, under President Chun Doo-Hwan's regime, the primary lender of Kukje Group, Korea First Bank, announced its plan to dissolve the Group. After a series of subsequent actions, Kukje was dissolved. But the true intention and legitimacy behind the dissolution were in doubt. The founder of the group filed a constitutional complaint, demanding nullification of the following series of exercises of governmental power for infringing on his fundamental rights: the Minister of Finance's decision to dissolve Kukje Group; the Minister of Finance's instruction to Korea First Bank to prepare for the dissolution by taking control of the finance of the Group's member companies and obtaining the right to dispose of them; and the Minister of Finance's instruction to Korea First Bank to release a press report about the dissolution.

In this case, the Constitutional Court ruled that the:

Minister of Finance's instructions to Korea First Bank (preparing dissolution and releasing press report) are not directives from upper to under administrative agencies, and these instructions trespassed the limit of administrative guidance which is conducted in expectation of private company's voluntary cooperation. Such public power's interventions virtually result in the dissolution of Kukje Group by enforcing compliance from the primary lender. These cannot be deemed dispositions, because these deeds were formally conducted by a private legal person, the primary lender of Kukje Group. However, as these deeds were substantially conducted by public agency resulting in dissolution of Chaebol, these can be an 'exercise of public power' which is required for Constitutional Complaint (*Heonbeopsowon*).

As witnessed, administrative guidance has been evaluated to have only de facto effect, hence it could not be an object of administrative or constitutional litigation. But in this case, the Constitutional Court controlled the 'ostensible'

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<sup>6</sup> At this point the following questions will be raised. Other developing countries' governments who have wide discretionary power did not succeed in economic development. What other factors enabled Korea to succeed? I think strong anti-corruption strategy through criminal procedure will be one of the answers. However, this issue is out of the scope of this chapter.

<sup>7</sup> Constitutional Court Decision, 29 July 1993 (89heonma31).

administrative guidance by ‘trespassing the limit of administrative guidance’ theory.

These case decisions indirectly inspired the enactment of the Administrative Procedure Act (APA) in 1996. In this statute, the principles of administrative guidance are provided as follows: ‘(1) The administrative guidance shall be made as little as necessary for the attainment of the purpose thereof, and shall not be unjustly exercised against the will or the counter party of administrative guidance. (2) An administrative agency shall not treat the subjects of administrative guidance disadvantageously because of the subjects’ non-compliance with the administrative guidance concerned.’

Overall, administrative guidance contributed to the efficient public administration and economic development at an early stage. But as the market economy was established, consensus was formed that administrative guidance can be detrimental to the establishment of the market economy. In this context, the Constitutional Court tried to control excessive administrative guidance, and related statutes were enacted.

### 3. Prospects

Although the use of administrative guidance is somewhat reduced, it is continuously used as an industrial policy. Recently, the Minister for Information and Telecommunications published administrative guidance relating to telecommunication rates, leading to a collective rate policy for enterprise. Should that be regulated as an unfair collaborative act under the Monopoly Regulation and Fair Trade Act, or is it exempted from this statute’s application?<sup>8</sup>

Scholars usually deal with this issue in the context of power distribution between ‘sector-specific regulatory institution’ and ‘general competition regulatory institution’. In the same line, this issue is related to the relationship between industrial policy and competition policy. In Korea, more emphasis was put on industrial policy until the 1970s, but the importance of competition policy increased from the 1980s, with the enactment of the Monopoly Regulation and Fair Trade Act in 1980. This shows economic development based on governmental initiative being replaced by market economy based on private sector initiative. But use of administrative guidance in some industries (e.g. IT industry) shows the need for industrial policy even after achieving basic economic development.

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<sup>8</sup> Monopoly Regulation and Fair Trade Act:

Article 58 (Legitimate Actions Taken Pursuant to Acts and Subordinate Statutes): This Act shall not be applied to legitimate acts of an enterprise or an enterprise’s organization as committed in accordance with any Acts or any of its decrees.

Although the Supreme Court accepts that lawfully published administrative guidance can avail the exceptions to the Monopoly Regulation and Fair Trade Act, in individual cases, the Supreme Court usually denies such exceptions, hence narrowing the scope of exemptions of this Act.<sup>9</sup> In principle, as a market economy is established, active use of administrative guidance should be diminished. However, lawfully conducted administrative guidance for the purpose of industrial policy should be acknowledged.

### III. TRANSPARENCY

#### 1. History

##### A. Administrative Procedure Act (APA) and Information Disclosure Act (IDA)

From the 1970s, many scholars advocated the need for the Administrative Procedure Act (APA), and as a result, the draft APA was first introduced in 1987. However it was not enacted then, because many bureaucrats insisted that this Act may hamper efficient administration, and it was too early to adopt this Act at that time in a Korean environment. Nevertheless, many scholars and civic groups continuously advocated the importance of this Act to enhance transparency of government. Finally the draft of APA was presented in 1994, and was enacted and promulgated on 31 December 1996, taking effect from 1 January 1998 (Kim Donghee, 2006, p. 365).

From the 1980s, many scholars and civic groups also advocated the enactment of the Information Disclosure Act (IDA), but it was delayed by fear of its potential adverse effects. In 1994, the Council for Information Disclosure was established within the Ministry of Government Administration, and this council proposed the draft of IDA. After public hearing, it was enacted and promulgated on 31 December 1996, and took effect from 1 January 1998 (Kim Donghee, 2006, p. 401).

Let's examine how the administrative case decisions affected the enactment of these two statutes. First, even before APA and IDA were enacted, their spirit was included in the Korean Constitution, and the Constitutional Court actively interpreted them. The Korean Constitution was first designed in 1948, and was amended nine times, with the most recent amendment in 1987. In the constitution of 1987, a due process clause was included (Article 12(1), (3)) and the Constitutional Court was founded on the basis of this Constitution. The Constitutional Court clearly ruled that the due process clause applied not only

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<sup>9</sup> Supreme Court Decision, 23 November 2006 (2004 du 8323).

to criminal procedures, but also to legislative and administrative procedures.<sup>10</sup> The freedom of speech and press clause has been provided from the Constitution of 1948 (present Article 21(2)) and the Constitutional Court recognized that the claim for information disclosure can be drawn from this clause.<sup>11</sup>

Secondly, prior to the enactment of these statutes, clauses related to administrative procedure (hearings etc.) were provided in individual statutes, and the Supreme Court actively interpreted them. The Supreme Court ruled as follows.

This statute provides that hearing (*cheongmun*) is necessary before public agency's unilateral administrative action that closes the private company's office. The purpose of this clause is to provide private companies with the opportunity to present evidence for their part and thus enable public agencies to act more prudently. As a result, hearing is a mandatory process prior to public agency's administrative action. If a public agency acts without a hearing, that administrative action is illegal, and should be abolished.<sup>12</sup>

Thirdly, prior to the enactment of APA and IDA, similar regulations existed in the form of directives (*hunryeong*), but the Supreme Court interpreted them passively. This attitude ironically enhanced the necessity of enactment of these legislative statutes. For example, there were the 'Prime Minister Directive on Administrative Procedure for the Protection of Civil Rights and Interest'<sup>13</sup> of 1989 and the 'Prime Minister Directive on Management of Administrative Information Disclosure'<sup>14</sup> of 1994. But the Supreme Court ruled that these directives had no legally binding force upon people, and thus it was not illegal to omit the procedure that was provided in these directives.<sup>15</sup> These decisions led to a consensus among scholars and practitioners that statutes legislated in parliament are necessary.

In this context, administrative case decisions affected enactment of APA and IDA either directly or indirectly, but these enactments are closely related with the establishment of democracy in Korea.

First, the local government of Cheongju city adopted the 'Municipal Ordinance on Administrative Information Disclosure'<sup>16</sup> in 1991, because

<sup>10</sup> Constitutional Court Decision, 24 December 1992 (9 2heonga8).

<sup>11</sup> Constitutional Court Decision, 4 September 1989 (88 heonma22).

<sup>12</sup> Supreme Court Decision, 14 June 1983 (93 nu 14).

<sup>13</sup> (*gukminui kwonikgujaell uihan haejeongjeolchae kwanhan gukmuchongri-hanryeong*).

<sup>14</sup> (*haejeongjeongbogonggaeunyeongjichim*).

<sup>15</sup> Supreme Court Decision, 9 August 1994 (94 nu 3414).

<sup>16</sup> (*haejeongjeongbogonggaejorye*).

many civic groups demanded the mayor's public spending be opened to public scrutiny. Cheongju's experience spread to other local governments. As a result, enactment of statutes at national level became a very natural process. This is a good example of grassroots democracy in Korea.

Secondly, Korean civic groups played an important role in the enactment of APA and IDA. The civil protest of June 1987 laid the foundation for democracy after years of military dictatorship. Through this civil protest, the Constitution was amended and a direct election system of president was adopted. Since then, civic groups shifted their focus from an anti-dictatorship movement to a legislative reform movement, and pressured the government to enact APA and IDA.

Comprehensively we see that administrative case decisions have been closely related with the establishment of democracy in Korea. We also find that democracy guarantees high transparency in government and the establishment of the market economy. There are many debates on the relationship between democracy and the market economy. I think Korean experience after the 1980s provides one example of democracy and the market economy going hand in hand.<sup>17</sup>

## B. Government Procurement Act

The Government Procurement Act has a somewhat different history. It deals with the process of procuring goods, services and works for public agencies. Since controlling budgets is crucial, this area was traditionally dealt with by public finance law, with government procurement being provided for in the Public Budget and Accounting Act<sup>18</sup> and Local Government Finance Act.<sup>19</sup>

However, nowadays government procurement is provided for in separate statutes. The 'Act on the contract in which state is party'<sup>20</sup> was enacted in 1995 (Central Government Procurement Act: CGPA), and the 'Act on the contract in which local government is party'<sup>21</sup> (Local Government Procurement Act: LGPA) was enacted in 2005.

The influence of the WTO Government Procurement Agreement (GPA) was absolute in enacting these statutes. Korea tried to join the GPA three times

<sup>17</sup> For example, Professor Chua asserts that democracy and market economy do not always go hand in hand especially in multi-ethnic countries. Overall, Korea has somewhat fewer problems in regard to multi-ethnicity. I think it can be one of the reasons that democracy and market economy got along very well in Korea from the 1980s. See further Chua, Amy, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *Yale L.J.* 1 (1998).

<sup>18</sup> (*yeosanheogyebeop*).

<sup>19</sup> (*jibangjaejeongbeop*).

<sup>20</sup> (*gukgall dangsajorohanun gyeoyake kwanhan beopryul*).

<sup>21</sup> (*jibangjachidanchaell dangsajorohanun gyeoyake kwanhan beopryul*).

during the Tokyo Round, but failed due to developed nations' discontent with Korean government's annexes. Korea eventually managed to enter the GPA in 1994 during the Uruguay round.<sup>22</sup> After joining this agreement, the Government Procurement Act was enacted in 1995 separately from the Public Budget and Accounting Law.

Even after the enactment of the Government Procurement Act, however, procurement by local government was still regulated by Local Government Finance Law. But in 2005, the Local Government Procurement Act was enacted separately from the Local Government Finance Law. Since LGPA was enacted 10 years after Korea's membership of WTO GPA, LGPA seems to have no relationship with the WTO GPA. But the opposite is true. The Local Government Procurement Act was enacted for the purpose of establishing the procurement law regime which corresponds to that of the central government. So WTO GPA indirectly influenced the enactment of the Local Government Procurement Act. The role played by administrative case decisions in the enacting of these statutes is as follows (Kim Daein, 2006, p. 86).

First, this enactment was little influenced by the Constitutional Court. This is due to the fact that the procurement law regime was traditionally considered as a part of private law (especially contract law), and many scholars thought that private law had relatively little relation to constitutional law.

Secondly, the Supreme Court has ruled that administrative litigation is permissible to debarment.<sup>23</sup> This illustrates the Supreme Court's efforts to strengthen the transparency of procurement by regulating the discretionary power of procuring agencies. Of course, this administrative case decision may not be seen as having had any direct effect upon the enactment of these statutes. But it laid a foundation for a new procurement law regime focusing on transparency.

Overall, administrative case decisions' influence on the enactment of these statutes is very limited. On the other hand, globalization based on WTO law took a pivotal role. WTO GPA affected domestic procurement law in two different ways. First, it enhanced transparency of procurement. But secondly, it also minimized the use of industrial policy by the Korean government (Kim Daein, 2006, pp. 83–125).

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<sup>22</sup> See further, Yang, Junsok/Kim, Hong-Youl, *Multilateral Discussions of Government Procurement and Implications for Korea*, KIEP, 2001.

<sup>23</sup> Supreme Court Decision, 23 August 1994 (94 nu 3568).

## 2. Current Situation

### A. Administrative Procedure Act (APA) and Information Disclosure Act (IDA)

Three most widely used provisions of the Administrative Procedure Act are: (1) procedures relating to disposition (*cheobun*), (2) previous notice of administrative legislation (*haejeongsang ipbeopyeogo*), and (3) previous notice of administrative plan (*haejeongyeogo*).

Let's look at one example of procedure relating to administrative action. Before sanctioning drunk driving, the standard for administrative action needs to be made public so that drivers know what level of alcohol intake leads to cancellation or suspension of their driver's license (Article 20).

Before imposing a disadvantageous disposition, the administrative authority should notify the title of the disposition, full name or title, and domicile of the parties concerned, and the factual ground and legal basis of the administrative disposition, etc (Article 21). Before imposing disposition, an opinion hearing procedure should take place. There are three kinds of opinion hearing procedure: hearing (*cheongmun*), public hearing (*gongcheonghoe*), and notification of one's opinion (*uigyeojaechul*). Of these three procedures, hearing or public hearing should take place when other individual statutes stipulate or public agency deems it necessary (Article 22).

The Supreme Court ruled that 'when previous notice of administrative action or the opportunity to express one's opinion is not guaranteed, the administrative action is illegal because of defect in the procedure.'<sup>24</sup>

When enacting, amending or abrogating legislation, the administrative bureau needs to notify it in advance through official journals, internet, newspapers or broadcasting networks (Article 41, 42). The period of this notice should be at least 20 days (Article 43). When the administrative bureau wants to establish, implement or revise plans which may heavily influence the lives of the people or cause any conflict in interest, it needs to announce it publicly beforehand (Article 45).

The Supreme Court ruled that if previous notice is not substantially guaranteed, administrative action is illegal because of defect in administrative procedure.<sup>25</sup> In relation to cases which are excluded from APA's application, the Supreme Court ruled as follows:

Article 21 Paragraph (4) Item 3 of APA stipulates that formal hearing requirement may not apply 'when reasonably deemed that there are grounds that hearing of opinions is impractical or the hearing is clearly unnecessary considering the nature of

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<sup>24</sup> Supreme Court Decision, 28 May 2001 (2000 du 10212).

<sup>25</sup> Supreme Court Decision, 28 May 2001 (2000 du 10212).

the dispositions concerned'. Whether there are these grounds must be determined by the nature of the administrative disposition concerned, and not by whether the hearing notice had been returned nor by the method of notification of the hearing. In addition, the fact that the party concerned with the administrative disposition had been absent on the date of the hearing notified as such, alone does not justify the administrative agency's infringing administrative disposition conducted without having opened the hearing required by the relevant Act or subordinate statutes. Therefore, an infringing administrative disposition without having undergone the process of a hearing on the grounds that the notice of the hearing had been returned or on the grounds that the party concerned with the administrative disposition had been absent on the day of the hearing shall be determined as unlawful.<sup>26</sup>

This shows the Supreme Court's effort to minimize the scope of exception to APA's application.

IDA emphasizes the principle of 'information disclosing' (Article 3), but allows exception on issues concerning national security, defense, unification, and diplomatic relations, and other private information which is evaluated to be seriously infringing upon an individual's privacy or freedom (Article 9). IDA also provides that all people have a right to apply for information disclosure (Article 5(1)), and urges public agencies to list and show all information they have, which should be easily accessed through the telecommunication network (Article 8(1)).

When asked to disclose a piece of information, the public organization needs to decide whether or not to disclose it within ten days from the date of the request (Article 11). National agencies operate a Committee on Information Disclosure in order to decide on which information to open or close to the public (Article 12). When it decides to disclose, it needs to notify the date and place of disclosure to the person requesting the information (Article 13).

In relation to information subject to non-disclosure, the Supreme Court ruled that the 'public agency's ordinance based on the statute' does not mean all ordinances based on delegation of statute. It only means specific ordinance which is concretely delegated from the statute. Thus the Supreme Court minimized the sphere of information subject to non-disclosure.<sup>27</sup> This approach was adopted in the revised 2004 IDA.<sup>28</sup>

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<sup>26</sup> Supreme Court Decision, 13 April 2001 (2000 du 3337).

<sup>27</sup> Supreme Court Decision, 11 December 2003 (2003 du 8395).

<sup>28</sup> IDA (revised in 2004) Article 9 (Information Subject to Non-Disclosure):

- (1) All information that is held and managed by public institutions shall be disclosed to the public: Provided, that the information falling under each of the the following subparagraphs may not be disclosed to the public:
  1. Information that is classified as a matter that needs to be kept secret or

In another related case, the Supreme Court tried to also restrict the scope of non-disclosure as follows.

Article 1, 3 and 6 of the Act prescribes that public institutions in principle shall disclose informations in their possession and management to the people in order to ensure people's rights to know and secure people's participation in state affairs and the transparency of the operation of state affairs. Thus, public institutions receiving people's request of disclosure must disclose informations unless non-disclosure grounds provided under each item of Article 7(1) of the Act are applicable. And in the case of non-disclosure, public institutions must plead and prove the reason why certain items of Article 7(1) of the Act apply to specific parts of information. After examining the information requested to be disclosed, public institutions should indicate that information disclosure in this case infringes on legal interests or basic rights of individuals. And thus we can say that rejection of such requests cannot be justified upon comprehensive grounds.<sup>29</sup>

In this way, the Supreme Court restrained the scope of non-disclosure.

In the 1996 IDA, 'people who had statutory interest' could protest, appeal, or file a lawsuit. However the Supreme Court ruled that 'anyone who is denied disclosure has statutory interest'<sup>30</sup> and this decision affected an amendment of this clause. In the present Act, if application for disclosure is denied, 'anyone who does not accept this decision' can protest to the administrative authority concerned (Article 18), or appeal to upper administrative authority (Article 19), or file a litigation in court (Article 20).

Overall, we see that administrative decisions heavily influenced the revision of the Information Disclosure Act. Many decisions were adopted by Legislature (Kyoung, 2004, p. 11). This shows one example of legal activism in Korea.<sup>31</sup>

## B. Government Procurement Act

The Central Government Procurement Act (CGPA) provides for two cases: procurement from national contractors and procurement through international

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closed under orders given under this and other Acts (limited to the rules of the National Assembly, the rules of the Supreme Court, the rules of the Constitutional Court, the rules of the National Election Commission, the Presidential Decree and municipal or local ordinances) ...

<sup>29</sup> Supreme Court Decision, 11 Decembre 2003 (2001 du 8827).

<sup>30</sup> Supreme Court Decision, 11 March 2003 (2001 du 6425).

<sup>31</sup> Professor Ginsburg asserts Korean administrative law reform shows more tendency toward legal activism than that of Japan. Ginsburg, Tom, 'Dismantling the "Developmental State"?' Administrative Procedure Reform in Japan and Korea', 43 *Am. J. Comp. L.* 585(2001), p. 586.

tender (competition). A Presidential Decree (Decree) and Ministerial Ordinance (Ordinance) were enacted by delegation of CGPA. And especially for international tender situations, the International Contract Dispute Resolution Council was established (CGPA Article 29). The international tendering process is further regulated by delegation of this statute by the Presidential Decree on Government Procurement through International Tender (Special Decree)<sup>32</sup> or Ministerial Ordinance on Government Procurement through International Tender (Special Ordinance).<sup>33</sup> Special Decree provides non-discrimination as a principle of international tender, and bans the discriminatory distribution of information (Article 4).

A typical example of transparency is the information disclosure clause. In international tendering, procuring agencies should comply with requests from bidders for information disclosure, and information concerning procurement practice or procedure should be included in the list of disclosure (Special Decree Article 17(2); Special Ordinance Article 4(1)). If this disclosure brings about the discouragement of legal execution or infringement of public interest, information disclosure can be denied (Special Ordinance Article 4(3)).

In domestic tendering, procuring agencies or the contracting officer should disclose the following information via a 'designated information processing tool' (online): purpose of contract, bidding time, calculated or anticipated price, method of contract, name of contractor, size of contract, overall price of contract, etc (Decree Article 92-2, Ordinance Article 4(3)). Nevertheless, in local government procurement, information related to contracting is not included in the list of disclosure (LGPA Article 84).

With regard to the method of contracting through international tendering, there are three types: open competition, selective competition, and single-source contract (Special Decree Article 7). This was stipulated according to the WTO GPA. For domestic tendering, there are four types: open competition, limited competition, selective competition, and single-source contract (CGPA Article 7, LGPA Article 9). Open competition is the principal method. It is a similar enactment to that of the UNCITRAL Model Law on Government Procurement. It can be evaluated positively because there is a high chance that it will strengthen transparency in Korea (Kim Dae-In, 2006, pp. 137–8).

Disputes regarding government procurement are dealt with by the judiciary, and the Supreme Court rules apply civil procedure to the disputes. This is because the Supreme Court deems government procurement contracts as private contracts. One reason for this is because the Government Procurement

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<sup>32</sup> *(tuikjeongjodaluilwihan gukgall dangsajarahanun gyeyake kwanhan beopryulsihaengryeong tuikbyeolgyujeong).*

<sup>33</sup> *(tuikjeongjodaluilwihan gukgall dangsajarahanun gyeyake kwanhan beopryulsihaengtuikbyeol gyuchik).*

Act provides '[government procurement] contract should be concluded by consent of coordinate parties, each party should fulfill this contract in good faith' (CGPA Article 5).<sup>34</sup> 'Lawsuit for confirmation of awarding contractor' is the most frequently used remedy in civil procedure. There are some government procurement disputes which are dealt with in administrative lawsuits. A conspicuous example of this is a dispute regarding debarment. The Supreme Court deems debarment as an administrative disposition, and permits quashing litigation (*chuisososong*).

### 3. Prospects

#### A. Administrative Procedure Act (APA) and Information Disclosure Act (IDA)

Despite their short history, the APA and IDA have greatly strengthened transparency in the government. While many analyses concerning possible causes of Asia's financial crisis in 1997 abound, many agree that the financial supervisory system's malfunctioning fuelled the crisis. Conversely, enhanced transparency in government with the adoption and implementation of APA and IDA is expected to contribute to overcoming weaknesses in the Korean economic regulation system.

Nevertheless, there are shortcomings in these statutes. In the case of the APA, hearing (*cheongmun*), which is a core element, is undertaken passively and only when another statute calls for it or when administrative authority deems it necessary is it taken into effect (Hong, 2007, p. 482). Public hearings (*gongcheonghoe*) on controversial issues are often disrupted by opposing groups.<sup>35</sup>

As for the Information Disclosure Act, a large amount of information is still closed to the public, infringing on the people's right to know. Moreover, many critics say that Information Disclosure is often misused for private interest, thus weakening the statute's real function of monitoring administrative agencies (Kyoung, 2004, p. 3).

Policies and institutions need to improve in order to overcome these weaknesses, yet more importantly, people's understanding of the rule of law also needs to be upgraded to ensure the success of these statutes. In most countries,

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<sup>34</sup> Supreme Court Decision, 11 September 2001 (2001 da 33604).

<sup>35</sup> Recently a public hearing relating to the Korea-US FTA (Free Trade Agreement) was disrupted by anti-FTA civic groups. Many civic groups in Korea think that disrupting the public hearing is one of the methods to express their opinion clearly. Of course there are many reasons for this phenomenon. Civic groups should not be solely blamed for this phenomenon. Because public hearings in Korea were traditionally only a formality.

people's awareness of the rule of law can be described as progressing through three 'stages'. In the first stage, the sense of responsibility (imposed by government) only is emphasized. In the second stage, the rights of the people are emphasized in contrast with the first stage. In the third stage, people's rights and voluntary sense of responsibility are balanced. Misuse or abuse of two Acts in Korea shows that the country is still in the 'second stage'.<sup>36</sup>

However, many indicators point to the expectation that understanding of the rule of law will develop from the second to the third stage. Many important decisions are pouring out from the Constitutional Court and Supreme Court, and these decisions are widely discussed among non-legal professionals.<sup>37</sup> Also, the rapid development of the Internet facilitates access to legal resources. These phenomena are expected to balance the sense of responsibility and the sense of right in Korea.

## B. Government Procurement Act

With respect to the Government Procurement Act, e-procurement is established successfully, enhancing transparency in government tremendously.<sup>38</sup> But the single-source contract (*suuigyeyak*) is often indicated as a main source of corruption (Jeong, 2006, pp. 107–46). Many efforts have been made to fight against corruption in the single-source contract scheme, but this problem is as yet unsolved.

The reason for corruption surrounding the single-source contract lies in a limited scope of trust. Francis Fukuyama asserts that 'trust' as a social capital is indispensable in the development of capitalism. The enlargement of 'level of trust' in one society minimizes the transaction cost, and it can be an engine for developing capitalism. He points out that Korea has limited scope of trust (limited to blood relationship, school tie, etc.) (Fukuyama, 1996, pp. 178–200).

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<sup>36</sup> This theory is an application of Professor Park's so-called '3 stages of administrative law development theory' to people's understanding of the rule of law. Professor Park asserts administrative law in Germany and Korea developed through 3 stages: Authoritarian Stage→Liberal Stage→Communitarian Stage. See further Park, Jeong-Hoon, *The Purpose and Direction of Administrative Law Education*, in: *The System and Methodology of Administrative Law*, Parkyoungsa, Seoul 2005, p. 75.

<sup>37</sup> Professor Lim says the Constitutional Court 'has processed thousands of complaints from ordinary citizens, and has no doubt helped give ordinary Koreans a sense of rights they had lacked for so many decades under various forms of authoritarian rule'. Lim, Ji-Bong, *The Korean Constitutional Court, judicial activism, and social change*, in Tom Ginsburg ed., *Legal Reform in Korea*, RoutledgeCurzon, New York 2004, p. 18.

<sup>38</sup> See further, Apec, *To Enhance Efficiency and Transparency in the Public Procurement Sector by Utilizing the Government electronic Procurement System (GePS)* – submitted by Republic of Korea [2003/SOMIII/GPEG/009].

In a case of a procuring agency evaluating qualification for contract in breaching the standard stipulated in Presidential Decree on Government Procurement Law, the Supreme Court ruled that:

breaching the standard stipulated in Presidential Decree on Government Procurement Law does not automatically lead to nullification of the contract. The breach should have such gravity as enormously infringing the fairness of the tendering process, and the other party knew or could have known this situation, or it should be evident that this awarding or conclusion of contract was initiated by infringing the good custom or other established social order. Only under this special circumstance, government procurement contract is rendered void.<sup>39</sup>

The above decision is based on two theories. One is a view that government procurement contracts are private law contracts. The other is that public finance law has no legally binding effect on people. But these theories should be criticized for two reasons.

First, it does not reflect the legal nature of the Government Procurement Act. As separated from Public Finance and Accounting Law, the newly enacted Government Procurement Act adopted many clauses concerning transparency. It increased public law elements in the Government Procurement Act. The Supreme Court should have paid more attention to the legal nature of the Government Procurement Act (Kim Dae-In, 2006, p. 110).

Secondly, it does not correctly reflect the enactment history of the Government Procurement Act. Under WTO GPA's influence, the Government Procurement Act strengthened the protection of unsuccessful bidders. On that perspective, denying the legally binding effect towards people is not persuasive (Kim Dae-In, 2006, pp. 110–11).

In considering the public law element of this contract, major transparency related clauses should be deemed mandatory, so that violation of the clauses leads to nullification of contract. For example a 'tendering nullification clause' or 'method of contract clause' should be interpreted to be mandatory.

More fundamentally, we should raise the following issues: 'Is it right to deal with government procurement disputes principally by civil procedure?' If we consider government procurement as a public contract, disputes arising therefrom should be handled by the administrative procedure (Kim Dae-In, 2006, pp. 148–60).

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<sup>39</sup> Supreme Court Decision, 11 December 2001 (2001 da 33604).

#### IV. CONCLUSION

In a Law and Development context, Korean administrative cases present a good example of how they are related to public governance and economic development. From the above arguments, we can see the following four points.

First, Korean economic development in its early stages (1962–1979) was indebted more to ‘efficient’ government rather than ‘transparent’ government. Most of these efficiencies were accomplished by the public agency’s broad discretionary power through ‘administrative guidance’. In this period, the judiciary was reluctant to engage in government’s discretionary power conducted through administrative guidance. After accomplishing basic economic development, more emphasis was laid upon transparency of government.

Secondly, in each stage of economic development, the Korean government used globalization differently. In the early stage, the Korean government supported enterprises to increase export through administrative guidance. Globalization in this period was somewhat limited. After establishing basic economic development, the Korean government faced liberalization of the global economy in a more positive manner. So strengthening transparency of government procurement through joining WTO GPA took place in this stage.

Thirdly, in establishing a legal system for transparency of government, it was important to actualize the spirit embodied in the Constitution. The Supreme Court and the Constitutional Court took a critical role to make the Administrative Procedure Act and Information Disclosure Act work well according to the spirit of the Constitution. In addition, the democratization of Korean society was a basis for this phenomenon.

Fourthly, in order for transparency-related statutes to firmly establish their roots, people’s awareness of the rule of law will have to increase. Many important decisions are pouring out of the Constitutional Court and the Supreme Court, and these decisions are widely discussed among non-legal professionals. And Internet access to legal resources is also helping. These phenomena are expected to increase people’s awareness of the rule of law.

The international economic environment has changed a lot in contrast with that of Korea’s early economic development, so the Korean experience cannot be applied universally to other developing countries. However, even in today’s world, the role of the state in economic development should be emphasized, and I think the Korean experience can be an important reference from which developing countries could learn.

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# 11. Principles and structure of patent litigation

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## I. INTRODUCTION

The current principles and structure of litigation in each country reflect the legal system and economy of that country which, historically, have been in a constant state of change. Looking at the history of the Korean economy throughout the past half-century,<sup>1</sup> the role of patent litigation in Korea has undergone dramatic changes: while patent law did not work efficiently until the 1980s, the importance of patent protection increased very rapidly in the 1990s and during the 21st century, and accordingly, the volume and quality of patent litigation has increased as well. GNP per capita increased from 100 U.S. dollars in the 1960s to more than 16,000 U.S. dollars in 2007, and export of goods increased from 60 million U.S. dollars to more than 200 billion U.S. dollars throughout that same period.<sup>2</sup> The history of economic development in Korea has clearly displayed changes both in the general structure of domestic industries and in the role of patent law and litigation. Until the early 1980s, economic development was made possible mostly by labor-intensive industries, which were supplied with a highly educated but low-wage labor force. In the mid-1980s, however, due especially to labor unrest and sharp wage increases, the pace of economic development slowed down considerably. As labor-intensive and low-tech industries in Korea lost their competitiveness, it became clear that Korea needed technology-intensive industries to maintain its economic development.<sup>3</sup> Although the Patents Act had existed before the 1980s, the importance of patent protection was only recognized in the mid-1980s and beyond.

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<sup>1</sup> Since Korea was subject to Japanese colonialism for most of the first half of the 20th century, it is meaningless for Korea to consider her own economy or legal system.

<sup>2</sup> Ministry of Finance and Planning, Main Economy Index (2008).

<sup>3</sup> Sang-Hyun Song and Seong-Ki Kim, The Impact of Multilateral Trade Negotiations on Intellectual Property Laws In Korea, 13 *UCLA Pac. Basin L.J.* 118 (1994).

During the course of the resulting dramatic transformation of patent law and litigation practices, the two-tier litigation system modelled after Continental patent law has been challenged and criticized, and at the same time, American influence on the field of patent law has also appeared. Parallel to developments in the U.S., Korean patent law has adopted university ownership of patents,<sup>4</sup> the doctrine of equivalents,<sup>5</sup> and other pro-patent characteristics.

Before going into detail regarding the principles and structure of patent litigation, it would be useful to briefly describe general features of patent litigation in Korea. Once a patent is issued, a patentee may bring suit against someone who has allegedly engaged in patent infringement. Two procedures are available to obtain legal relief: first, requesting an injunctive remedy through a preliminary injunction action, and secondly, seeking damages or a permanent injunction stemming from claims of patent infringement. Unlike the U.S., patent infringement in Korea is a criminal offense subject to prosecution. More specifically, if a patentee brings forth an accusation to the public prosecutor's office, the prosecutor's office will file a criminal suit against the alleged patent infringer, and if proven guilty, a person who infringes a patent right or exclusive license can be sentenced to up to seven years imprisonment or up to a fine of 100 million Korean won (Patent Act, Art. 225).

In general, there are two defenses to such a suit: first, the alleged infringer may argue that the patentee's patent is invalid ('invalidity defense'), and secondly, the alleged infringer may argue that even if the patent were valid, the products in question do not actually infringe upon the patent ('non-coverage defense'). With regard to the invalidity defense, the Patent Act states that an invalidation trial must convene to determine the validity of a patent (Patent Act, Art. 133). Even if the elements of novelty and inventive step are missing, a registered patent is considered valid; therefore, before the invalidation trial decision is finalized, courts cannot separately find a patent to be invalid throughout the course of infringement proceedings. In this way, Korea's Patent Act is very different from that of the U.S., where the invalidity defense is allowed within the context of an infringement suit. Regarding the non-coverage defense, in addition to arguments that a defendant's product or service differs from a plaintiff's patented invention, the Patent Act allows patent infringement defendants to opt for a 'trial to confirm the scope of a patent right' to verify that their product/service is outside the scope of an existing patent right. In the following sections, both substantive and procedural issues relating to patent dispute trials will be discussed.

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<sup>4</sup> Section 10 of the Invention Promotion Act.

<sup>5</sup> Decision of 21 August 2001, 98Hu522 (Korean Supreme Court).

## II. DISPUTE RESOLUTION THROUGH TRIAL

### 1. The Significance of the Trial

Appealing a general administrative disposition usually only requires bringing a cancellation hearing to court, whereas appealing decisions of the Korean Intellectual Property Office (KIPO) requires appellants to request a trial at the Intellectual Property Tribunal (IPT) before initiating a cancellation hearing in court. This is due to the ‘administrative trial prerequisite principle’, in which decisions of the KIPO and its examiners are respected as expert decisions. It is doubtful, however, that forcing an invalidation trial or a trial to confirm the scope of a patent right separately from a patent infringement suit is really beneficial to a patentee and his opponent because these two trials are, in essence, adversarial. Although in the past, the trials were allowed in the Supreme Court only after a decision by the Board of Appeals, the Supreme Court requested constitutional review to challenge this procedure on the grounds that it violated citizens’ right to trial according to law in the presence of judges. While the Constitutional Court was reviewing the case, the Patent Act was amended to create the Patent Court of Korea on March 1, 1998 and the Patent Court now exercises exclusive jurisdiction over all appeals from the decisions of the IPT.

### 2. Invalidation Trial

An invalidation trial is a means, upon the request of an interested party or examiner, of retroactively invalidating a patent right if the right violates certain invalidation criteria as set forth in relevant law. The Patent Act, unlike Anglo-American law, requires that all patent invalidation claims be resolved in an invalidation trial. When the validity of a patent is in question as part of an infringement suit, the courts may suspend the proceedings in such a suit until an invalidation trial is conducted (Patent Act, Art. 164).

Participation in a patent invalidation trial is limited to interested parties or the examiner. The scope of interested parties often becomes a main issue in such cases. Often, the assignee of the patent right and the licensee of the patent are both considered interested persons as assigning and licensing a patent usually involves compensation.<sup>6</sup> Although courts have sometimes ruled that the licensee of a patent does not constitute an interested party, this excessively limits the scope of interested parties such that invalid patent rights are left

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<sup>6</sup> Decision of 29 May 1984, 82Hu30 (Korean Supreme Court). For more information regarding design invalidation, see the decision of 25 March 1980, 79Hu78 (Korean Supreme Court).

unchallenged. There have also been situations in which an interested party loses its status during trial and the parties (the interested party and the registered patentee) agreed to discontinue the proceedings or assign the rights to the patent.<sup>7</sup> This interpretation, however, also excessively limits the scope of interested parties by preventing invalidation of so-called ‘weak patents’ and, as a result, only works to discourage technical innovation.

The patentee may request a correction of the patent during the course of an invalidation trial (Patent Act, Art. 133*bis*). The IPT may conduct an *ex officio* trial examination without the request of the parties and also discover necessary evidence without request (Patent Act, Art. 157–159). Grounds that have not been pleaded by a party or intervener in a trial may be examined; however, in such cases, the parties and interveners must be given an opportunity, within a designated period, to state their opinions regarding the grounds. The rationale behind allowing such statements is both to prevent unforeseen harm to the parties and also to preserve an appropriate and fair trial.<sup>8</sup> On this view, the invalidation trial is, in essence, not a judicial proceeding – where the rights and obligations of parties are adjudged strictly based on law – because it allows patentees to correct their patents and enables the IPT to conduct *ex officio* trial examinations; it is, rather, a quasi-judicial proceeding where efficient dispute resolution is provided through similar means.

### 3. Trial to Confirm the Scope of a Patent Right

A ‘trial to confirm the scope of a patent right’ is a quasi-judicial trial in which the IPT determines whether the allegedly infringing product falls within the scope of a patent right at issue in a patent right dispute. The Patent Act states that either a patentee or an interested party may request a trial to confirm the scope of a patent right (Patent Act, Art. 135). The trial to confirm the scope of a patent right, similar to any other confirmation trial (*Feststellungsklage*), consists of both an active confirmation trial and a passive confirmation trial; the former occurs where the patentee actively sets the scope of their patent right and the latter occurs where the opposing interested party requests confirmation on their working method’s non-infringement. The Patent Act also allows for multiple confirmation trials as the trials are instituted on a patent claim basis.

There are two complex issues that arise in the context of trials to confirm the scope of a patent right: first, whether it is appropriate under this trial process to differentiate the scopes of two separately registered patent rights,

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<sup>7</sup> Decision of 23 October 1990, 89Hu2151 (Korean Supreme Court); Decision of 26 November 1991, 91Hu240 (Korean Supreme Court).

<sup>8</sup> Decision of 9 February 2006, 2003Hu1994 (Korean Supreme Court).

and secondly, how to determine the scope of a patent right in relation to an invalidation trial where all or part of a registered patent is publicly known or worked. Regarding the first issue, it is questionable whether both an active trial to confirm the scope of a patent right (where the earlier registrant argues that the later registered patent infringes upon its patent) and a passive trial (where the later registrant argues that their patent does not infringe upon the earlier registered patent) are accepted. Some courts have held that the latter (passive trial) falls within the procedural purpose of the trial to confirm the scope of a patent right<sup>9</sup> whereas the former (active trial) does not because arguments set forth in it are essentially the same as those dealt with in an invalidation trial.<sup>10</sup>

The second issue is whether it is legal to invalidate the scope of a patent right not through an invalidation trial but via a trial to confirm the scope of a patent right, when all or an integral part of an invention is publicly known or worked. The Supreme Court has affirmed that the scope of a patent right cannot be accepted<sup>11</sup> with regard to patent claims which are publicly known or worked at the time of filing of a particular patent application. Although some inconsistent cases exist,<sup>12</sup> the Supreme Court generally denies the scope of a patent right not only when an invention is exactly identical to a 'publicly known or worked invention' (thus lacking novelty)<sup>13</sup> but also when an invention was easily created by a person with ordinary skill on the basis of a 'publicly known or worked invention' (thus lacking inventive step).<sup>14</sup> An interesting point is that courts base their conclusion that a defendant's invention does not lie within the scope of a plaintiff's patent right not because the right itself is invalid or is identical or easily created from a publicly known or worked invention, but upon the argument that the defendant's invention merely utilizes a publicly known or worked invention.<sup>15</sup> In other words, although you cannot invalidate an invention lacking inventive step in a trial to confirm the scope of a patent right (unlike an invalidation trial), you can confirm that a patent claim that is easily created from a publicly known or worked invention does not lie within the scope of a right in question. The important question is whether this 'publicly known or worked invention'

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<sup>9</sup> Decision of 28 April 1992, 91Hu1748 (Korean Supreme Court); Decision of 23 April 1985, 84Hu19 (Korean Supreme Court); Decision of 30 July 1996, 96Hu375 (Korean Supreme Court).

<sup>10</sup> Decision of 20 December 1996, 95Hu1920 (Korean Supreme Court).

<sup>11</sup> Decision of 26 July 1983, 81Hu56 (Korean Supreme Court Full Bench).

<sup>12</sup> Decision of 2 June 1992, 91Ma540 (Korean Supreme Court).

<sup>13</sup> Decision of 26 July 1983, 81Hu56 (Korean Supreme Court Full Bench).

<sup>14</sup> Decision of 27 April 2004, 2002Hu2037 (Korean Supreme Court); Decision of 30 October 2001, 99Hu710 (Korean Supreme Court).

<sup>15</sup> Decision of 27 April 2004, 2002Hu2037 (Korean Supreme Court).

defense can also be used in civil or criminal suits as it is in the trial to confirm the scope of a patent right.

#### 4. Appealing a Decision

Appealing an IPT invalidation decision or trial to confirm the scope of a patent right occurs through the Patent Court of Korea (Patent Act, Art. 186). Although the Patent Court is similar in many ways to the United States Court of Appeals for the Federal Circuit (CAFC), the two differ immensely in that the Patent Court does not have jurisdiction in regular civil cases, such as claims for damages in patent infringement suits, whereas the CAFC does act as the appellate court in such cases. Before the Patent Act was amended on 5 January 1995, decisions by the KIPO Board of Appeals were appealed directly to the Supreme Court. The Supreme Court, intimating that the Board of Appeals system was unconstitutional, requested on 25 August 1993 that it be subjected to constitutional review. The system's unconstitutionality was argued on the grounds that 1) a non-judicial 'board' acted as the final court that dealt with questions of fact, violating Art. 27 Section 1 of the Constitution of Korea ('All citizens shall have the right to be tried in conformity with the law by judges qualified under the Constitution and the law'); 2) finalization of findings of fact in a patent trial occurred at the Board of Appeals rather than the judicial branch, violating the Separation of Powers doctrine; and 3) administrative trials were allowed in the High Court whereas patent trials were not, violating the right to equality.

The Constitutional Court rendered a decision that the system was 'unconformable to constitution' in that although the Board of Appeals system violated the constitutional right to trial, the right to equality, and provisions relating to the Separation of Powers doctrine,<sup>16</sup> the system was deemed 'unconformable to constitution' so as to limit the repercussions and confusion of rendering the half-century-old Board of Appeals system wholly unconstitutional. Other reasons for the decision included the 27 July 1994 amendment to the Court Organization Act and the 5 January 1995 amendment to the Patent Act, which allowed for the Patent Court to replace the Board of Appeals system beginning on 1 March 1998.<sup>17</sup>

The 27 July 1994 amendment to the Court Organization Act stipulated that a special High Court level Patent Court was to be established on 1 March 1998. The KIPO, on the other hand, integrated the existing examination board and Board of Appeals into a new IPT, and the appeals to this tribunal were to

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<sup>16</sup> Art. 11, para. 1; Art. 27, para. 1; Art. 37, para. 2; Art. 101, para. 1 of the Constitution of the Republic of Korea.

<sup>17</sup> Decision of 28 September 1995, 92*HunGa*11 (Korean Constitutional Court).

be lodged to the Patent Court. In this context, the Patent Court essentially replaces the Board of Appeals as the judicial body that determines questions of fact in order to protect the right to trial. In determining questions of fact in patent trials that require highly technical and professional knowledge, the Patent Court, however, is to have a Technical Examiner participate in the trial who states opinions throughout the adjudication process (Court Organization Act Art. 54*bis*). The Technical Examiner system is similar to the Technical Judge system of Germany's Federal Patent Court in that a technical professional participates during trial but differs in that Korean Technical Examiners can only submit advisory opinions and cannot render final decisions. This is similar to Japan's Appeal Examiner system, and in this sense, the Technical Examiner system in Korea is a creative hybrid of Germany's Technical Judge and Japan's Appeal Examiner system.

### III. REQUIREMENTS OF PATENT REGISTRATION AND THE SCOPE OF PROTECTION

#### 1. Standard to Determine 'Inventive Step'

If a claimed or filed invention falls exactly upon a single prior art, the invention is construed as lacking novelty, whereas if the constituent elements of the invention derive from two or more prior art materials, the novelty of the invention is affirmed. In such cases, the inventive step element may be deemed lacking if a person with ordinary skill in the art to which the invention pertains could have easily made the invention.

In evaluating inventive step, courts have generally employed a standard of a person with ordinary skill in the art to which the invention pertains and have construed the time of the filing as the controlling date. When comparing a filed invention to a prior art, if the former has difficulty in its element, remarkability in its effect, and uniqueness in its purpose, the inventive step element is confirmed.<sup>18</sup> Specifically, the standard of 'difficulty in its element, remarkability in its effect, and uniqueness in its purpose' should involve an inquiry into whether or not a person of ordinary skill in the art to which the invention pertains could have easily predicted the invention, but in actual practice, if the 'difficulty in its element, remarkability in its effect, and uniqueness in its

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<sup>18</sup> Decision of 23 August 2002, 2000Hu3234 (Korean Supreme Court); Decision of 12 March 1999, 97Hu2156 (Korean Supreme Court); Decision of 24 April 1998, 96Hu2364 (Korean Supreme Court); Decision of 23 August 2002, 2000Hu99 (Korean Supreme Court); Decision of 28 June 2002, 2001Hu2658 (Korean Supreme Court); Decision of 23 August 2002, 2000Hu3234 (Korean Supreme Court).

purpose' of the filed invention can be found when comparing the filed invention with prior art material, the invention is considered to have the element of inventive step. There are, however, some differences to consider in different fields. For example in the fields of machinery, car manufacturing, electricity, electronics, and communications, the difficulty in its element is important, whereas in medicine, chemistry and biotechnology, remarkability in its effect is relatively more significant (Han 2007, p. 9).

In the event that only one single prior art exists, determining inventive step through directly comparing the elements, effect, and purpose of the two would yield the same result as determining whether a person with ordinary skill in the art to which the invention pertains could have easily made the invention because only the one prior art is compared to the filed invention. When, however, two or more prior arts exist and the filed invention is derived from combined elements of the multiple prior arts, it is questionable whether determining 'a person with ordinary skill in the art to which the invention pertains could easily have made the invention' can be achieved through determining the 'difficulty in its element, remarkability in its effect and uniqueness in its purpose.' This is because if you directly compare a prior art and a filed invention on a one-on-one basis when several prior arts exist, inventive step may be denied when 'a person with ordinary skill in the art to which the invention pertains' could have easily made the invention, even if 'difficulty in its element, remarkability in its effect and uniqueness in its purpose' are established. Also, if a patent examiner or a court comprehensively compares the filed invention with prior art in light of the differences in element, effect, and purpose, this may result in the court's failure or neglect to adjudge whether a professional in the technical field could have easily combined or utilized two or more prior arts in the invention. This is especially true regarding software inventions, because software methods involve not only software technology but also business methods or other non-software technologies; thus, comparisons in the field of software occur among more than two prior arts, and therefore, comparing only the differences in element, effect, and purpose falls short in determining inventive step.

## **2. A Prior Art's Teaching, Suggestion, and Motivation**

As stated above, when two or more prior arts exist, it is not easy to compare differences in element, effect, and purpose. Even if differences are found, it is even more difficult and subjective to determine inventive step. Thus, in practice, the patent office and courts determine whether a person with ordinary skill in the art to which the invention pertains could have easily made the invention often relying on examining any teaching, suggestion, and motivation of combining prior arts. An interesting point is that many Patent Court deci-

sions affirm inventive step by finding that no teaching, motivation, or suggestion from prior art would allow for a person with ordinary skill in the art to which the invention pertains to have easily created an invention, despite a possible lack in inventive step when only looking at element, effect, and purpose.<sup>19</sup> Examining whether teaching, motivation, and suggestions from prior art would enable a person with ordinary skill in the art to which the invention pertains to have easily created an invention seems valid and appropriate because the lawmaker's intent of the Patent Act regarding inventive step was to issue patent rights as an incentive for inventions that contribute to technological advancement. It is inconvenient, however, that specific criteria do not exist to determine how specific the teaching, suggestions, and motivations must be in order to determine whether it was easy to combine the elements of prior arts. In other words, more specific analysis and criteria must be provided to negate inventive step; whether teaching, motivation, or suggestions that require combining the elements of prior arts needs to be specifically expressed in the prior art or whether, even if the teaching, motivation, or suggestion is not specifically expressed in the prior art, a person with ordinary skill in the art to which the invention pertains could have easily created an invention through the teaching, motivation, or suggestion.

In the U.S., where much discussion and many court decisions on this subject exist, the Federal Court has adopted the 'TSM test' (teaching, suggestion, or motivation test) in order to prevent the dangers of hindsight; an invention that was difficult for a person with ordinary skill in the art to which the invention pertains to create during the patent registration, in hindsight could be deemed easy to create during the trial or examination stage, thus negating inventive step. For the past decade, however, the CAFC has tightened the standards of the TSM test. The court, for example, has ruled that even when suggestion from a prior art is found, if the suggestion still required extensive testing and experimentation in order to create the invention, inventive step cannot be denied.<sup>20</sup> The courts have also stated the Patent and Trademark Office has the burden of proving that it placed the rationale behind denying non-obviousness on record and, thus, cannot simply rely on the examiner's conclusion to reject non-obviousness because of a 'prior art's hint or suggestion.'<sup>21</sup>

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<sup>19</sup> 99*Heo*2464 (Patent Court); 2002*Heo*1508 (Patent Court); 2004*Heo*7388 (Patent Court); 2004*Heo*7890 (Patent Court); 2002*Heo*2983 (Patent Court); 2005*Heo*4263 (Patent Court); 2005*Heo*3512 (Patent Court); 2004*Heo*3942 (Patent Court).

<sup>20</sup> *In re Bell*, 991 F. 2d 781 (Fed Cir 1993); *In re Deuel*, 51 F. 3d 1552, 1559 (Fed Cir 1995).

<sup>21</sup> *In re Sang-Su Lee*, 277 F. 3d 1338, at 1343–6 (Fed Cir 2002).

The CAFC has been criticized for tightening the standards of the TSM test, thus loosening the boundaries of inventive step, which resulted in the excessive issuing of patents. Amidst such criticism, the Supreme Court reviewed and adjusted the TSM test. In *KSR International Co. v. Teleflex Inc.* the Supreme Court held that the CAFC's application of the TSM test was too strict and that the test must be applied more flexibly to uphold the fundamental principle of determining obviousness.<sup>22</sup> The Supreme Court's decision indicated that it is more reflective of the basic notion of inventive step to deny an invention of non-obviousness when an invention used in a certain industry can be easily modified due to demand in design or other market demands by a person having ordinary skill in the art to which said subject matter pertains. In other words, even though prior art documents do not explicitly show the teaching or motivation to combine two prior art references, if a person having ordinary skill in the art to which said subject matter pertains could have easily combined the prior art references considering market demand, the invention can be rejected on grounds of obviousness. The Supreme Court's adjustment of the TSM test has led to an increased rejection on behalf of the CAFC on grounds of obviousness.<sup>23</sup>

### 3. Patent Invalidation and Abuse of Rights

The elements of inventive step and non-obviousness are central in both infringement and invalidation actions, which are separated under a two-tier system in Korea. The two-tier litigation system which involves the division of infringement actions in judicial courts and invalidation actions in the IP Tribunal has often led to time-consuming and high-cost dispute resolution processes.<sup>24</sup> Thus, although the Patent Act, in essence, only negates the effects of a patent right through a patent invalidation trial, the courts have allowed the 'publicly known or worked invention' defense – where defendants argue that

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<sup>22</sup> *KSR International Co. v. Teleflex Inc.*, 127 S.Ct 1727 (2007).

<sup>23</sup> *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.* F. 3d (Fed. Cir. 2007).

<sup>24</sup> In a famous dispute relating to patented inventions for baby diapers, the patentee brought a lawsuit against its competitor by arguing that its competitor's diapers infringed on its patents. The defendant responded to the lawsuit by bringing another action for invalidity of the patent in the Intellectual Property Tribunal. The invalidity action eventually went up to the Supreme Court, which took seven years to render its final decision that all the claims but one were obvious and invalid. Decision of 18 September 1998, 96Hu2395 (Korean Supreme Court) and Decision of 12 April 2002, 99Hu2150 (Korean Supreme Court). It was eventually found in the following infringement actions that the one valid claim of the patentee was not infringed by the defendant's product. Decision of 23 November 2005, 2003Na22112 (Seoul High Court).

the allegedly infringing product derives from a publicly known or worked invention – to prove that their invention does not fall under the scope of plaintiffs' patent rights.<sup>25</sup> A question arises whether this defense can also be used in civil or criminal proceedings, where infringement of rights is argued.

There are two types of proceedings in infringement litigation: preliminary injunction proceedings, where a temporary injunction against the infringement is sought; and main proceedings, where a permanent injunction against the infringement or a claim for damages is sought. The Supreme Court has affirmed decisions dismissing temporary injunction motions because the need to enjoin an invention does not exist when an invention that includes a 'publicly known and worked' technology cannot win in the main proceedings.<sup>26</sup> Although precedent granting a temporary injunction against the infringement of rights exists,<sup>27</sup> where the invention in question has novelty but is perceived to possibly lack inventive step, it is interpreted that the Supreme Court can deny the motion because the patent right may be invalidated through the lack in inventive step.<sup>28</sup>

During main proceedings stemming from patent infringement, the Supreme Court has ruled that 'even before the patent invalidity trial is finalized, the court may determine whether an invalidating factor exists, and filing a motion seeking an injunction or damages when a patent right is clearly invalid is construed as an abuse of rights.'<sup>29</sup> Within the same theoretical background in the recent case relating to a printer's photo-sensitive drum, the Seoul High Court dismissed claims for injunction and damages given that when a patent/invention in question is clearly invalid due to lack of inventive step, claiming such injunction and damages is an abuse of rights.<sup>30</sup>

Comparing this with the aforementioned Supreme Court decisions relating to the trial to confirm the scope of a patent right and the preliminary injunction case, it is valid to deny motions for injunction and claims for damages when a patent right lacks inventive step even in the main proceedings of rights infringement cases. This is because there is no reason for the Patent Act to encourage inventions lacking in inventive step, and allowing for injunctions and damages based on a patent right lacking in inventive step prevents the public and competitors from using publicly known and worked inventions.

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<sup>25</sup> Decision of 27 April 2004, 2002Hu2037 (Korean Supreme Court); Decision of 30 October 2001, 99Hu710 (Korean Supreme Court).

<sup>26</sup> Decision of 12 February 1993, 92Da40563 (Korean Supreme Court); Decision of 10 November 1994, 93Ma2022 (Korean Supreme Court).

<sup>27</sup> Decision of 2 June 1992, 91Ma540 (Korean Supreme Court).

<sup>28</sup> Decision of 12 February 1993, 92Da40563 (Korean Supreme Court).

<sup>29</sup> Decision of 28 October 2004, 2000Da69194 (Korean Supreme Court).

<sup>30</sup> Decision of 25 January 2005, 2003Na8802 (Seoul High Court).

Allowing an invalid patent right that lacks inventive step to be exercised goes against the Patent Act's purpose and harms free competition, thus constituting an abuse of rights, and therefore exercise of such invalid rights must be denied. Because software patents have the highest registration rate and because thousands of patent/inventions are involved in one single IT product (Shapiro 2001), software patents especially must be subject to a high level of scrutiny in such regards.

In the same light, can the 'publicly known or worked' defense also be invoked in criminal trials?<sup>31</sup> If an invalidation decision is finalized, thus retroactively invalidating the patent right, an infringement suit can no longer exist (Criminal Procedure Act, Art. 420, para. 6).<sup>32</sup> The Supreme Court has decided as a matter of law that even before an invalidation decision is rendered, publicly known and worked inventions cannot fall under the scope of a patent right. This interpretation is also applied in criminal cases, and thus, if all or part of a patent's scope is publicly known, the patent infringement suit is denied.<sup>33</sup>

#### **4. The Patent Right's Scope of Protection**

In essence, the protected scope of a patent right is limited to what is written in the patent claim(s) section of a patent registration, and in the patent claim(s) 'the matter for which protection is sought in one or more claims', or 'claim(s),' must be concisely and clearly stated (Patent Act, Art. 42; Art. 97). Therefore, the 'all elements rule' – the elements of the patent claim(s) must all be present in the allegedly infringing product, or manufacturing process thereof, to constitute an infringement – governs patent right infringement as the basic standard. However, if the 'all elements rule' is applied too strictly, a slight modification or improvement can lead to circumventing infringement, and ultimately the patent right cannot be protected. To prevent this result, the doctrine of equivalents, an Anglo-American interpretation of law, has been introduced and used by the Supreme Court.<sup>34</sup>

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<sup>31</sup> For additional information, see decision of 12 November 1993, 92Do3354 (Korean Supreme Court) in relation to denial of design infringement.

<sup>32</sup> For additional information, see decision of 16 May 1996, 93Do839 (Korean Supreme Court) related to denial of trademark infringement. Decision of 29 January 1991, 90Do2636 (Korean Supreme Court) has been vacated.

<sup>33</sup> Decision of 29 May 1984, 82Do2834 (Korean Supreme Court); Decision of 9 December 1986, 86Do1147 (Korean Supreme Court); Decision of 25 May 2006, 2005Do4341 (Korean Supreme Court).

<sup>34</sup> See the decision of 28 July 2000, 97Hu2200 (Korean Supreme Court) and the decision of 21 August 2001, 98Hu522 (Korean Supreme Court).

The doctrine of equivalents states that even though the allegedly infringing product is not completely identical to the literal elements of the patent claims, if the allegedly infringing product has a substantially identical process, acts through a substantially identical function and yields substantially identical results, patent infringement is deemed to have occurred. In determining equivalence by comparing difference in elements of the infringing device and the claimed invention, the standard applied is whether a person with ordinary skill in the art to which the invention pertains could have easily substituted the claimed invention with an equivalent device. Although the concept of easiness in substitution is not the same as inventive step, determining easiness ultimately derives from the degree of inventive step. Inventions that have a strong inventive step – basic inventions or pioneer inventions – are, in a broad sense, accepted as substantially identical or equivalent devices, whereas improvements are only accepted in a narrow scope. Therefore, the doctrine of equivalents must discretely and selectively be applied to devices pertaining to industries, such as the software industry, where inventions are usually created by modifying existing devices. The courts seem to concur with this argument.

In a case where an injunction applicant owned the patent right to ‘the method of providing game services via telecommunications devices’, the applicant argued that the respondents SK Telecom and LG Telecom had infringed its patent right by providing game services using a Wireless Application Protocol (WAP). The Seoul District Court dismissed the temporary injunction motion stating that despite the applicant’s ownership of a valid, non-obvious patent/invention, (1) the game service provided by the respondents via LAN could not be seen as an equivalent substitute to the applicant patent/invention’s notion of the Internet, (2) the respondent’s WAP server was not an equivalent means to the applicant’s server, and (3) the applicant’s patent/invention and the respondent’s game service differed in their elements.<sup>35</sup>

Also, when a patent applicant or patentee intentionally reduces the scope of patent claim(s), they are estopped from citing the doctrine of equivalents for the purpose of broadening the scope of their patent claim(s).<sup>36</sup>

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<sup>35</sup> Decision of 21 March 2002, 2001*KaHap*3105 (Seoul District Court).

<sup>36</sup> Decision of 30 August 2002, 2001*Heo*5992 (Patent Court), decision of 26 November 2004, 2003*Da*1564 (Supreme Court).

## IV. REMEDIES IN PATENT INFRINGEMENT

### 1. Reevaluating the Injunction System

We have already discussed how the ‘publicly known or worked invention’ defense and the ‘lack of inventive step’ defense are effective defenses in temporary injunction trials and permanent injunction motions during patent infringement litigation. If a patent/invention lacks inventive step, the patent infringement does not exist, and thus, it is theoretically sound for a court to dismiss a temporary injunction or permanent injunction motion in such cases. However, it is difficult under the current law to dismiss an injunction motion when a patent is deemed to have inventive step, and is thus valid, and is infringed.

Injunctions are remedial means of protecting exclusive rights such as real rights. Although rights to remove interference and rights to prohibit infringement are not explicitly laid out in the Civil Act or the Copyright Act, the courts have consistently granted satisfactory remedies for infringement on personal rights.<sup>37</sup> Unless infringement on property rights or personal rights is clear, the courts have denied injunctions against business disruptions<sup>38</sup> and environmental pollution (Yoon 1995, p. 9).<sup>39</sup> Even in reviewing domestic theories on injunction claims, the majority opinion is that although a legislative action may exist for allowing injunctions in relation to the Monopoly Regulation and Fair Trade Act, there is no need to allow for an injunction as a general remedy for all illegal acts because the Civil Act allows for the right to remove interference, and ample precedent from judgments on personal rights exists (Kim 1999, pp. 22–43).

In situations involving infringement on personal rights, the Supreme Court has allowed the granting of injunctions because personal rights cannot be protected through the mere awarding of monetary damages or reputation restoration dispositions.<sup>40</sup> Also, because infringement on personal rights tends to be continuous and recurring, unlike one-time illegal acts such as car accidents, the benefit and protection of law is only possible through preemptive injunctions. Thus, the primary reason behind allowing injunctions for infringement of personal rights is not because personal rights have the characteristics

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<sup>37</sup> Decision of 12 April 1996, 93Da40614; 40621 (Korean Supreme Court).

<sup>38</sup> Decision of 15 October 2002, 2002KaHap2377 (Seoul District Court), decision of 24 October 2002, 2002KaHap1031 (Seoul District Court).

<sup>39</sup> Decision of 23 May 1995, 94Ma2218 (Korean Supreme Court). However, the lower courts of Japan, which share a similar legal system, have allowed injunctions on the grounds of pollution (decision of 27 November 1975, Osaka High Court).

<sup>40</sup> Decision of 12 April 1996, 93Da40614, 40621 (Korean Supreme Court).

of absolute rights but because they are the most efficient and satisfactory remedy due to the unique characteristics of personal interest. This can be evidenced by reading the text of the statutes relating to such matters.<sup>41</sup> Therefore, although the Civil Act is silent on the issue of allowing injunctions against illegal acts, the courts generally allow injunction motions if an illegal act is recurrent and monetary compensation is not enough to protect the necessary interests governed by law.

In the same sense, even if a statute provides for an injunction in a given situation, the court must be able to deny the motion when protecting the interest of a patent is not desirable due to the purpose of the law or the public's interest. Looking closely at the Civil Act's provisions on property, an owner's right to property, though exclusive in nature, does not automatically grant the right to remove interference. In cases regarding legal superficies, the owner of a plot of land cannot exercise the right to remove interference against the owner or occupant of a building (removal of building) and can only claim rent (Civil Act, Arts. 305, 306; Provisional Registration Security Act, Arts. 10, 12; Act on Stumpage, Arts. 3, 6).<sup>42</sup> The Supreme Court, stretching this notion even further, stated that although legal elements of legal superficies are not met, the owner of a plot of land cannot exercise his right to remove interference under the notion of 'customary legal superficies.'<sup>43</sup> The reasoning behind the Civil Act and behind the Supreme Court decision to deprive the owner of the right to remove interference and injunction under legal superficies is not only related to inferring implied consent but also stems from the fact that it is not in the interest of the litigants and the public to do so and is, in fact, more reasonable to allow only for claiming damages through rent.

Although the Patent Act also limits patent rights in a similar way as legal superficies (Patent Act, Arts. 103; 107; 138), it is difficult to state that it is possible to deny an injunction when the requirements for injunction are met. Some argue that injunctions must always be granted because compared to property rights, a patent right is socially beneficial in that it promotes inventions (Kieff 2001; Wagner 2003). It is undeniable that the Patent Act limits the court's powers in judging the legality of an injunction motion. Although the concept of injunction has sprouted from the law of equity and, thus, should, at

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<sup>41</sup> Decision of 27 September 2001, 99HunBa77 (Korean Constitutional Court) describes the Unfair Competition Prevention and Trade Secret Protection Act as restrictive legislation rather than empowering legislation, supporting this interpretation of law that the injunction clause of the Unfair Competition Prevention and Trade Secret Protection Act stems not from an absolute right but is grounded in protective reasons.

<sup>42</sup> For similar reasons, a land owner's right to dispose of stumpage is also limited.

<sup>43</sup> Decision of 28 April 1995, 94Da61731 (Korean Supreme Court), decision of 24 September 1991, 91Da21701 (Korean Supreme Court).

least in the United States, be subject to flexibility, most CAFC decisions that confirm the existence of infringement have automatically led to granting injunctions.<sup>44</sup> However, in response to the inherent dangers of abuse of software patents, the Supreme Court has re-established the principle that the effects on the litigants as well as on the public good must all be considered when ordering an injunction.<sup>45</sup>

## 2. Injunction Motions by Patent Trolls

Although *eBay v. MercExchange*<sup>46</sup> was significant in that the U.S. Supreme Court reaffirmed the four elements required to issue an injunction, it is unclear whether all injunction requests by a patent troll are to be denied or what type of software patent abuse should be regulated. In other words, there is a need to define a standard that specifically denotes when an injunction is dismissed despite patent infringement. It seems difficult to figure out an appropriate standard which distinguishes patent trolls from universities or private inventors. While universities and private investors are similar to patent trolls in the sense they do not exploit their patent/invention to run a business, universities and private investors need more incentive and more remedies for their inventions than patent trolls who are merely transferees or licensees. Moreover, given the fact that the requirements for injunctions under American and Korean law differ from each other, the U.S. Supreme Court's decisions do not directly help interpret our Patent Act. According to Korea's Patent Act, which bestows upon patentees the right to injunction upon infringement, the courts can dismiss an injunction only in cases of patent right abuse even when a patentee proves infringement of a patent right. However, the U.S. Supreme Court's decision is honorable in that it does not automatically allow an injunction order without reviewing the effects not only to the actual parties involved in the litigation but also to the public. Following this interpretation is of great value to Korea's Patent Act because if the Patent Act allows for an abuse of patent rights defense in patent infringement cases, the theoretical support would be the consideration of effects on the competitors, including the litigants, on social interest, and the purpose of the Patent Act as a whole. The example mentioned above is an illustration of dismissing an injunction motion on the grounds of patent right abuse of an obvious patent.<sup>47</sup> It is a difficult question to determine

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<sup>44</sup> *eBay, Inc. v. MercExchange, LLC*, 401 F. 3d 1323 (U.S. Court of Appeals for the Federal Circuit).

<sup>45</sup> *eBay, Inc. v. MercExchange, LLC*, 126 S. Ct 1837, 164 L. Ed. 2d 641 (Supreme Court, 2006).

<sup>46</sup> *eBay, Inc. v. MercExchange, LLC*, 126 S. Ct 1837, 164 L. Ed. 2d 641 (Supreme Court, 2006).

<sup>47</sup> Decision of 25 January 2005, 2003Na8802 (Seoul High Court).

whether an abuse of patent right is allowed in situations besides those involving a patent that lacks inventive step.

When an abuse of patent violates the Monopoly Regulation and Fair Trade Act, it is subject to a notification by the Fair Trade Commission and also subjects the abuser to liability for damages. It may also be subject to Adjudication for the Grant of a Nonexclusive License or Trial for Granting a Nonexclusive License under the Patent Act. In all other abuse of patent cases, the injunction must be dismissed. In the past, the Patent Act deemed a faulty patent as an abuse of patent right and ordered compulsory licensing or cancellation of the patent right (Patent Act, Art. 52).<sup>48</sup> For unknown reasons, the 1973 Patent Act's abuse of patent right provision has been deleted, but the 1973 provision is evidence of the existence of the abuse of patent doctrine, and can be interpreted as applying to today's Patent Act.

An abuse of patent right can exist not only in the passive exercise of a patent right but also in an active exercise. An active abuse of patent right occurs when one agrees to a patent licensing agreement with a third party and disrupts the production and business by arguing an illegal extension of the patent right (Patent Act in 1973, Art. 52, clause 6; US Patent Act, 35 USC Sec. 271, d). An important question is what the elements are to constitute an abuse of patent right. Because there are no court findings on this matter, the Fair Trade Commission's 'Guidelines of reviewing undue exercise of intellectual property rights' to the Monopoly Regulation and Fair Trade Act could serve as a potential standard. Of course, abuse of patent rights is not limited to the examples set out in the Fair Trade Commission's Guideline, so there are additional cases where the abuse of patent right is determined.

Patent trolls exercising patent rights that lack inventive step in order to stop others from producing goods are considered to abuse such rights as they are exercising rights that do not fall within their scope of protection in order to hinder others from production and business.<sup>49</sup> However, considering that it is, in practice, difficult to clearly define the notion of a patent troll, it cannot be presumed an abuse of rights when a patent troll exercises a valid patent right. Therefore, even if a patentee does not engage in direct business activity, but receives license fees from a third party, they cannot automatically be pinned as a patent troll, and their claim to damages and injunctions cannot be seen as an abuse of rights. However, if a patent right is acquired without the purpose of providing commercial services, manufacturing products, or research and development, but for the sole purpose of receiving excessive license fees and

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<sup>48</sup> Amended 31 December 1973, Legislation 2658.

<sup>49</sup> Decision of 25 January 2005, 2003Na8802 (Seoul High Court) stated that it is an abuse of patent right to lodge a claim for damages or injunction based on an obvious invention, although the patentee cannot be deemed a patent troll.

damages using the injunction as a threat, abuse of rights may be allowed. However, although using an injunction to hinder one's production and business constitutes an abuse of patent right, it is not always an abuse of patent right to claim damages. Therefore, claims for both damages and injunctions must be dismissed for patent rights that lack inventive step, but damages claims for infringement of a valid patent should be accepted.

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