Journal of Korean Law

Seoul National University College of Law
BK LAW 21

INFORMATION ABOUT THE JOURNAL OF KOREAN LAW

The Journal of Korean Law is published twice annually, in February and August, by the College of Law, Seoul National University (SNU). Please address all correspondence to:

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Style. The *Journal of Korean Law* has not yet formally adopted its own style guidelines. In the meantime, please refer to *The Bluebook: A Uniform System of Citation* (17th ed., 2000).

Postmaster. Please send address changes to the *Journal of Korean Law*, College of Law, Seoul National University, Shillim-dong San 56-1, Kwanak-ku, Seoul 151-743, Korea.

ISSN 1598-1681

Journal of Korean Law

The Constitutional Court System of Korea: The New Road for Constitutional Adjudication

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Abstract

Over the course of its relatively short history, the Republic of Korea's Constitutional Court has broken the mold of its precursory bodies and has enlarged its role and significance in the country's system of judicial review. The success of the Court's progressive activity and efforts of its surrounding environment to remove the obstacles hindering its rightful function has brought about the just scrutiny of public power by independent constitutional authority. Its fourteen years of recorded achievement have become one of the most important sources of scholarship and teaching in the discipline of law. It has injected the necessary doses of reality often absent in the application of Korean legal dogma. As an introduction to the articles that follow, this article provides a general overview of the encouraging example the Constitutional Court system has set in Korea: from the background of its precursory bodies, implementation, structure, and jurisdiction to its impact and significant activity since its implementation.

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I. Introduction

One of the most remarkable developments in Korean Constitutional history since 1987 has been the significant activity of the Constitutional Court. In spite of its relatively short period of operation, its influence has been far-reaching. It has altered public attitudes toward the constitution and law in general, and toward constitutional discipline as well.[1] As the reform and democratization process has accelerated since the inauguration of the new civilian government in 1987, its activities have been pronounced. Simply, the statistics discussed below signify its active role in invigorating constitutionalism.

Throughout the history of Korean constitutional change, the judicial review system has never been the center of controversy. Since each constitutional amendment has primarily concentrated on the term of the presidency, the method of presidential election or the executive branch's relationship to the legislative, the judicial review system has not received the full attention it deserves. In practice, the courts have not been active in judicial review.[2]

The current 1987 Constitution adopted a new system of judicial review-the Constitutional Court system. Though the 1960 Constitution, drafted just after the student revolution of April 1960, provided a continental European type of Constitutional Court, it never had the opportunity to function because of the ensuing May 1961 military coup. Thus its precedent has more theoretical than practical relevance.[3]

A series of articles on the current Constitutional Court in this issue will review its activities and issues, such as the jurisdictional conflict between the Constitutional Court and the Supreme Court, the modes and effect of judgments, the scope of constitutional petition, the general trends of Constitutional Court decisions, the analyses of particular cases and so on. This article hopes to provide a general

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1) The author wrote an article with another jurist on this issue ten years ago when its activities were still in the incipient stage. *See* James West and Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 The American Journal of Comparative Law, 73-119(1992).

2) Dae-Kyu Yoon, Law and Political Authority in South Korea 150-199(Seoul: Westview Press & Kyungnam University Press, 1990).

3) However, the jurisdiction of the constitutional petition devoid of the 1960 Constitution was created in the 1987 Constitution. West and Yoon, *supra* note 1, at 77.

introduction and overview of the Constitutional Court system, so one may better understand the discourse that follows.

Before introducing the current system, a summary of previous judicial review systems is needed to understand the historical development of the Korean judicial review system.

II. Historical Overview

A constitution provides several different ways to protect its constitutional order. One of the most important parts is the review of the constitutionality of laws. However, such an authority has been given to various organs according to place and time. Except during the Third Republic (1962-1972) when the Supreme Court exercised the authority to review the constitutionality of legislation, since the inauguration of the first constitution in 1948, Korea has maintained a continental European type of judicial review system in one form or another.

Since the inauguration of the first constitution, one distinctive aspect of the Korean judicial review system has been the division of labor according to subject matters. Although the review on the constitutionality of a legislation [Beomnyul],[4] that is, a law which has been duly passed by the legislature, has been at issue as is introduced below, lower laws other than legislation have consistently been reviewed by the ordinary courts. In the latter case, the Supreme Court has exercised the final authority in deciding their constitutionality.[5] Therefore, in this article, a "law" which is discussed in connection with judicial review means a "legislation" or "statute" enacted through due process by the National Assembly.

In the past, the activities of the judicial review organs have been significantly influenced by the political atmosphere of the time. Insignificant or dormant activities of previous organs aptly reflect the nature of respective political powers.[6]

The first constitution of the First Republic of Korea (1948-1960) gave the authority to review the constitutionality of legislation to the Constitutional Committee, a practice that reflects a combination of German and French practices. The Committee was

4) The 1987 Constitution, Art. 53.

5) The current constitution is not an exception. *See* Art. 107(2).

6) For the details on the Korean judicial review systems, *see* Yoon, *supra* note 2, at 151-170.

composed of a Vice President who was *ex officio* chairman, five Justices of the Supreme Court, and five members of the legislature. This composition was occasioned by the prevailing view that judicial review involved the courts and the legislature with only minimal executive participation and thus would ensure fairness and impartiality of constitutional adjudication. In its eleven-year history, the Constitutional Committee reviewed only seven cases altogether, among which only two laws were decided unconstitutional.

The Second Republic (1960-1962) adopted the Constitutional Court system in place of the Constitutional Committee, a decision influenced by the successful history of the then West German Constitutional Court. As mentioned above, it never had an opportunity to function because of the military coup of May 1961. The same system was ultimately incorporated in the current constitution of the Sixth Republic (1987-present) and has producd remarkable outcomes.

The Third Republic (1962-1972) adopted the American style of judicial review system as the Supreme Court was designated as the main protector of the constitution. Judicial review by the courts, encouraged by the successful record in the United States, was launched with the expectation that certain politicized issues would be subject to litigation. The courts had many opportunities to review the constitutionality of laws, but were reluctant to declare a law unconstitutional. Although the lower courts occasionally made daring holdings of unconstitutionality, in fear of politicizing the judiciary, the Supreme Court maintained a principle of self-restraint by reversing all except one of the lower courts' holdings of unconstitutionality.[7)]

Under the Fourth (1972-1980) and Fifth(1980-1987) Republics, the Constitutional Committee was reinstated for the review of the constitutionality of legislation that was never actively discussed as intended during the period of authoritarian political power. The Committee reviewed no legislation during its existence. Unlike the previous Constitutional Committee of the First Republic, its jurisdiction was extended to impeachment and dissolution of political parties. In addition to lawyers, high officials and law professors with more than 20 years professional experience in legal matters were eligible for membership on the committee. Remarkably, the Constitutional Committee remained completely inactive throughout its existence.

The latest constitution of the Sixth Republic (1987-present) adopted the

7) For the decisions of constitutionality, *seeid.* at 171-194.

Constitutional Court system. As we shall see later, the Constitutional Court has been very active in exercising its authority to review the constitutionality of state actions including state legislation. In addition to judicial review power, the Court has vast authority to secure the constitutional system.

Apart from the successful experience in Europe, the adoption of the Constitutional Court system in Korea was not based on theoretical ground but was a result of a compromise between political parties in existence at the time the constitution was being drafted.[8] The inoperation of the Constitutional Committee between 1972-87 and the disinclination of the Supreme Court to take a leading role in defining the content of "constitutionalism" may account for this compromise.[9] Those involved in the drafting of the constitution may have thought that the future activity of the Constitutional Court would follow that of its ineffective predecessors and hardly imagined the actual results its inauguration would bring.

III. Jurisdiction and Organization

The newly created Constitutional Court not only enjoys a broad jurisdiction but is also in a better position to exercise its authority since obstacles residing in the process of previous systems have been removed. Three articles of the constitution are devoted to the Constitutional Court. The details were materialized by implementing legislation-the Constitutional Court Act (CCA).[10]

The jurisdiction of the Court is defined in Article 111 of the Constitution as follows:

1. Questions of the constitutionality of laws upon request of the courts
2. Impeachment
3. Dissolution of political parties
4. Competence disputes between state organs; and
5. Constitutional petitions.

8) The Constitutional Court, The Ten-Year History of the Constitutional Court [Heonbeop Jaepanso 10 nyeonsa] 72-73(Seoul, 1998).

9) West and Yoon, *supra* note 1, at 77.

10) Law No. 4017 of August 5, 1988, entered into force September 1, 1988. It was amended as Law No. 4408 of November 30, 1991.

Article 111 also provides the procedure to appoint nine Justices of the Court and defines their necessary qualifications. Nominations are limited to persons qualified as judges, having successfully passed the state judicial (bar) examination.[11] Three Justices are nominated by the President, three by the National Assembly, and three by the Chief Justice of the Supreme Court. The Presiding Justice of the Court is designated by the President with the consent of the National Assembly.

Article 112 fixes the tenure of the Justices at six years with the possibility of reappointment. The same article provides that Justices may not engage in partisan political activities, and that they may be removed from office during their terms only by impeachment or conviction for a serious criminal offense.

Article 113, the final article concerning the Constitutional Court lays down the principle that at least six of the nine Justices must concur on Constitutional Court decisions, except in cases presenting intragovernmental jurisdictional dispute, in which case a simple majority is sufficient. This article further states that the specifics of the organization of the Court are to be determined by implementing legislation and that subject to such legislation the Court is authorized to establish procedural and internal administrative regulations.

The current Constitutional Court system has been improved by removing the important legal obstacles residing in the previous systems. Constitutional petition was created in its jurisdiction to protect fundamental rights when existing laws do not afford remedies through ordinary court processes for unconstitutional state action.[12]

A more important improvement concerns the process of reviewing the constitutionality of legislation. Under the Constitutional Committee system of the

11) Justices are appointed from among eligible persons who are forty or more years of age and have been in any of the following position for fifteen or more years: (1) Judge, public prosecutor, or attorney; or (2) A person who is qualified as an attorney and has been engaged in legal affairs for or on behalf of a governmental agency, a national or public enterprise, a government-invested institution or other corporation; or (3) A person who is qualified as an attorney and has been in a position higher than assistant professor of jurisprudence in a recognized college or university. CCA, Art. 5(1). The same qualification is required for the Justice of the Supreme Court. Court Organization Act (Law No. 3992 of December 4, 1987, lastly amended on January 29, 2001, as Law No. 6408), Art. 42.

12) Article 68(1) of CCA provides: Any person who alleges that his fundamental rights guaranteed by the Constitution have been infringed upon through the exercise or nonexercise of public power may petition for relief or remedy to the Constitutional Court through the procedure of Constitutional Petition, excluding the judgement of the ordinary court. However, if any relevant procedures for relief are provided by other laws, no Constitutional Petition request shall be made without first using such procedures.

previous constitutions of 1972 and 1980, the Committee could not exercise its reviewing authority unless an ordinary court requested *ex officio* or upon the parties' motion to review. Therefore, the ordinary courts had the authority to initiate a reviewing process. If the ordinary courts did not make this request, the Committee had no chance to review at all. In fact, this was the case under the Constitutional Committee system during the fifteen year period in which no requests were forwarded to the Committee, hence no reviews were made by the Committee.[13)]

Under the current Constitutional Court system, however, the ordinary courts' authority to request constitutional review is no longer an obstacle since the parties concerned can file a petition directly to the Constitutional Court when an ordinary court has rejected their request for review.[14)] The passive or reluctant attitude of ordinary courts cannot be an obstacle to the Constitutional Court to exercise its reviewing authority anymore. As we will see later, the Court is very active in exercising its authority in its newly democratized environment.

The Constitutional Court Act created two classes of Justices without any textual basis in the Constitution: six of the nine are "standing Justices" while the remaining three are "non-standing Justices." The standing Justices serve full-time and are entitled to the same "remuneration and privileges and rights" enjoyed by the Justices of the Supreme Court. The non-standing Justices have an "honorary" status and receive no salary for their service, although they are entitled to an allowance for expenses connected with their work.

At the time the Act was passed, the introduction of the distinction between standing and non-standing Justices seems to have lacked any rationale beyond the expectation that the number of cases referred to the Constitutional Court would not be so large as to require the full-time service of all nine Justices in consideration of the passivity and dormancy of previous organs. To the contrary, however, since its beginning, a substantial number of cases have been docketed in the Constitutional Court. Commentators called for the Act to be amended to provide all nine Justices with the same full-time status, and such an amendment eliminating the "non-standing" status

13) Yoon, *supra* note 2, at 164-68.

14) Article 68(2) of CCA is provided for this occasion, by saying that "Any party to a court proceeding whose request for referral to the Constitutional Court for judgment on the constitutionality of a law was rejected by the court of original jurisdiction may have recourse to the Constitutional Court to obtain a final and proper judgment."

was finally adopted by the National Assembly in November 1991.[15]

Although the Constitutional Court has administrative apparatus and a secretariat to carry out its role,[16] the assistance of professional jurists is widely utilized. Therefore, the Constitutional Court has "constitutional research officers" as staff to assist the Justices.[17] In addition, the Court can request other state institutes to second their staff to that of the Constitutional Court research officers.[18] In fact, the Court gets assistance from judges, prosecutors and law professors temporarily seconded, for two years, from the courts, prosecutor's offices and universities. While, in the early stage after its inauguration, the Court has relied mainly on those lawyers seconded to it, as time passed, it successfully recruited its own permanent staff and continues to do so. For example, as of mid-1991 the Court had two permanent research officers but five judges, three prosecutors and one academic as seconded researchers. However, in early 2001, full-time research officers of its own rose to nineteen while thirteen temporarily seconded researchers serve to assist the Justices.[19] The unprecedentedly active role and prestige of the Court has brought about the increase of researchers and expedites the successful recruitment of competent jurists.

IV. Activities of the Constitutional Court

As an organ for constitutional review, the Constitutional Court is more active than any system that Korea has employed so far. Many decisions on the constitutionality of laws highlight its activities.[20] Statistics provide a general picture of its activities thus far.

Since the Constitutional Court started on September 19, 1988, it has received 6,499 cases and disposed of 5,980 of them, with 293 being withdrawn by the parties concerned and 519 pending, as of February 28, 2001. Among 5,980 disposed cases, the Court decided 2,720 cases on their merits, dismissing 2,964 cases in the screening process without reviewing their merits. The Court's activities are primarily concerned

15) Amended on November 30, 1991 as Law No. 4408. This amendment also reinforces research staff. *See* CCA, Art. 19.

16) CCA, Arts. 17-21.

17) CCA, Art. 19.

18) CCA, Art. 18(4).

19) Among the thirteen seconded researchers, eight are judges while five are prosecutors.

20) *See* West and Yoon, *supra* note 1, at 104-113.

with the review of the constitutionality of legislation and constitutional petition which occupies the bulk of them as shown below. To date, only 15 cases on competence dispute have existed, with none on impeachment or the dissolution of political parties.

A. Judicial Review of Legislation, 1988-2001

As of February 28, 2001 since its inauguration on September 19, 1988, excluding 121 cases withdrawn by the parties, the Constitutional Court disposed 1,094 cases among the total 1,245 cases received concerning judicial review of legislation. The courts referred 393 cases to the Constitutional Court *ex officio* or upon the requests of the parties concerned, among which the Court disposed 374 cases. The remaining 852 cases were referred to the Court in the form of constitutional petitions by the parties concerned as provided by Article 68(2) of CCA, upon rejection by the courts to refer matters to the Constitutional Court even though the parties requested constitutional review. In this occasion, the Court disposed 720 cases. The dispositions on the constitutional review of legislation are tabulated as follows:

Dispositions of Review on Legislations

	Total	Withdrawn	Dismissed in Screening	Unconstitutional*	Constitutional
Total	1,094	121	148	284	540
Referred by courts	374	97	17	102	158
Petition form upon courts' rejection to request	720**	24	131	182	382

* The category of "unconstitutional" disposition includes all modes of unconstitutionality, such as "inconsistent with the constitution," "partly unconstitutional," "constitutional on condition of proper interpretation," as well as plain unconstitutional. The number of plain unconstitutional decisions is 182 among 284.

** One case which cannot be classified under the above categories is added.

Excluding 269 withdrawn and dismissed cases, the court rendered 825 judgments on their merits in cases challenging the constitutionality of legislation, among which 284 faced unconstitutionality one way or another. The proportion of judgments with

review on their merits resulting in the invalidation or partial repudiation of legislation is very high, at about 34 percent.

One thing we have to pay attention to, is the statistics on the petition form of request through Article 68(2) of CCA which is used as way to the Court when the court at hand rejected to refer. The rate of unconstitutionality is still very high. Even though the courts rejected appeals to refer cases to the Constitutional Court against the party's request, the parties concerned received a high rate of unconstitutionality judgment after directly petitioning the Court themselves.

This strongly suggests that the ordinary courts at hand do not like to refer cases to the Constitutional Court in spite of the parties' requests unless the court has a strong conviction concerning the unconstitutionality of the law at issue. The courts should refer as many as possible if they have any reservation about constitutionality and help provide the Court with the opportunity to review the constitutionality of laws. They should not burden the parties by forcing them to go through the petition process a second time.

The highlight of the activities of the Constitutional Court is the judgment of legislation as unconstitutional. The Court has been very active in supporting private economic rights overridden by the government or public institutions, and invalidating legal provisions bestowing discriminatory privileges on public institutions. In the area of civil rights, the Court has been more discreet though it sometimes invalidated restrictive provisions on private citizens in the criminal process. Some of important decisions were introduced in a previous paper by the author.[21] More analytical review on the Court's attitude toward its decisions is made by another author in this issue.

B. Constitutional Petitions, 1988-2001

Constitutional petition is quite a new system in Korea. A considerable number of petitions have been filed. Concerning the number of cases, four times as many petitions than judicial reviews of legislation have been filed.

Petitions fall into two categories. First, Article 68(1) of CCA provides that petition jurisdiction is available in situations where existing laws do not afford remedies through ordinary court processes for unconstitutional state action. It should be noticed that the decisions of ordinary courts are not eligible for the petition.[22] A petition of this

21) *Id.*

22) *See* CCA, Art. 68(1), *supra* note 12.

type may be filed only if all available administrative and judicial remedies have been exhausted. If no ordinary judicial review is available, then a direct petition is possible. An example is a challenge to a prosecutorial decision not to indict an accused criminal, for in such cases the ordinary courts have no jurisdiction over the matter.

Second, a party who requests that a court refer question of the constitutionality of legislation to the Constitutional Court and has been refused may renew the claim of unconstitutionality by immediate petition to the Constitutional Court under Article 68(2) of the Act. If the claim alleges a constitutional defect in a law and is disallowed by the court, then an ordinary appeal is not the sole recourse and an Article 68(2) petition may be immediately filed in the Constitutional Court to obtain a definitive ruling on the constitutionality of the law in question as explained above.[23)]

Thus, the two kinds of petition are quite distinct. An Article 68(1) petition, if granted, vindicates individual rights infringed upon by the state and involves fact-finding by the Constitutional Court itself. An Article 68(2) petition, if granted, stays ongoing litigation pending the Constitutional Court's judgment on the validity of a legislative act, but the finding of facts and the final disposition are made by the court of original jurisdiction, subject to the guidance of the Constitutional Court on the constitutional question.[24)] An Article 68(2) petition is the alternative way to approach the Constitutional Court for the judicial review of legislation in cases where an ordinary court refuse to help and parties concerned are, otherwise, about to lose an opportunity to challenge the constitutionality of legislation at issue. Therefore, Article 68(2) petition has to be dealt with under the tabulation of judicial review of legislation.

The scope of subject-matter reviewable through the Korean petition procedure is considerably narrower than under the German system because the German system does not exclude regular court decisions from the scope of state action which may be the subject-matter of petitions for Constitutional Court review. Under these circumstances, the constitutional petition procedure, thus far, has been invoked most often in circumstances where ordinary judicial review has been unavailable.

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23) There is a very short time limit for this type of petition. A petitioner should file to the Constitutional Court within fourteen days reckoned from the day a request for a referral to the Constitutional Court was rejected by an ordinary court. CCA, Art. 69(2). A petition based on Article 68(1) must be filed within sixty days reckoned from the day the cause of the petition was known or within one hundred and eighty days reckoned from the day the cause occurred. CCA, Art. 69(1).

24) West and Yoon, *supra* note 1, at 92-93.

However, as aforementioned, the Constitutional Court has broadened the scope of remedy by accepting exhaustion exceptions. For example, when the ordinary judicial process places an unreasonable burden on a petitioner without adequate relief, or when it is almost impossible for a petitioner's claim to be accepted in an ordinary court due to firmly established precedents, a petitioner can be immune from exhaustion requirement.[25)]

As of February 28, 2001, a total of 5,239 petitions were filed to the Constitutional Court under Article 68(1) and 4,875 were disposed. Excluding 171 petitions withdrawn by the parties concerned, and 2,811 dismissed in the screening process,[26)] the court reviewed 1,893 petitions on their merits. In 153 petitions,[27)] the Court found state actions unconstitutional. That is, about 8 percent of petitions were acknowledged unconstitutional. From the commencement of operations of the Court to February 28, 2001, the cumulative record is tabled below.

Dispositions of Constitutional Petitions

	Total	(in Screening) Withdrawn	(in Screening) Rejected	Denied	Granted*	Unconstitutional**
Total	4,870	171	2,811	1,735	125	28
Against legislative act	626	41	445	115	1	24
Against executive act	3,723	118	1,864	1,615	124	2
Against judicial act	394	5	382	5		2
Others	127	7	120			

* "Granted" disposition means that a state act is revoked as unconstitutional. Therefore, it accords to an "unconstitutional" decision.

** 21 state acts were pronounced plainly "unconstitutional." Here among 28 decisions are included two decisions of "inconsistent with the constitution" and another five "conditionally unconstitutional."

25) *Seesupra* note 8, at 166-172.

26) Article 72 of CCA provided a procedure for the review of petitions by a petit bench of the Constitutional Court composed of three Justices. If a petit bench fails to dismiss a petition within thirty days, it automatically passes to the grand bench for disposition. Among 1,070 dismissed petitions, 839 were taken care of by a petit bench in screening procedure.

27) This number consists of 125 granted and 28 unconstitutional decisions.

Among petitions disposed, about 75 percent are raised against the executive acts, among which about three-quarters are petitions contesting decisions by public prosecutors not to institute (or to suspend) criminal indictments. In other words, from the total number of petitions under Article 68(1), almost three-fifths are against the public prosecutors' decisions.

Another distinctive aspect is the high rate of dismissal in the screening process. More than half of the cases disposed by the Constitutional Court were rejected the opportunity to be reviewed on the merit. The grounds for dismissing a petition in the course of prior examination include failure to exhaust other available remedies, failure to satisfy the time limits for filing a petition[28] and failure to submit the petition through a licensed attorney.[29] The high rate of dismissal in the screening process can be attributed to these grounds as well as to the ignorance of the parties concerned (ignorance concerning the exclusion of an ordinary court's decision, the short time limit, prohibition of *pro se* submission, etc.).

The above statistics of the number of cases handled by the Constitutional Court and high rate of unconstitutionality of legislation and state actions suffice to show the active operation of the Court. Our question is what contributed to enable the Court to exercise its full capacity provided by the laws.

As explained above, the current Constitutional Court system was improved by removing significant obstacles that resided in the previous system[30] and was given broader jurisdiction.[31] In addition to the significant improvement of legal limitations, what should be emphasized most is the new political environment since democratization of 1987 that has enabled the Constitutional Court to carry out its full-fledged role and allowed its Justices to commit themselves to the Court's positive role and high vision without intimidation from outside. The high rate of unconstitutionality of laws demonstrates, in part, the poor job of the legislature and the emphasis of administrative expedience under the authoritarian regimes to the detriment of citizens'

28) CCA, Art.69. *Seesupra* note 23.

29) The Constitutional Court procedure adopts the principle of mandatory attorney representation. If a private person has no financial resources to appoint an attorney, he may request the Court to appoint a Court-designated attorney. CCA, Arts. 25(3) · 70 · 72(3).

30) *For example,* CCA, Art. 68(2) was created to prevent the courts from ignoring parties' request for constitutional review.

31) The constitutional petition of CCA, Art. 68(1) is a new part of jurisdiction.

interest. In particular, political crises due to military coups or other such factors brought about dissolution of the legislature and created ad hoc bodies. Such bodies rushed through many bills without proper deliberation at the expense of citizens' rights and interests in favor of political purpose and administrative convenience.[32] Now those laws have faced scrutiny by the Constitutional Court and many of them have been determined unconstitutional.

V. Concluding Remarks

The Constitutional Court system has greatly contributed to changing public and bureaucratic attitudes toward the constitution and public power. Public power is finally scrutinized based on the constitution. As the constitutional expression is abstract and generally simple, the job to interpret the constitution and to realize the spirit of the constitution is upon the judicial review agencies. This means that the activation of the Constitutional Court contributes to lessening the gap between theory and reality. The constitutional decisions fill the gap and materialize the spirit of the constitution. The constitution is neither a political manifesto, nor a legal justification for political power. However, this is not because the current constitution employed the Constitutional Court system, but because the political environment has removed many obstacles that block the satisfactory function of the system.

The active role of the Constitutional Court means the expansion of constitutionalism. Active discussions on constitutional questions have brought new vigor to the public law discipline. Authoritarian politics and the lack of constitutional decisions forced constitutional scholarship to resort to dogmatics. Constitutional decisions have become one of the most important sources of law. Dogmatics can no longer exist alone, but should be imbued with reality. Thus, the Constitutional Court system's active role has brought about a new chapter in public law scholarship and teaching in Korea.

Constitutional review is, in general, designed to resolve social conflicts in terms of law. That is, it is a judicialization of the political process on the condition that politics is under the law. When politics is not under legal control, constitutional review becomes no more than a meaningless means to justify wishes of political powers. Therefore, the independent exercise of authority from political powers is the *raison*

32) *See* Yoon, *supra* note 2, at 95-96.

d'etre of the constitutional review system. The current Constitutional Court system of Korea is an encouraging example of constitutional review concerning how and under what condition a system is successfully rooted in a society. So far, the Korean choice can be said to be a great success and is unlikely to regarded otherwise in the near future.

Some Problems with the Korean Constitutional Adjudication System

*Jongcheol Kim**

Abstract

Despite its very short history, the Korean Constitutional Court has been successful in carving out its position as the bastion of the Constitution and human rights. However, it now faces the more difficult task of consolidating its identity as such. This task requires not only more activist efforts on the part of the Court itself but also institutional reforms. Indeed, the relatively active performance of the Court over the last decade has veiled certain institutional defects of the present adjudication system. For the further development of the Korean constitutional adjudication system, these defects must be corrected not only by constitutional and statutory interpretation but also by revision of the relevant provisions of the Constitution and the Constitutional Court Act.

This essay examines major institutional problems requiring constitutional and statutory revision and provides alternative proposals. Three kinds of problems will be looked into in this essay: (1) those requiring both constitutional and legislative revision; (2) those requiring the adoption of new legislative devices; and (3) those requiring only legislative revision. The first category includes (1) expansion of the Court's jurisdiction, (2) reform in the composition of the Court, (3) changes in the quorum of judgement, and (4) problems of the separation of the power of constitutional review between the Court and the Supreme Court. The second category includes (1) measures to address the weak binding force of the Court's decisions, (2) the lack of general procedures for provisional remedies or injunctions, (3) the statutory base for modified decision of unconstitutionality. The third category is concerned with (1) mandatory representation by attorney and (2) exclusion of ordinary courts' judgements from constitutional complaint.

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I. Introduction

When the new Constitutional Court of Korea (hereinafter, the "Court") was established in the wake of the Korean people's victory over President Chun Doo Whan's iron-fisted rule in 1987, skepticism about the success of this new institution and uncertainty about its proper working was deep and widespread. For one thing, the previous constitutional adjudication bodies[1] were anything but successful, and were derided as mere rubber stamp institutions for the military dictatorship or a nominal institution existing only on paper.[2] 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 on an activist role in wielding its powers of constitutional review and hearing constitutional complaints.[3]

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 Constitution and people's fundamental constitutional rights. As of April 30, 2001, almost six months after the launch of the third term of the Court and thirteen years after its establishment, the Court has invalidated or partially repudiated legislative acts in 315 cases, of which 102 cases were referred by the ordinary courts for rulings on the constitutionality of laws and 213 cases were heard in the form of constitutional complaints.[4] Given that the

1) The forms of constitutional adjudication adopted between 1948 and 1987 have included the Constitutional Committee system, a European Constitutional Court system, and an American Judicial Review system. For a brief history of constitutional adjudication in Korea, *see* the Constitutional Court, The First Ten Years of the Korean Constitutional Court(2001), at 6-11; G. Healy, *Judicial Activism in the New Constitutional Court of Korea,* 14 Colum. J. Asian L. 213, 214-218 (2000) .

2) For example, no case was laid down by the Constitutional Committee during the fifteen years between 1972 and 1987. Kun Yang, *The Constitutional Court in the Context of Democratization: The Case of South Korea,* Verfassung und Recht in Übersee 31 (1998), at 161.

3) Professor Yang pointed out four factors contributing to the unprecedented activism of the early Constitutional Court: (1) a more liberated political climate than before, (2) people's heightened consciousness of rights in general, (3) active role of "human rights lawyers," and (4) the appointment of activist judges made possible due to the creation of an independent constitutional court separated from bureaucratized ordinary courts. *See* Yang, *supra* note 2, at 166-167. *See* also, Kyong-Whan Ahn, *The Influence of American Constitutionalism on South Korea,* 22 S.Ill. U. L. J. 71,76-85 (1997).

4) *See* the official statistics of the Court in its website, <http://www.ccourt.go.kr/intro/i3.html>.

number of cases the Court disposed of in the form of norms control or constitutional review,[5] the highlight of the constitutional adjudication system, amounts to 1,035 cases, the proportion of the judgements resulting in unconstitutionality, unconditional or conditional, is thus relatively high.

Despite broad support and positive evaluations from both ordinary people and specialists in academia and practice over the past thirteen years, the present Constitutional Court now faces the more difficult task of consolidating its role as the champion of individual rights and the trusted bastion of the rule of law in the Korean governmental structure and in the hearts and minds of the people.[6] Such a task cannot be tackled by the Court itself. Rather, certain institutional defects inherent in the present system must be removed. Indeed, the relatively active performance of the Court over the last decade has veiled certain institutional defects of the present adjudication system as provided for by the Constitution and the Constitutional Court Act (hereinafter, CCA).

The existence of such defects can be attributed in part to the haste in which the new constitutional adjudication system was formed, as sweeping changes were made to the previous Constitution in a relatively short period of time in 1987.[7] Another cause for the existence of such defects is the competition of interests between political parties, as well as conflicting interests within the Judiciary itself, since it was sure to be most affected by the creation of the new independent constitutional court.[8]

The original plan agreed upon in the political sphere was to endow the Supreme Court with the power of constitutional review while there was disagreement between the ruling party and the opposition parties over which institution would have jurisdiction over matters such as impeachment, party dissolution and competence dispute. The Supreme Court was reluctant to address such political matters and thus

5) That is, those cases decided through the Art. 41 of the Constitutional Court Act procedure (constitutional review of statutes upon judicial requests) and the Art. 68 (2) of CCA procedure(constitutional review of statutes upon individual requests).

6) Healy, *supra* note 1, at 234.

7) For a brief description of the background of the 1987 Constitution introducing the present Constitutional Court system, J. West and Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 Am. J. Comp. L. 73, 73-75 (1992); The Constitutional Court, *supra* note 1, at 15-20.

8) *See generally,* the Constitutional Court, *supra* note 1, at 18-19; West and Yoon, *supra* note 7, at 75-77; Healy, *supra* note 1, at 218-219.

sided with the ruling party advocating the creation of the Constitutional Committee endowed only with the powers to decide political matters. Opposition parties argued for leaving all the powers of constitutional adjudication with the Supreme Court. The final result was the creation of the independent Constitutional Court with full jurisdiction including constitutional complaints.

After agreeing to the proposal, the Supreme Court was eager to place some institutional limitations on the powers of the new Constitutional Court. Its demands were reflected primarily in three limitations on the new Court's power. First, only ordinary courts can request the Court to review the constitutionality of statutes.[9] However, this limitation soon became nominal as individuals are allowed to challenge the constitutionality of a law in a form of constitutional complaint.[10] Second, the power to review on the constitutionality of inferior legislation such as administrative orders, regulations, and measures is given to the Supreme Court instead of the Constitutional Court.[11] Third, the scope and procedure of constitutional complaint is delegated to the implementing legislation, i.e. CCA which in reality excludes ordinary courts' judgements from the scope of constitutional complaints.[12]

In short, the lack of time and competing interests of concerned parties installed institutional defects in the new constitutional adjudication system. For the further development of the Korean constitutional adjudication system, these defects must be corrected not only by constitutional and statutory interpretation on the part of the Court itself but also by revision of the relevant provisions of the Constitution and CCA.

The purpose of this essay is to examine major institutional problems and provide alternative proposals. The problems to be examined can be placed under three categories: (1) those requiring constitutional revision together with legislative revision; (2) those requiring the adoption of new legislative devices; and (3) those requiring only legislative revision. The first category includes (1) the expansion of the Court's jurisdiction, (2) the qualification and term of constitutional justices and their appointment procedure, (3) quorum of judgement, and (4) the division of the power of constitutional review between the Court and the Supreme Court. The second category

9) Constitution, Art. 107 (1).

10) Constitution, Art. 111(1)(v) and CCA, Art. 68(2).

11) Constitution, Art. 107(2).

12) CCA, Art. 68(1).

includes (1) some required measures to cope with the weak binding force of the Court's decisions, (2) the lack of general procedures for provisional remedies or injunctions, (3) the required statutory base for modified decision of unconstitutionality. The third category is concerned with (1) mandatory representation by attorney and (2) exclusion of ordinary courts' judgements from constitutional complaint.

II. Problems with Constitutional Provisions on Constitutional Adjudication

A. Necessity to Expand the Court's Jurisdiction

Under Artilce 111 of the Constitution, the Court has jurisdiction in five areas: (1) constitutional review of statutes upon request; (2) impeachment; (3) dissolution of political parties; (4) competence dispute; and (5) constitutional complaint.[13)]

Some constitutional lawyers have argued that the scope of the Court's jurisdiction is not sufficient to allow the constitutional adjudication system to protect the values and order enshrined in the Constitution.[14)] They have been advocating and expanding the jurisdiction of the Court in three main areas.

First, it is unclear why the constitutional review of statutes should be undertaken only upon a request from an ordinary court and only when the constitutionality of statutes is relevant to the judgement in judicial proceedings. Some have advocated the introduction of a French-style preliminary review or a German-style abstract norms control. The French Constitutional Committee or *Conseil Constitutionelle* has the power to review the constitutionality of laws before their promulgation upon the requests of President, Prime Minister, President of National Assembly (Assemblée National), President of Senate (Sénat) or a group of Members of National Assembly or Senate.[15)] The main advantage of this preliminary review system is that it can avoid the legal instability which inevitably results from a decision of unconstitutionality under

13) Almost same provision is contained in Art. 2 of CCA.

14) *E.g.*, Kun Yang, Moon-Hyun Kim, Bok-Hyun Nam, Report on Reform of the Korean Constitutional Court Act [Heonbeopjaepansobeop-ui Gaejungbangahn-e Gwanhan Yeongu Yongyeok Bogoseo] (Studies on Constitutional Adjudication No.10, The Constitutional Court, Seoul, 1999), at 4-9.

15) Jong-Sup Chong, A Study of Constitutional Litigation (1) [Heonbeopjaepan Yeongu(1)] (1995), at 359-361.

post review systems. In the latter case, legal relationships or situations validly constituted under the statute in question must be changed when the governing law is declared unconstitutional. Although the German constitutional adjudication system does not have preliminary review, it has both "concrete norms control," which conditions constitutional review on the relevance of laws to the judicial cases, and "abstract norms control," which does not. The Federal Constitutional Court of Germany(*Bundesverfassungsgericht*) can review the constitutionality of laws when the Federal and Land Governments and a group of Members of German Parliament (*Bundestag*) request adjudication on the constitutionality of federal and Land laws.[16] This system could greatly diminish the possible legal instability which may be caused by concrete norms control.

However, a system of preliminary review or abstract norms control should be introduced in a cautious way, with careful consideration of the political and institutional implications and peculiarities of such systems. In considering the adoption of a French-style preliminary review it should be borne in mind that, unlike our system modelling a German-style constitutional court system, the French *Conseil Constitutionelle* is a highly political institution and its preliminary review of laws is understood as part of political process. As far as the adoption of abstract norms control is concerned, there would be less problem of institutional integrity with a German-style constitutional court system than with a French-style preliminary review. One caveat, however, is that it should be undertaken together with the improvements in the process of the composition of the Court designed to strengthen its independence. Without full independence from the political sphere, any process involving political institutions such as the executive branch or a group of National Assemblymen in the process of constitutional review has the danger of undermining the political neutrality of the Court.

The second field in which we need to consider the expansion of the Court's jurisdiction is election cases, particularly those related to presidential and National Assembly election.[17] The subject matter of such election cases is the validity of a highly political process (*i.e.,* the composition of constitutional institutions), and thus has a close relationship with the legitimacy of the constitutional order. If our

16) *Id.* at 331-333.

17) Yang *et al., supra* note 14, at 5, 8.

constitutional adjudication system should be consistent in its organizational formation, this subject matter should be determined by the Constitutional Court which, unlike ordinary courts, is dedicated to judicial resolution of political matters such as impeachment and dissolution of political parties.

The third area of which jurisdiction should be given to the Court is the judgement over whether the office of the presidency is vacant, or whether the President is unable to perform his/her duties for any reason.[18] Article 71 of the Constitution provides only that in such cases, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for the presidency, and there is no provision giving any institution the power to determine when and how such conditions are to be met. Given the Court's specialized jurisdiction in constitutional questions relating to the composition of constitutional institutions, it would be reasonable for the Court to take in charge of such a matter.

B. Necessity to Reform the Composition of the Court

Articles 111 and 112 of the Constitution and Articles 3 through 9 of CCA provide for the composition of the Court and the privileges and obligations of Constitutional Justices. One Chief Justice and eight Constitutional Justices (hereinafter, "Justices") composed of the Court are to be appointed by the President. However, the President should appoint three candidates nominated by the National Assembly and three candidates nominated by the Chief Justice of the Supreme Court. To be appointed as Justices, all the candidates should be "qualified as judges," more than forty years of age and with more than fifteen years of career as judges, prosecutors or attorneys. Justices are guaranteed six years term with the possibility of reappointment, with a mandatory retirement age of sixty-five for Justices and seventy for the Chief Justice.

There are three main arguments challenging the constitutional justice appointment process and the status of constitutional justices. First, the present process of the appointment of Justices lacks democratic legitimacy.[19] In particular, giving the power

18) Yang *et al.*, *supra* note 14, at 6, 8.

19) *See* Yang *et al.*, *supra* note 14, at 14-16; Hyo-Jeon Kim, *The Constitutional Court in Korea: Its Problems and Proposed Improvement* [Heonbeopjaepanjedo-ui Munjaejeom-gwa Geui Gaesunchaek], Public Law [Gongbeopyeongu], Vol. 27 No.1 (1998), pp.68-69, 72-73.

to nominate three candidates to the Chief Justice of the Supreme Court, who is not elected but rather appointed by the President, has been criticized as undermining the democratic legitimacy of the Court. Moreover, although the nominees for Justices of the Supreme Court must be approved by the National Assembly, the candidates nominated by the Chief Justice of the Supreme Court are free from the control of the National Assembly.

Secondly, the requirement that all Justices must be qualified as judges has little justification. This means that all the candidates must have passed the state judicial examination and have attended a single two-year training institute.[20] The Korean judicial examination is extraordinary, as each year only a fixed small number of applicants can pass regardless of their objective capacity of handling legal matters. This highly selective exam, together with an intensively homogeneous training course, inhibits the development of lawyers with diverse social backgrounds. This problem is exacerbated by the additional statutory requirement that Justice must have more than fifteen years of job experience as judges, prosecutors, and attorneys. Since most promising attorneys tend to have served as judges or prosecutors, the fifteen year career requirement means that almost all candidates for Justices cannot be free from juristic and bureaucratic culture widespread in the Korean legal profession,[21] creating a danger that the Court becomes insular and overly-fraternal system.[22]

Moreover, it is important to see that constitutional adjudication by nature requires practical wisdom and policy-related theoretical understanding rather than positivist juristic precision and miscellaneous knowledge of technical judicial procedures. Therefore, the membership of the Court should be open to those with diverse social and professional backgrounds. In particular, law professors with sufficient wisdom and experience in dealing with constitutional matters should be allowed to serve on the

20) For a critical sketch of the Korean legal education and legal profession, *see* Jae-Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 Asian-Pacific Law & Policy Journal 45, 45-68 (2001).

21) *Id.* at 54-55. In reality, there are at least sixteen promotional steps for judges. *See*, Ahn, *supra* note 3, at 78.

22) Comparatively, the German system too requires in principle a lawyer's license. However, two differences from the Korean system should be noted. First, the German Constitutional Court is open to law professors as an exception to the principle. Second, the German Bar is not such a closed and homogeneous society like the Korean Bar. Therefore, it would be safe to say that the diversity problem is not very serious in the German system. For a comparative survey on this point, *see* Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany, and Korea*, 6 Tulsa J. Comp. & Int'l L. 123, 140-146 (1999).

Court.[23]

Third, the short limited term of Justices and their reappointment scheme needs to be reconsidered. The present scheme of short six year terms with the possibility of reappointment may represent a challenge to the independence of the Court by making Justices sensitive to the opinions of those with the appointive power.[24] Possible alternatives to the present system are a system of life tenure[25] or a system guaranteeing a single longer term for Justices. The latter is preferable to the former, as the former may make the Court fortress of conservatives. Finally, it should be noted that there is little reasonable justification for the difference in retirement age for the Chief Justice and other Justices.

C. Necessity to Reduce the Intensified Quorum in Special Decisions

Article 113 of the Constitution provides for a special quorum of six Justices when the Court holds a law unconstitutional, or makes a decision of impeachment, a decision of dissolution of political parties, or a decision to uphold a constitutional complaint. Article 23 (2) of CCA provides that such an intensified quorum is also required to overrule a precedent on interpretation and application of the Constitution or laws made by the Court. This intensified quorum may diminish the possibility of upholding such cases. For example, a majority of five Justices who find a law to be unconstitutional cannot override the minority in dissent. Therefore, the statute in question cannot be struck down even though a majority of the Justices believe it is in violation of the Constitution. Given the importance and serious effects of such special decisions, the intensified requirement may be justified.

However, this specified quorum may result in unexpected nonsense in certain cases. Article 23 (1) of CCA allows the Full Bench to be open with the attendance of seven or more Justices. This means that when the Full Bench is open with seven Justices, only two dissents can prevent the Court from finding an offending law unconstitutional and protecting individual's constitutional rights.[26] This is too severe,

23) Healy, *supra* note 1, at 227.

24) Yang *et al.*, *supra* note 14, at 17-19.

25) Healy, *supra* note 1, at 229.

26) Bok-Hyun Nam, *Some Problems with the Quorum of Constitutional Adjudication Procedures*

and has the strong effect of giving state institutions a much higher priority than the protection of fundamental rights.

In addition, the fixed quorum may create self-conflicting judgement in the case of competence dispute.[27] Decisions in competence dispute do not require the intensified quorum and are made by the majority vote of Justices participating in the final discussion. The problem arises when the majority of five Justices affirms the infringement of the plaintiff agency's competence because they think the other party's measure is based on an unconstitutional law. The Court may revoke the defendant's action according to the majority rule applied to competence dispute proceedings, while not declaring the relevant law is unconstitutional due to the intensified quorum.

One alternative to the present fixed intensified quorum might be the reduction of the special quorum from six to five. However, this being another version of fixed quorum, it cannot remove the logical problems built in the present system.[28] A second option is the ordinary majority rule with the condition that the consent of at least four Justices is required in the cases of unconstitutionality decisions and affirmative decisions on constitutional complaints. This option may increase the possibility of unconstitutionality decisions, thereby undermining legal stability. A third option may be to just address the problem of the Full Bench composed of seven Justices by introducing a system of spare Justices replacing the Justices excluded or recused in a specific case. The spare Justice or *Ersatzmitglieder* system benchmarked from the Austrian system[29] is attractive because it requires no change in the present system of intensified quorum. However, this may cause more serious organizational problem. It may mean the creation of a kind of "second grade" Justices whose status is different from that of the "first grade" Justices. The integral identity of the Court may be threatened by allowing the "second grade" Justices to change the pendulum in important cases. Although all options have their own merits and demerits, the second option is most preferable, not only because it creates fewer administrative and institutional problems, but also because comparative research shows that most

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[Heonbeopjaepan-ui Gyeoljungjungjoksu], Contemporary Public Law and the Protection of Individual's Rights and Interests [Hyundai Gongbeop-gwa Gaein-ui Gweonri] 989(Seoul, 1994).

27) *Id.* at 997-1000.

28) Yang *et al.*,*supra* note 14, at 39.

29) *See*, Chong, *supra* note 15, at 302-304.

constitutional adjudication systems have such a scheme.[30]

D. Necessity to Unify Jurisdiction over Constitutional Review

As mentioned above, one problem built into the present constitutional adjudication system in the course of its creation is the separation of the power of constitutional review between the Court and the Supreme Court. The latter has the power to review the constitutionality of inferior legislation such as administrative orders, regulations, and measures[31] while the former to review the constitutionality of statutes.[32] The Constitution have 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 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.

It is ironic that the very system designed to protect the constitutional order, *i.e.* the constitutional adjudication system itself, is destined to cause constitutional conflicts which damage the uniformity of the constitutional order. Given that the raison d' être of the independent constitutional court is to be the final arbiter of the Constitution, the ideal solution to this problem would be to give the final say in constitutional interpretation to the Constitutional Court.

Two options for implementing this idea can be taken into consideration.[33] First, the Supreme Court could maintain the power to review the constitutionality of inferior legislation, but the Supreme Court's decisions could be challenged in constitutional complaints. Second, as in the review on statute, when the constitutionality of administrative orders or measures is at issue in a trial, the ordinary court in charge

30) *See generally,* The Ministry of Justice, Constitutional Adjudication System [Heonbeopjaepanjedo] (Ministry of Justice Materials No. 95) (1988); Heung-Soo Moon and Bong-Ki Shin, Constitutional Adjudication Systems in the World [Segyegakguk-ui Heonbeopjaepanjedo] (1994); Chong, *supra* note 15, at 297-395.

31) Constitution, Art. 107 (2).

32) Constitution, Art. 111 (1).

33) Yang *et al.*, *supra* note 14, at 340-345.

should request a decision of the Court and rule in accordance with that decision.

III. Some Problems with the Procedures of Adjudication under the CCA

A. Necessary Statutory Revisions

1. Mandatory Representation by Attorney

Article 25 of CCA requires every party in any constitutional adjudication proceedings should be represented by an attorney. Article 25 (2) constitutes an exception to the principle under Article 3 of "the Act on Litigation to Which the State is a Party" that the Minister of Justice may allow officials having no qualification as an attorney to take charge of judicial cases to which the state is a party. Article 25 (3) is also an exception to the general rule in other judicial proceedings that no qualification as an attorney is required for a person to pursue a legal proceeding.

Although both provisions prescribe mandatory representation by an attorney, Article 25 (3) gives rise to more questions because it may prevent ordinary citizens with no full financial resources from bringing their cases before the Court, while the state agency would have no financial problem to hire attorney. Indeed, the most affected parties by mandatory representation requirement are those filing constitutional complaints because other proceedings to which private person is a party (*e.g.*, impeachment) are extremely rare.[34] Even in such a rare case, the involved individuals might be well represented, as they are high ranking officials. Therefore, the mandatory representation by attorney should be examined in the light of the nature and function of constitutional complaint.[35]

Constitutional complaints are concerned with the infringement of individual's fundamental right by governmental powers. Given the importance of fundamental rights, the application requirement should not be too strict. This ideal is reflected in the

34) So far, no record of impeachment since the establishment of the Court in 1988.

35) Jongcheol Kim, *Some Problems with General Procedure of Adjudication in the Constitutional Adjudication Act* [Heonbeopjaepansobeopsang Ilbansimpanjulcha-e Daehan Ipbeopnonjuk Gochal], Hanyang U. Law Rev. [Beophaknonchong], Vol. 16 (1999), at 299 ff.

rule that the expenses for adjudication by the Court shall be borne by the state.[36]

However, mandatory representation by an attorney may infringe upon individual's right to file a constitutional complaint. The relatively high fees of attorneys in Korea may hinder individuals having no financial resources from filing a constitutional complaint. This can be confirmed by statistics showing that the violation of mandatory representation by an attorney is the most common reason for rejection of such complaints by the Designated Bench of the Court. As of April 30, 2001, the number of rejections due to the violation of mandatory representation rule amounts to 797 cases out of a total of 2298 cases rejected.[37]

We may also question why the mandatory representation rule should be applied to constitutional complaints, which are concerned not only with fundamental individual rights but also with the consitutional order, when no such requirement is applied in ordinary judicial proceedings where conflicts between private interests are at stake. In a case[38] answering this question, the Court argued that mandatory representation by an attorney would be advantageous to the petitioners by guaranteeing professional and skillful representation and thus by preventing reckless and negligent pursuit of complaints. Although it sounds logical or reasonable, the advantage of professional representation should not be overestimated or used to justify the total prohibition of the application for constitutional complaint itself. The requirement of professional assistance is not justifiable because professional techniques and knowledge are not crucial in our constitutional complaint procedure. Oral arguments in an adversarial system are not required in principle[39] and the Court has the power to ask the relevant public authorities to provide records or materials necessary for the adjudication.[40] What makes the situation worse is the relatively high requirements that the Court has suggested for allowing court-appointed counsels for the petitioners with no financial resources,[41] which can help camouflage such a problematic requirement. In short, to enhance individual's liberties and rights, mandatory professional representation should be abolished.

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36) CCA, Art. 37 (1).

37) *See* the Constitutional Court website <http://www.ccourt.go.kr/intro/i3.html>.

38) 89 heonma 120 etc., 2 KCCR 296 (Sep.3, 1990).

39) CCA, Art. 30 (2) .

40) CCA, Art. 32.

41) CCA, Art. 70.

2. Exclusion of Ordinary Courts' Judgements from Constitutional Complaint

According to Article 68(1) of CCA, the judgements of ordinary courts are excluded from the jurisdiction of the Court over constitutional complaint. One exception to this exclusion is provided in Article 68(2) of CCA, which allows constitutional complaints against a court's denial of a request for constitutional review of a statute in any judicial proceeding. As demonstrated above, the Judiciary argued for the exclusion of judicial judgements from the constitutional complaint process.[42] The Judiciary argued that allowing the Court's review on judicial judgements would mean the creation of a fourth court higher than the Supreme Court. Underlying this argument is the belief that the Supreme Court itself is a guardian of individual rights and is in better position to review on judgements of inferior courts than the Constitutional Court, which cannot be said a genuine judicial institution.

However, this stance may be in direct conflict with the essential aim of the system of constitutional complaints, under which jurisdiction is given to the Court independently of the judiciary. In a constitutional democracy, all constitutional institutions must promote the realization of fundamental values enshrined in the Constitution, and the ordinary courts cannot be an exception to this constitutional principle. Insofar as the constitutional complaint system is adopted to fulfill such a constitutional ideal, that is, to prevent and remedy infringement of fundamental individual rights by any governmental powers, there is no reason for the ordinary courts to be a sanctuary free from such constitutional control, especially where they may violate the Constitution. This was partially confirmed by the Court in a case[43] where the constitutionality of Article 68(1) of CCA excluding judicial judgements from the constitutional complaint process was at stake. The Court held that the provision was unconstitutional in so far as it is interpreted to allow any judicial judgement violating individual's fundamental rights by application of a statute declared void by the Court to be included in the category of such judgements excluded from the constitutional complaint process.[44]

However, the Court's decision recognized only a shallow exception to the

42) The Constitutional Court, *supra* note 1, at 18-19.

43) 96 heonma 172, etc., 9-2 KCCR 842 (Dec.24, 1997).

44) 96 heonma 172, etc., 9-2 KCCR 842 (Dec.24, 1997), at 859-865, 867.

exclusion of courts' judgement rule, and did not extend the Court's jurisdiction to cover all constitutional complaints against the judgements of ordinary courts. Therefore, the essential problems still remain. The most serious problem is that almost all administrative actions, which have a relatively high propensity for the infringement of fundamental rights, are excluded from the constitutional complaint process. This problem is attributed to the combined effect of the exclusion of judgement rule and the prior exhaustion rule, a legal requirement that the would-be petitioner should exhaust all other relief processes before he/she files a constitutional complaint.[45] Administrative actions are subject to judicial review by the ordinary courts according to the exhaustion rule, and once the courts take over the case, there is no access to a constitutional complaint under the exclusion of courts' judgement rule. This problem was tackled by the Court by extending exceptions to the prior exhaustion rule.[46] However, the recognition of exception by way of interpretation is inevitably limited and insufficient. The authentic response to the problem is to allow the Court's review of the judgement of ordinary courts through legislative reform.

B. New Procedures Necessary in Constitutional Adjudication

1. The Weak Binding Force of the Court's Decisions

The CCA has several provisions regarding the binding force of the Court's decision over public authorities, including the ordinary courts, other state agencies and local governments.[47] However, there is no general provision giving the Court the power to take actions to enforce its decisions, leaving the enforcement of decision to the discretion of other state institutions. The only provision with regard to how the Court's decision is to be executed is Article 60 of CCA, which orders the National Election

45) CCA, Art. 68 (1).

46) The Court has developed three categories of the exception to the prior exhaustion rule: (1) in case of constitutional complaints directly challenging the validity of laws; (2) in case that there are no identifiable legal remedies; and (3) in case that despite of the existence of remedies, the possibility to be redressed is almost none, for example, due to the established precedents of the ordinary courts. *See generally,* the Constitutional Court, An Introduction to Constitutional Adjudication System[Heonbeopjaepansilmoojeyo](1998), at 167-169.

47) CCA, Art. 47(1) [effect of unconstitutionality decision]; CCA, Art. 67(1) [effect of decision on competence dispute]; CCA, Art. 75(1) [effect of decision of upholding in the constitutional complaint case].

Commission to take necessary actions to enforce the Court's decision to dissolve a political party in accordance with the Political Parties Act.

Thus the decisions of the Court, the protector of the constitutional order and values, can be ignored by the other institutions since there are no specific processes for enforcement.[48] Most countries with constitutional adjudication system in any form have mechanisms for the enforcement of decisions of constitutional adjudication institutions. For example, Article 35 of the German Federal Constitutional Court Act provides that the Federal Constitutional Court may decide who should execute its decision, and how and what must be done. The Supreme Court of the United States may deliver enforcement decrees to execute its decision.[49]

One caveat is that even if general provision for the enforcement of the Court's decision is introduced, the Court must not abuse such powers. Respecting the principle of the separation of powers, it must use its enforcement powers only as a last resort and only in those exceptional cases in which other institutions go against the Court's decision.[50]

2. The Lack of General Provisions for Provisional Remedies

Under CCA, only two processes of competence disputes and dissolution of political parties have provisions regarding provisional remedies or injunctions.[51] In the case of impeachment, since Article 50 of CCA provides for the suspension of the power of the impeached official, there is no room for the Court to consider provisional remedies. In other words, there is no provision for provisional remedies or injunctions in cases of constitutional review of statutes and constitutional complaints. In addition, even in the cases of competence dispute and dissolution of a political party, the provisions for provisional remedies specify only the Court's power to suspend the defendant's actions. They are silent on the specific conditions, procedures and effects of provisional remedies. Some lawyers argue that under the *mutatis mutandis* provision

48) Kim, *supra* note 35, at 314-315.

49) *E.g., Brown v. Board of Education II,* 349 U.S. 294 (1955); *Swan v. Charlotte-Mecklenburg Board of Education,* 402 U.S.1 (1971).

50) Kim, *supra* note 35, at 316.

51) Respectively, CCA, Arts. 57 and 65.

of Article 40 of CCA, the relevant provisions in the Civil Proceedings Act or the Administrative Proceedings Act are applicable to constitutional adjudication. In fact, the Court accepted the request for provisional remedies in a constitutional complaint case on such a ground.[52]

However, statutory interpretations supplementing legislative defects have built-in limitations. In particular, applying the Civil Proceedings Act or the Administrative Proceedings Act to the constitutional adjudication system may ignore its unique features. For example, provisional remedies in the constitutional adjudication system, unlike those in other proceedings, often involve the protection of the constitutional order and values together with subtle political issues.[53] The implementing law for constitutional adjudication needs to provide basic devices together with their requisites designed to realize aims of the system. If we agree on the need for the legislative introduction of provisional remedies in cases of constitutional complaint or constitutional review of statutes, it would be preferable to create a general procedure articulating the basic conditions, procedures and effects of provisional remedies, applicable to all proceedings, while leaving some requisites peculiar to each proceeding in the special section for that proceeding.[54]

3. The Statutory Basis Necessary for Modified Decisions of Unconstitutionality

Article 45 of CCA provides that "the Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional." Artilce 47 of the Act declares that "any statute or provision thereof decides as unconstitutional shall lose its effect from the day on which the decision is made" except criminal laws. Literally, these provisions may mean that the Court can deliver only clear-cut decisions of unconstitutionality or constitutionality. If the Court finds the law to be the violation of the Constitution, it should invalidate immediately the statute in question *in toto;* otherwise the law should be valid with no reservation. To put it differently, the Court may not be allowed to affect the partial invalidation of a provision of a statute by limiting the scope of validity of the provision or to hold or maintain the validity of the

52) 2000 heonsa 471 (Dec.8, 2000).

53) Kim, *supra* note 35, at 316.

54) *Id.* at 316-317.

provision for a certain period of time.

However, many public lawyers have recognized the necessity of such modified forms of decisions, either to avoid the vacuum in law caused by the total invalidation or to give deference to the legislature's policy-making power.[55] By the end of the first term of the Court in 1994, the Court firmly established that such modified forms of unconstitutionality are a kind of unconstitutionality decision and thus have the same effect as prescribed by Article 47 of CCA.[56]

Modified decisions recognized so far by the Court are those of "nonconformity to the constitution" and "limited unconstitutionality(or constitutionality)." The former decision declares either that the statute at stake is unconstitutional but its legal effect is maintained until the legislature revises it,[57] or that the statute in question is unconstitutional and its application is immediately suspended while requesting the legislature to take necessary actions by a fixed point in time after which it would become void.[58] The latter decision declares that the statute at issue itself is valid but it would be deemed void insofar as it is to be interpreted or applied as the Court found unconstitutional.[59]

Some lawyers and commentators have criticized the introduction of modified decisions by statutory interpretation as an usurpation of legislative power which allows the Court to decide the kind and scope of unconstitutionality decision, or as a cover for the Court's reluctance to decide politically sensitive cases.[60] Indeed, the Supreme Court has refused to recognize the binding force of modified forms of unconstitutionality decision, characterizing decisions of limited unconstitutionality as simply one possible interpretation of a statute which the ordinary courts are not

55) The Constitutional Court, *supra* note 1, at 86.

56) *E.g.*, 88 heonga 5, etc., 1 KCCR 69 (Jul. 14, 1989); 88 heonga 6, 1 KCCR 199 (Sep.8, 1989); 91 heonma 21, 3 KCCR 91 (Mar. 11, 1991); 90 heonga 23, 4 KCCR 300 (Jun. 26, 1992); 92 heonba 49, 6-2 KCCR 64 (Jul. 29, 1994).

57) *E.g.*, 91 heonma 21, 3 KCCR 91 (Mar. 11, 1991).

58) 88 heonma 5, 5-1 KCCR 59 (Mar. 11, 1993).

59) This form of decision is two-fold, *i.e.* the limited decision of unconstitutionality and the limited decision of constitutionality. However, they are not different in nature, though different on surface. The superficial difference is that the one is chosen to uphold a particular interpretation of a statute while the other is chosen to exclude. *See* 96 heonma 172 *etc.*, 9-2 KCCR 842 (Dec. 24, 1997).

60) *E.g.*, Justice Byun Jung Soo's dissenting opinions in 88 heonga 6, 1 KCCR 199 (Sep. 8, 1989), at 265-269 and 90 heonga 11, 2 KCCR 165 (Jun. 25, 1990), at 171-177.

obligated to follow.[61] Although the Court nullified such a decision of the Supreme Court,[62] the Supreme Court continues to keep their defiant stance.[63] No one would seriously deny that this conflict between the two highest constitutional institutions damages the uniformity of the constitutional order. Given the obvious necessity of modified forms of unconstitutionality decision, legislation is needed to authorize such decisions and to stipulate their effects. Needless to say, the Court should not abuse modified decisions, since this may lead to the people to lose faith in the Court and thus undermine the foundations of constitutional review.

IV. Concluding Remarks

I will make no attempt here to summarize the arguments I have made in this paper. However, it would be necessary to add to them that institutional reform of the constitutional adjudication system alone is not sufficient to guarantee its consolidation in the constitutional arrangements. The role perception of Constitutional Justices as the "guardians of the Constitution" is another essential element in the development of the Court's overall institutional effectiveness.[64]

If these two conditions are met, the future of the Korean constitutional adjudication system will be very fine and bright. The remaining question is, *when* will the day come?

61) Supreme Court Decision 95 nu 11405 (Apr. 9, 1996).

62) 96 heonma 172, 173, 9-2 KCCR 842 (Dec. 24, 1997).

63) The latest record of the Supreme Court's defiance as such is Supreme Court Decision 95 jaeda 14 (Apr. 27, 2001).

64) *See* Yang, *supra* note 2, at 170.

The Constitutional Court and Freedom of Expression

*Kyu Ho Youm**

Abstract

The 1987 Constitution underscores the crucial role of courts in freedom-of-expression jurisprudence in connection with judicial independence and activism in a democratic Korea. This is especially the case with the growing impact of judicial review upon the broadened notion of freedom of expression as a constitutional right. On the premise that freedom of expression is firmly embedded in Korea's constitutional law, this Article explores the question how the Constitutional Court has drawn the lines in reconciling individual rights to free expression with community interests since 1988. It first analyzes the textual framework on freedom of expression under the Constitution and then examines the defining decisions of the Constitutional Court on freedom of expression in Korea. The study concludes that the Constitutional Court has contributed immeasurably to institutionalizing freedom of expression as a permanent fixture of Korean democracy, although it tends to be self-consciously restrained in invalidating politically sensitive statutes.

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I. Introduction

The Republic of Korea (South Korea) is widely considered a functioning democracy not only in theory but also in reality. One Western diplomat in Seoul said: "We think democracy functions well here. Koreans have won their long struggle for democracy, and it is working well."[1] Korea's evolution to a liberal democracy since 1988 is remarkable.[2] Now Koreans do not have to worry whether they will be in trouble when they criticize President Kim Dae Jung. "Indeed, one gauge that South Korea remains vibrantly democratic is that Mr. Kim's critics say the nastiest things about him and get away with it," according to a *New York Times* report.[3]

Korea's emergence as a thriving democracy is exemplified by the fascinating metamorphosis of freedom of expression from an empty rhetoric to an everyday reality. Seoul National University law professor Kyong Whan Ahn stated in a law review article on constitutionalism in Korea: "Korea is undergoing a rapid transformation in many ways: from an authoritarian society to a democratic one, from a non-litigious society to a litigious one, and from a country with a decorative constitution to a country with a working constitution."[4] The "most notable textual" improvement in the civil liberties of Koreans, according to Ahn, was the newly amended Constitution's guarantee of freedom of expression as a right.[5]

After all, the 1987 Constitution illustrates a new Korea, "where constitutions come in to mark the transition from the Before to the After--stating the principles by which the People henceforth will govern themselves," and "[w]ithin this framework, judicial review appears as a possible (but not inevitable) institutional device to prevent

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1) Nicholas D. Kristof, *Seoul's Leader Irked by Opposition Criticism at U.N. Over Rights,* New York Times, April 23, 1999, at A5 (quoting a Western diplomat in Seoul).

2) *See generally* Consolidating Democracy in South Korea (Larry Diamond & Byung-Kook Kim eds., 2000); Institutional Reform and Democratic Consolidation in Korea (Larry Diamond & Doh Chull Shin eds., 2000).

3) Kristof, *supra* note 1, at A5. *See also* U.S. Department of State: Republic of Korea Country Report on Human Rights Practices for 1999 (visited June 30, 2001) <http://www.state.gov/www/global/human_rights/1999_hrp_report/southkor.html> (noting that "press criticism of the Government is extensive in all fields, and authorities have not used repressive measures to stop media reporting. Many radio and television stations are state supported, but they maintain a considerable degree of editorial independence in their news coverage").

4) Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea,* 22 S. Ill. U. L.J. 71, 115 (1997).

5) *Id.* at 110.

collective backsliding: although 'We the People' have emerged into a new age, it is all too easy for us to lose our way, and the judges are there to make it harder to regress."[6] As Harvard law professor William P. Alford aptly put it, the Constitutional Court in Korea has established itself as "one of the most important bulwarks" against Korea's possible regression to its authoritarian past.[7]

The freedom of speech and press law of Korea, of course, cannot reveal the entire picture of how Koreans' political rights and civil liberties are defined and practiced amidst Korea's continuing progress to a liberal constitutional State in which the freedom of the individual is a preferred value. "[F]reedom of the press," said professor David A. Anderson of the University of Texas School of Law, "depends less on the laws that protect or restrict the press than on the society's values, traditions, culture, and political philosophy."[8]

Nonetheless, the crucial role of courts in freedom-of-expression jurisprudence merits systematic attention because an independent judiciary is indispensable to making constitutionalism more than an embellishment. Chief Justice William H. Rehnquist of the U.S. Supreme Court stated: "Many nations have impressive guarantees of free speech, free elections, and the like. But these have not had the same meaning in those countries because of the want of an independent judiciary to interpret them."[9]

Judicial independence and activism in a democratic Korea have been a hallmark of the expanding political liberties in Korea during the past 13 years. This is decidedly true of the enormous impact of judicial review upon the broadened notion of freedom of speech and the press as a constitutional right. "Korea is not a country where an active judiciary is expected or tolerated," professor Kyong Whan Ahn wrote. "There have been significant changes, however, in recent years. Courts have declared many statutes void, and governmental actions are now constantly challenged."[10] Instead of

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6) Bruce Ackerman, The Rise of World Constitutionalism 8 (1997).

7) William P. Alford, Recent Transformations in Korean Law and Society, 1 J. Korean L. 173, 174 (2001) (reviewing Recent Transformations in Korean Law and Society (Dae-Kyu Yoon ed., 2000)).

8) David A. Anderson, "Press Law in Modern Democracies: A Comparative Study," *3 Const. Commentary* 184, 184 (1986) (reviewing *Press Law in Modern Democracies: A Comparative Study* (Pnina Lahav ed., 1986)). In this context, Seung-Mock Yang, *Political Democratization and the News Media,* in Institutional Reform and Democratic Consolidation in Korea, *supra* note 2, at 149-70, is insightful.

9) William H. Rehnquist, *The Constitution: An Independent Judiciary Makes It Work*, 23 Trial 69, 74 (1987).

10) Ahn, *supra* note 4, at 75 (citation omitted). Ahn has cited five major factors behind making Korean courts

"categorical" or "declaratory" law, Koreans now opt for "justificatory" law under their constitutional-law politics.[11] Thus, the emergence of the Constitutional Court[12] as a key factor in making the rule of law undergird Korea's open democracy should come as little surprise.[13]

On the premise that freedom of expression is firmly embedded in Korea's constitutional law, the present study examines how the Constitutional Court has drawn the lines in reconciling individual rights to free expression with community interests since 1988. This Article analyzes the textual framework on freedom of expression under the Constitution. It then takes a critical look at the ideas and principles underpinning freedom of expression as they have been enunciated by the Constitutional Court as "the most important line drawer between the rights and obligations of the individual and those of society."[14]

II. The Constitution on Freedom of Expression

Among the fundamental liberties protected under the Constitution of Korea is freedom of expression. The Constitution provides for freedom of expression thus:

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more active than ever: (1) Access to constitutional adjudication has become easier; (2) Judicial independence has been enhanced; (3) The Korean bar has expanded rapidly; (4) Korea has joined the world economy; and (5) Koreans have a different attitude toward litigation and the Constitution. *Id.*

11) For a discussion of "categorical or declaratory" vs. "justificatory" law, *see* Alan M. Dershowitz, The Genesis of Justice 221 (2000).

12) For an informative overview of the Constitutional Court in 1988-1998, *see* The Constitutional Court, [Heonbeopjaepanso 10nyeonsa] 71-86 (1998). For a discussion of the structure and authority of the Constitutional Court under the Constitution of Korea, *see* Gavin Healy, Note, *Judicial Activism in the New Constitutional Court of Korea*, 14 Colum. J. Asian L. 213, 218-28 (2000).

13) Professor Alan M. Dershowitz of Harvard Law School noted:

> A legal system that sees the need to justify itself by reference to the experience of the people "signifies that it reckons with the will of the people to whom the laws are directed; it seeks their approval, solicits their consent, thereby manifesting that it is not indifferent to man".... This contrasts sharply with other ancient codes that reflect "no concern for the will of the people to whom the laws are directed. The laws are to be obeyed; they need not be understood. Motives are not necessary. The law's authority is derived from the need to have law and order, and it is the king and his entourage who decide what law and order are; the people are not privy to that decision"....
>
> Dershowitz, *supra* note 11, at 223 n.11 (citation omitted).

14) Henry J. Abraham & Barbara A. Perry, Freedom and the Court, at vii (7th ed. 1998).

(1) All citizens shall enjoy freedom of speech and the press and freedom of assembly and association;
(2) Licensing or censorship of speech and the press and licensing of assembly and association shall not be recognized;
(3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by law;
(4) Neither speech nor the press shall violate the honor or rights of other persons or undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.[15)]

The explicit prohibition of prior censorship of speech and the press under the 1987 Constitution is a significant improvement of the Constitution of 1980, which did not proscribe censorship of expression.

Several other provisions of the Constitution relate to freedom of expression in one way or another. Article 37 forbids Koreans' other basic freedoms and rights to be disregarded on the grounds that they are not enumerated in the Constitution. Nevertheless, the constitutional freedoms and rights of Koreans may be restricted by law under such circumstances as are necessary "for national security, the maintenance of law and order, or for public welfare."[16)]

Privacy, which often collides with free speech and press, is a right under the Constitution: "The privacy of no citizen shall be infringed."[17)] It is also protected under Article 10 of the Constitution, which provides: "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."[18)] Further, Articles 14 and 16 stipulate "freedom of residence and the right to move at will"[19)] and citizens' right to "be free from intrusion into their place of residence."[20)]

15) The 1987 Constitution, Art. 21.
16) *Id.* Art. 37(2).
17) *Id.* Art. 17.
18) *Id.* Art. 10.
19) *Id.* Art. 14.
20) *Id.* Art. 16.

It is truism that "[t]he press cannot report what it does not know."[21] This general statement about the news media's need to access information raises the question whether the Korean press as an agent of the public is granted a constitutional right to attend meetings, hearings, and similar proceedings of the executive, legislative, and judicial branches of government.[22] The Constitution provides that trials must be open to the public, but courts can close the trials "when there is a danger that such trial[s] may undermine the national security or disturb public safety and order or be harmful to public morals."[23] Similarly, National Assembly sessions are required to be held in the open, but they can be closed if the majority of the lawmakers present decide to do so or if the Speaker deems closed sessions necessary for reasons of national security.[24]

It has been debatable for years whether freedom of speech and the press under the Constitution guarantees freedom of information or right to know largely because no constitutional provision mentions it specifically. But professor Song Nak-in of Seoul National University's College of Law, who has authored a definitive treatise on Korean media law, noted that "it is indisputable that the right to know has been accepted through scholarly treatises and case law as a basic right deserving constitutional recognition."[25] Indeed, in addition to the freedom of expression clause of the Constitution, the petition clause protects Koreans' right to open records.[26]

III. The Constitutional Court on Freedom of Expression

The Constitutional Court's treatment of freedom of expression as a right in Korea has been dynamic and bold. The Court has been keenly aware of "the liberal

21) 2 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech§ 25:1, at 25-2 (2000).

22) Access to government meetings is distinguishable from access to government records, although they share a common interest in promoting the public's right to know. While the former focuses primarily on providing the press and the public with opportunity to attend the meetings of government bodies, the latter is mainly designed to ensure access to government records. Needless to say, the open meetings and open records law derives from the information-is-power notion that "[s]uppression is institutional: an agency of government chooses to conduct its business in secret, to make its work product inaccessible to the public, or to conceal from the public what it is up to." Donald M. Gillmor et al., Mass Communication Law: Cases and Comment 423 (6th ed. 1998).

23) The 1987 Constitution, Art. 109.

24) *Id.* Art. 50(1).

25) Song Nak-in, Media and Information Law[Eollon Jeongbobeop] 359 (1998).

26) The 1987 Constitution, Art. 26.

justification of a free press and the acceptability of those justifications as part of the legal argument."[27] Law professor Chong Jong-sup of Seoul National University contextualized the Constitutional Court's assertive role in institutionalizing free expression as a critical component of democratic politics in Korea:

> Suppression of free expression was very severe during the period of dictatorship and authoritarian rule [in Korea] because freedom of expression was tantamount to permitting criticism of those in power. Demands for freedom of expression, however, were displayed more than anything else when Korea moved from an authoritarian rule to democracy. The Constitutional Court took an active attitude while drawing the boundaries for the constitutional guarantee of freedom of expression.[28]

A. Freedom of Expression Defies Mode of Communication and Warrants "Preferred Position"

The constitutional clause on freedom of speech and the press applies the same way regardless of what medium of communication is involved. No distinction can be made in the mode of communication as far as freedom of expression as a constitutional right is concerned, the Constitutional Court held. The words "speech and the press" in Article 21 of the Constitution are not limited to oral and printed communication. Thus, production and manufacturing of disks and videos are protected so long as they are used as a means of communication to express thoughts, the Constitutional Court ruled.[29] Likewise, the free expression clause of the Constitution applies to movies in their production and showing.[30] Commercial speech is also protected by the Constitution because it "disseminates ideas, knowledge, and information" to the public."[31] The status of advertising as protected expression in Korea's constitutional

27) Pnina Lahav, *Conclusion: An Outline for a General Theory of Press Law in Democracy,* in Press Law in Modern Democracies: A Comparative Study 344 (Pnina Lahav ed., 1985).

28) Jong-Sup Chong, *The Constitutional Court and the Attainment of Fundamental Rights in the Democratization of Korea:* 1988-1998, 40 Seoul Law Journal [Beophak] 226, 241 (1999).

29) Constitutional Court, 99 heonga 17, Feb. 24, 2000 (en banc).

30) Constitutional Court, 93 heonga 13, 91 Honba 10 (consolidated), Oct. 4, 1996.

31) Constitutional Court, 96 heonga 2, Feb. 27, 1998.

law parallels the "commercial speech" doctrine the U.S. Supreme Court articulated in 1976.[32]

The "preferred position" concept[33] has been embraced in a number of freedom of expression decisions of the Constitutional Court. "Freedom of speech is the very basis of the survival and development of a democratic State," the Constitutional Court held in 1991. "Therefore, it is especially characteristic of the modern constitutional law that the freedom possesses a preferred status."[34] The preferred position of free speech is more often accepted in protection of political expression. In 1994, for example, because electioneering is an element to constitute a democratic society as a mode of political expression, the Constitutional Court stated, legislators do not have unlimited discretion in determining the extent to which electioneering should be allowed. The Court continued: "The constitutionality of an election statute should be reviewed under the strict scrutiny standard."[35]

B. Prior Restraints: Administrative Preclearance vs. Judicial Injunctions?

The Constitutional Court has defined censorship of speech and the press as an administrative office's prior review of ideas or opinions to prohibit their publication on the basis of their contents.[36] In order for censorship to constitute a violation of the Constitution, the Court required that it should entail an obligation for the press to

32) *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding that advertisements convey vital information to consumers and that a free enterprise economy depends on a "free flow of commercial information").

33) The notion of a "preferred position" for freedom of expression, as widely accepted in U.S. constitutional law, holds that "some constitutional freedoms, principally those guaranteed by the First Amendment, are fundamental in a free society and consequently are entitled to more judicial protection than other constitutional values." C. Herman Pritchett, *Preferred Freedoms Doctrine*, in The Oxford Companion to the Supreme Court of the United States 663 (Kermit L. Hall ed., 1992).

34) Constitutional Court, 89 heonma 165, Sept. 16, 1991.

35) Constitutional Court, 93 heonga 4, June 17, 1992. If the "strict scrutiny" test adopted by the Constitutional Court of Korea is employed in the same way as it is in the First Amendment law of the United States, it protects more speech than any other method. As constitutional law experts Gerald Gunther and Kathleen M. Sullivan of Stanford Law School noted, the strict scrutiny "requires ... both a showing of 'compelling' state ends and the unavailability of less restrictive means, [and] the government virtually always loses and the speaker virtually always wins." Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 1033 (13th ed. 1997)

36) Constitutional Court, 93 heonga 13, Oct. 4, 1996.

submit expressive material to the government for approval, a prior review process employed by an administrative agency, and the compulsory means for the agency to enforce its proscription against expression of unapproved ideas.[37]

As the Constitutional Court held in 1996, "because the anti-censorship principle does not extend to *judicial* restrictions, court-issued injunctions against the exhibition of films (for example, provisional measures on grounds of defamation, violation of copyright, etc.) or seizure of the publications for violations of similar statutes (obscenity, defamation, etc.) do not violate the constitutional ban on censorship."[38] The Court also said the constitutional ban on prior restraint "does *not* prohibit governmental interference with constitutionally unprotected ideas after their expression."[39]

Meanwhile, the Constitutional Court stated that the censorship clause of the Constitution does not altogether prohibit the screening of motion pictures prior to their public showing:

> It will constitute censorship to allow a review board to ultimately rule on the exhibition of the movies through a licensing system. But it does not

37) *Id.*

38) Constitutional Court, 93 heonga 13, 91 heonba 10 (consolidated), Oct. 4, 1996 (parenthetical notes in original) (emphasis added). The Constitutional Court's distinction between administrative and judicial prior restraints brings to mind University of Virginia professor John Calvin Jeffries, Jr.'s argument that "administrative preclearance" should be treated differently from "injunctions" in American law. Professor Jeffries wrote in 1983:

> Under ... a system [of administrative preclearance], the lawfulness of speech or publication is made to depend on the prior permission of an executive official. Ordinarily, publication without such permissions is punished as a criminal offense, even where the particular speech in question could not constitutionally have been suppressed. Thus, it is the failure to obtain preclearance rather than the character of the speech itself that determines illegality.
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> ....
>
> Under a regime of injunctions, there is no routine screening of speech and no administrative shortcut to suppression. The government has to shoulder the entire burden of identifying the case for suppression and of demonstrating in court a constitutionally acceptable basis for such action. Moreover, because an injunction must be sought in open court, the character of the government's claims remains subject to public scrutiny and debate. Most important, the decision to suppress is made by a court, not a censor.

John Calvin Jeffries, Jr., "Rethinking Prior Restraint," 92 *Yale L.J.* 409, 421-22, 426 (1983).

39) *Id.* (emphasis added).

> amount to censorship to obviate possible violation of a positive law by the public showing of movies and to evaluate the ratings of the motion pictures in order to effectively manage their distribution if the exhibition of the movies is inappropriate to minors. Even prohibition of the showing of films without rating evaluation and imposition of administrative sanctions on the film exhibitors ... will not constitute prior censorship, for the ban on the exhibition of the unrated films does not result from the review of the films but it is only a measure to implement the uniform rating system.[40]

The most determining factor in ruling on the censorship issue of the pre-publication review requirement is whether or not the review board is dictated by an administrative agency in reaching its decisions. The Constitutional Court was clear-cut in addressing the issue: "The no-censorship principle under the Constitution applies to administrative prior restraint. Thus, while censorship is enforced by an independent board, not by an administrative agency, the censorship entity should be viewed as an administrative authority in practice if the administrative agency is primarily responsible for setting up the censorship procedure and continues to influence the composition of the censorship mechanism."[41]

In 1992, the Constitutional Court ruled on the "delivery of copies" provision of the Periodicals Act[42] in the context of prior restraint.[43] Article 10 of the Act requires the publisher of a registered periodical to "immediately" deliver two copies of the periodical to the Ministry of Public Information (MOPI) after publication. The delivery of copies requirement was challenged as a prior restraint on the press in violation of the Constitution.[44]

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40) *Id. See also* Constitutional Court, 99 heonga 117, Feb. 24, 2000; Constitutional Court, 97 heonga 1, March 27, 1997; Constitutional Court, 94 heonga 6, Oct. 31, 1996.

41) *Id.*

42) Act No. 3979 (1987), last amended by Act No. 5926 (1999).

43) Constitutional Court, 90 heonba 26, June 26, 1992. This 1992 Constitutional Court case started when the publisher of Labor Literature [Nodong Munhak] was fined by the Ministry of Public Information (MOPI) for not delivering the requisite copies. The publishers challenged the fine in a Seoul district court. The lower court rejected the petitioner's request that the delivery and fine provisions of the Periodicals Act be referred to the Constitutional Court for review.

44) *Id.*

The Constitutional Court, defining the type of press censorship, said: "[The ban on] censorship of speech and the press means the prohibition of prior censorship where the authorities examine the contents of citizens' expressions and then approve or disapprove certain expressions prior to their public dissemination."[45] The delivery of copies to the MOPI, the Court held, would not constitute press censorship because the contents of the publication were unrelated to the grounds for permitting or banning its circulation.[46]

On the other hand, the Court cautioned that the MOPI would be abusing the delivery provision if its enforcement constituted de facto press censorship. Censorship would result if the MOPI demanded the delivery of copies "before" or "simultaneously with" the circulation of the periodical or if the MOPI, mayor, or governor delayed in issuing certificates of delivery and then punished the periodical on the grounds that it was disseminated without these certificates.[47] Nevertheless, the Court concluded that the delivery provision serves the public interest in ensuring the efficient enforcement of the Periodicals Act, which is designed to promote the improvement of the publishing industry. The public benefits from the requirement would exceed the limits on the publisher's property rights, the Court stated.[48]

C. National Security Act Surviving Judicial Challenge--Political Compromise?

In reviewing the National Security Act[49] of 1980, the Constitutional Court ruled that the Act was "constitutional on condition of proper interpretation."[50] The Court, upholding the Act, laid out the proper application of the statute. The Court held that the Act would not violate the Constitution if it applied only to "the clear danger of bringing about substantive evils to the State," not to actions unharmful to the security

45) *Id.*

46) *Id.*

47) *Id.*

48) *Id.*

49) Act No. 3318 (1980), last amended by Act No. 5291 (1997).

50) Constitutional Court, 89 heonma 113, April 2, 1990. For a detailed discussion of the Constitutional Court's 1991 ruling on the National Security Act, see Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 Stan. J. Int'l L. 1, 10-12 (1994). The author's discussion of the National Security Act draws from the *Stanford Journal of International Law* article.

of the State or to the basic order of a liberal democracy.[51]

The restriction on the interpretation of the law, the Court argued, was "a natural demand evolving from the preferred position of freedom of expression" under the Constitution. In applying the statute to the specific facts of the case, the Court suggested that courts consider "the proximity between conduct and its danger to society" and "especially the gravity of the evil" resulting from the dangerous conduct.[52]

Dean Kun Yang of Hanyang University's College of Law in Seoul characterized the Constitutional Court's ruling on the National Security Act as a case on point in which the Court's activism was tempered by political reality in Korea.[53] He noted that the Court's judgment of "limited constitutionality" of the law was not necessarily a problem unique to Korean constitutional law. "The problem is, however, that it has been abused in many instances," Dean Yang argued. "Too narrow an interpretation of a statute often happens. More problematic is that the Court did not take into consideration how the law in question actually had been interpreted and applied by law enforcement authorities or ordinary court."[54]

D. Registration Requirements for Periodicals Not Licensing

The registration requirements of the Periodicals Act were questioned about their constitutionality relating to a constitutional ban of licensing of the press.[55] The Constitutional Court placed the constitutional issue in a broader perspective by discussing the "essential aspect of press freedom," especially as exercised by the news media.

The press freedom clause of the Constitution, the Court held, "protects freedom of the press vigorously" and at the same time "imposes certain duties and responsibilities" on the press to the extent necessary to ensure the media's sound development. The Constitution, for example, permits a statutory requirement that a

51) *Id.*

52) *Id.*

53) Kun Yang, *The Constitutional Court and Democratization,* in Recent Transformations in Korean Law and Society 33, 42 (Dae-Kyu Yoon ed., 2000).

54) *Id.* at 42-43.

55) Constitutional Court, 89 heonma 113, April 2, 1990.

publisher possess certain facilities. This requirement, according to the Court, was designed to provide an institutional safeguard for the wholesome growth of the press industry and to protect the work environment, welfare, and treatment of media employees as well as their editing and printing processes.[56)]

Drawing a distinction between freedom of the press as "an internal essence" and freedom of the press as an institutional entity, the Court stated:

> By confusing the essential aspect of freedom of the press with publication of periodicals which is a means of news reporting, people are likely to claim constitutional rights for the press on the assumption that publication of periodicals is part of press freedom. Freedom of the press under the Constitution represents a guarantee of the contents of expression, which is the internal essence of freedom of the press. It does not necessarily encompass the concrete printing facilities that might be necessary for exercising freedom of the press nor the activities of media owners as businessmen.[57)]

Therefore, "to statutorily require the publisher of a periodical to register with the government must be clearly differentiated from the interference with the essential aspect of freedom of the press." The Court concluded that to censor or meddle in the contents of news reports would violate the internal essence of press freedom, while to impose these requirements on the actual publishing facilities to guarantee the proper functioning of the media industry would not. The Court thus ruled that the registration provision was constitutional because its purpose was to enable the MOPI to ensure the stable growth of the media industry, not to allow infringement of the contents of reports and editorials.[58)]

In examining the ownership-of-printing-facilities requirement, the Constitutional Court held that a strict interpretation of this requirement--that publishers must possess their own printing facilities as a prerequisite to registration--would be found to violate the Constitution.[59)]

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56) *Id.*
57) *Id.*
58) *Id.*

E. Compulsory Apology for Defamation Violates Freedom of Conscience

As a general rule, a public apology had been recognized by Korean courts as a "suitable" way for the defamed to vindicate their reputation under the Civil Code.[60] In connection with public apology as an accepted "suitable measure" under the Civil Code, the Constitutional Court in April 1991 ruled in a 9-0 decision that the Civil Code was unconstitutional insofar as the Code applies to a notice of apology.[61] In a carefully reasoned opinion, the Court struck down the "unlawful act" provision of the Code as a violation of the Constitution on freedom of conscience and on restriction of freedoms for public welfare.

The Constitutional Court emphasized that the Constitution guarantees freedom of conscience separately from freedom of religion. This separate recognition of freedom of conscience under the Constitution, the Court said, indicates unambiguously that the Constitution prevents the government from interfering with the value judgments of individuals.[62] The Court also stated that freedom of conscience includes the right not to be forced by the government to express publicly or to remain silent on moral judgments.[63] The Court added that "the [freedom of conscience] provision is designed to secure a more complete freedom of spiritual activities as the moral foundation of democracy, which has been indispensable to the progress and development of humankind."[64]

The Constitutional Court argued that compulsory apology forces one to accept a guilt for libel against one's will. Thus, the apology is against an individual's freedom of conscience which includes his right of silence.[65] The Court observed:

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59) *Id.*

60) Act No. 471 (1958), Act No. 5454 (1997).

61) Constitutional Court, 89 heonma 160, April 1, 1991. For criticism of the Constitutional Court's decision on compulsory apology for defamation, see Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 Cardozo J. Int'l & Comp. L. 205 (2000).

62) *Id.*

63) *Id.*

64) *Id.* The Constitution Court noted the U.N. Universal Declaration of Human Rights of 1948, which South Korea ratified in 1990, for its guarantee of freedom of thought and conscience. The Declaration reads in relevant part: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

65) *Id.*

> A notice of apology is for a person to publicize to the general public a humiliating expression of mind in his name against his will by publishing it in the mass media such as newspapers, magazines, etc., in violation of his freedom of conscience. While its specific contents are determined by the state authorities as part of the judicial proceedings, the humiliating message still appears to have been a voluntary opinion of the person involved.[66]

Thus, the Court observed, the apology requirement undermines the right of character of individuals underlying the human dignity and value.[67]

Second, the Constitutional Court expressed strong reservations about the effectiveness of apology as a means to recover from a reputational harm. The Court viewed it as exceeding its utility as a necessary measure to recompense for a lost good name. Given that an apology is forcibly imposed by the State upon the media organization which has no will to apologize or believes in the innocence of its publication, the apology is similar to the now outmoded "talion."[68] The Court characterized the justice of retribution in libel law as anachronistic and primitive and thus incompatible with humanitarianism to be protected in a civilized society.[69] It said that the forcible apology for libel is a punitive sanction derived from the ancient law which valued the satisfaction of vendetta.[70] Accordingly, it should be limited to criminal law. Examining the impact of apology upon the application of the Civil Code, the Court asserted that "apology is used as a principal means of recovery for libel while it makes damage awards a supplementary decoration of the Civil Code."[71] Consequently, the damage award tends to be so small, the Court said, that the apology measure proves an impediment to the constitutional requirement of just compensation for reputational injury.[72]

Finally, the Constitutional Court addressed the question whether a notice of

66) *Id.*
67) *Id.*
68) *Id.*
69) *Id.*
70) *Id.*
71) *Id.*
72) *Id.*

apology is the compellingly necessary means to restrict freedom of the press to promote the public welfare. Analyzing the issue from a comparative perspective, the Court stated that apology is recognized only in Japan, where arguments against its constitutionality are "vigorously" raised.[73]

The Court, noting the libel laws of several Western countries including the United States,[74] set forth three alternatives to apology under the Civil Code: "(1) Publication in newspapers, magazines, etc., of the court opinions on damages in civil libel cases at the expense of the defendant; (2) Publication in newspapers, magazines, etc., of the court opinions against the defendant in criminal libel cases; (3) A notice of retraction of defamatory stories."[75] Judicial impositions of these measures would not raise constitutional issues as did the compulsory apology for libel, the Court said, because they would not involve a forcible judgment on conscience or a violation of right of character of the defendant.[76]

F. Right of Reply Not a Violation of Press Freedom

The Periodicals Act on the right of reply was challenged on the ground that it violated freedom of the press.[77] The Constitutional Court pointed to the two rationales behind the statutory recognition of the right of reply. First, when an individual's reputation has been injured by a news organization, the Court said, that individual should be given a prompt, appropriate, and comparable means of defense. To counter the effect of the offending article, the right of reply guarantees the injured party an opportunity for defense through the same news organization. Second, the right-of-reply requirement contributes to the discovery of truth and formation of correct public opinion. Readers often depend on information provided by the news media, and they

73) *Id.*

74) The Constitution Court discussed the libel laws of England, the United States, Germany, France, and Switzerland. The Court said that in England and the United States, damages are awarded as a rule while a voluntary apology by the defendant is recognized as a mitigating factor in reducing the damage award and that in Germany, France, and Switzerland courts order a retraction of the defendant's statements, rule on the truth of defamation, or award damages.

75) Constitutional Court, 89 heonma 160, April 1, 1991.

76) *Id.*

77) Constitutional Court, 89 heonma 165, Sept. 16, 1991.

cannot make a sound judgment until they hear the opposing arguments of the other parties.[78]

Dismissing the petitioner's argument that the reply provisions would violate the "essential aspect" of freedom of the press, the Court emphasized that other constitutional interests, i.e., reputation, privacy, and press freedom, were protected by the statutory requirements governing the right of reply. The Court concluded that the reasonable limitations on the right of reply functioned as "a safety mechanism to prevent the unwarranted encroachment on freedom of the press."[79]

The Constitutional Court in 1996 again reviewed the constitutionality of Article 19(3), which requires that right-of-reply claims be brought to trial pursuant to the provisional measures of the Civil Code.[80] The petitioner argued that the libel claims under the Civil Code are adjudicated through formal judicial proceedings, while the right of reply claims are subject to provisional measures, which are equivalent to "summary procedures." The Periodicals Act's judicial procedure on the right of reply claims, according to the petitioner, would violate the news media's right to a fair trial and the principle of equality, as guaranteed by the Constitution.[81]

In rejecting the petitioner's claim, the Constitutional Court noted that the right of reply was conceived to provide the injured party with a method to recover his lost reputation promptly in light of the periodicals' capacity to disseminate information extensively. The Court held.

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78) *Id.*

79) *Id.* The Constitutional Court cited the following qualifications on the right of reply designed to protect the press: (1) Such reply is limited to statements of facts only and thus does not affect expression of opinion by the press; (2) The news media can deny the reply request when the injured party does not have proper interest in the reply, when the contents of the reply are clearly contrary to the facts, or when the reply is only for commercial purposes; (3) The request for reply must be made within one month of the publication of the assertion, or 14 days in the case of daily publications, thereby relieving the media's concern about out-of-date reply requests; (4) The reply is limited to factual information and clarifying statements and cannot contain illegal contents such as libelous or obscene expression, and the length of the reply cannot exceed that of the original story; and (5) The pre-trial requirement for arbitration by the Press Arbitration Commission guarantees an opportunity for a voluntary resolution of the disputes between the parties. The Court also maintained that the reputation or credibility of the news organization is not directly affected by the reply because the reply is published in the name of the injured party, not of the publisher. *Id.*

80) Constitutional Court, 95 heonba 25, April 25, 1996. The right of reply requirements of the Periodicals Act were one of the "suitable measures" provided by Article 764 of the Civil Code as a way to recover from reputational injury.

81) *Id.*

> A person who is injured by a news report is able to defend himself from the injury to his right of character by immediately responding to the report. It is impossible for the injured person to effectively recover from his reputational loss if his recovery is made possible only through the formal judicial proceedings. This is because he will recover not until after the public forgets the original news report. When the request for a reply is enforced so late that it loses its timeliness and the readers or viewers cannot recall the contents of the story which precipitated the reply, its whole process will negate the freedom of participation in the formation of fair public opinion and the guarantee of a news media structure as an objective order.[82]

G. Obscenity (Unprotected) Distinguished from Indecency (Protected).

"In most countries," stated Sandra Coliver, ARTICLE 19's law program director in London, "it is criminal offence to publish certain kinds of pornographic, obscene and/or other materials which offend public morality."[83] Korea is not an exception. Court rulings in Korea's obscenity law interpret the vague provisions of various statutes that prohibit the creation and distribution of allegedly obscene material. More important, Korean courts decide how far the government may go in inhibiting sexual expression, though not necessarily obscene.

The Constitutional Court held that obscenity does not merit constitutional protection.[84] In marked contrast with obscenity, however, indecent but nonobscene expression is protected by the Constitution. In distinguishing obscene expression from indecent, the Court offered a thoughtful discourse on freedom of expression relative to obscenity. Invoking the "free exchange of ideas," "individual self-actualization," and "discovery of truth" values of free speech, the Court argued that no democratic politics will be possible without "open space" for an unfettered interchange of ideas through freedom of expression.[85]

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82) *Id.*

83) Sandra Coliver, *Comparative Analysis of Press Law in European and Other Democracies,* in Press Law and Practice 285 (Sandra Coliver ed., 1993).

84) Constitutional Court, 95 heonga 16, April 30, 1998.

85) *Id.*

Quoting from Articles 21(4) and 37(2) of the Constitution, however, the Constitutional Court contended that there is no absolute protection for speech or press. The Constitution does not allow the right of expression to jeopardize national survival or to impinge on more important personal rights of individuals, the Court noted. The critical question in balancing free speech against social interests is where to draw the line on governmental interference with expression. The Court relied heavily on the "preferred position" doctrine on free speech and press in arguing that the basic rights of citizens should be protected to the greatest possible extent while the governmental restriction of the rights should be limited as much as possible.[86]

The Constitutional Court identified three "unique" reasons why the State's involvement in expressive rights in particular should be far more restrained:

> First, the constitutional values of freedom of speech and the press are so important that they should be secured for democratic constitutionalism. Second, speech and the press are an expression of an individual's ideas and opinions to the others as a way of fulfilling his personality. Here no yardstick is absolute in judging which ideas or opinions are correct and valuable in a liberal democracy. The attempt of the State or the majority of people in society to tailor the ideas and opinions of people should be rejected and guarded against more than anything else under a liberal Constitution. Third, speech and the press are usually restricted in order to correct or prevent the harm from the speech and the press, and the governmental effort in this regard is justified and necessary. Nonetheless, the first mechanism, i.e., the competition of ideas, to deal with the speech-related harm exists before the government interferes. Accordingly, if the evils derived from speech and the press can be eliminated on their own through the competition of conflicting diverse ideas and views in society, the government's intrusion should be minimal. This explains why the diversity of opinions and open debates are emphasized when free speech and press is discussed in a constitutional democracy. [87]

86) *Id.*

87) *Id.* The Constitutional Court's comment on the "neutrality" principle relating to the government's role in

The Court held that the "self-correcting" process in the marketplace of ideas should run its course before the State is allowed to take action to remove the harm from expressive activities.

Does every expression correct itself in the open and free trade in ideas? The Constitutional Court answered in the negative. The Court held that certain expression, once it is published, cannot be undone for its harm through its competition with other ideas, or its harm is so serious that society cannot wait for other ideas and expressions to neutralize the harm.[88] This kind of expression, the Court stated, justifies the State's interference before the self-correcting mechanism operates through the general marketplace rules.[89]

The Constitutional Court applied its free-speech principle in determining whether the government can restrict obscenity without violating the Constitution:

> Obscenity is a sexually blatant and undisguised expression that distorts human dignity or humanity. It only appeals to prurient interests and, if taken as a whole, does not possess any literary, artistic, scientific, or political value. Obscenity not only undermines the healthy societal morality on sex, but its harmful impact is also difficult to eliminate through the open competition of ideas. Accordingly, obscene expression, if strictly interpreted as suggested here, is not within the area of constitutionally protected speech or press.[90]

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abridging speech echoes what the U.S. Supreme Court stated in 1974: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (citation omitted). *See alsoTexas v. Johnson*, 491 U.S. 397, 414 (1988) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

88) Here the Constitutional Court applies the "harm principle" in identifying obscenity as causing the type of injuries that will qualify as serious "harms" sufficient to justify regulation of speech. *See* Rodney A. Smolla, Free Speech in an Open Society 48-50 (1992).

89) Constitutional Court, 95 heonga 16, April 30, 1998.

90) *Id.* The Constitutional Court's discussion of obscenity as an unprotected expression under the Constitution seems to borrow in part from the U.S. Supreme Court's obscenity standard established in *Miller v. California*, 513 U.S. 15 (1973). Compare with the third prong of the *Miller* test, *Miller*, 513 U.S. at 24 (material may not be judged obscene unless it, "taken as a whole, lacks serious literary, artistic, political, or scientific value").

On the other hand, the Constitutional Court said that "indecent" expression is not obscene. The Court termed indecency "vulgar and coarse expression" such as violent and cruel language or profanity as well as sexual speech but not "hard-core" pornography. Thus, the Court argued, the notion of indecency is so broad in its application and so vague in its meaning that it results in uncertainty among those who enforce or violate the indecency regulation.[91]

The Constitutional Court conceded that there is a definite need to regulate "decadent pornography and excessively violent and brutal expression" to protect minors' healthy mind and sentiments. The Court held, however, that laws passed for the protection of minors must not prevent access by adults to material that is constitutionally protected (not legally obscene) simply to prevent its possible exposure to children. "Even though the law restricts indecent expression," the Court stated, "its target should be limited to juveniles and its methods should be narrowly tailored to prohibit the dissemination of the indecent material." Otherwise, the Court warned that the law would clearly violate adults' "right to know" because its total prohibition of the expression legally proper to the adults forces the adult material to conform with the adolescents' standards.[92] The Court was concerned that it would be "burning the house to roast the pig."

The Constitutional Court concluded : "Indecent expression, unlike obscenity, is protected by the freedom of speech and the press. It possesses certain redeeming social values. And we fear that the complete prohibition of indecent expression will violate the essential aspect of freedom of expression unless an important reason exists for the prohibition under exceptional circumstances."[93] In short, the regulation of indecency under the Publishing Companies Act[94] failed to meet both the "substantive" (too overbroad) and "definitional" (too vague) precision requirements of the free speech jurisprudence.

H. "Right to Know" and Access to Information Evolving from Freedom of Expression

The Constitutional Court's recognition of the "right to know" as emanating from

91) *Id.*

92) *Id.*

93) *Id.*

94) Act No. 904 (1961), last amended by Act No. 5659 (1999).

freedom of speech and the press has contributed to changing Korea to "a transparent, open nation" from "a closed, secretive one."[95] The right to know is necessary to a democratic society in promoting individual and social values such as self-fulfillment, search for truth, participation in political decision-making, and balancing of stability with change.

The Constitutional Court noted the "checking value" aspect of the right to know in making the government responsive to people.[96] In this connection, the Court four years earlier had discussed access to governmental information as part of the right to know: "The right to know should be broadly accepted if the requester is concerned with the requested information and the release of the information is not harmful to public interest. We are of the opinion that it is indisputable that public information must be mandatorily released to those who have a direct interest in it."[97]

The Constitutional Court in another important right-to-know case affirmed that a sufficient guarantee of access to information makes freedom of speech and the press a reality. Interestingly, the Court drew upon the U.N. Universal Declaration of Human Rights of 1948 as well as the Constitution of Korea for its conclusion that the right to know is "naturally included in the freedom of expression."

The Court also placed the right to know under the rubric of the right to liberty and the right to petition. The right to liberty, the Court said, meant "not to be impeded by the government in obtaining access to, collecting, and using information."[98] The right of petition is the right for citizens to petition the government to eliminate restrictions on informational access. If release of the requested records "would not conflict with the fundamental rights of those concerned or violate the national security, maintenance of law and order, and public welfare interest," the Court held, disclosure of the records

95) Jong-Sup Chong, *supra* note 28, at 246.

96) Constitutional Court, 89 heonga 104, Feb. 25, 1992. The "checking value" of citizens' access to public records in a democracy, Columbia University law professor Vicent Blasi noted in 1977, is because one of the most efficient checks on government inefficiency or corruption is the public's right to access government information. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 Am. B. Found. Res. J. 522, 529 (1977).

97) Constitutional Court, 88 heonma 22, Sept. 4, 1988. This was the first case in which the Constitutional Court had recognized access to government records as part of the "right to know" under the Constitution in Korea. Professor Chong Jong-sup called the 1988 decision of the Constitutional Court on the right to know in Korea "rightly epoch-making." Jong-Sup Chong, *supra* note 28, at 247.

98) *Id.*

would be a "faithful" execution of the government's duty to guarantee the basic constitutional rights of its citizens.[99]

In May 1998, the Election Act [100] provisions that prohibit the news media from publishing their opinion polls during the campaign period were the focus of the Constitutional Court case.[101] Although the issues involved in the case did not result from a dispute over access to government records, the court opinion in the Election Act case attests vividly to how freedom of speech and the press, along with freedom of information, is balanced with other competing sociopolitical interests. Especially Justice Yi Yong- mo's forceful dissenting opinion in the Constitutional Court's decision illuminates the still fomenting process of a free speech jurisprudence in Korean constitutional law.

The case before the Constitutional Court involved the People's New Party and other petitioners' argument that Article 108 of the Election Act on prohibition of survey results violated their right to know and the news media's freedom of the press and that it infringed the citizens' right to vote. The provision, the petitioners claimed, prevents access to information that is crucial to people in selecting their candidates for election.[102]

The Constitutional Court, in an 8-1 decision, upheld the prohibition of releasing the opinion survey results for a certain period before the election date.[103] Referring to the "bandwagon effect" and "underdog effect" of the opinion surveys on elections, the Court stated:

> [They] are feared to mislead the real intent of people and to undermine the fairness of the elections. Moreover, as the election day approaches, the negative effect of the announced public polls will be maximized. Especially when the unfair or inaccurate opinion polls are published, there is a high possibility that it may damage the fairness of the elections conclusively. On the other hand, the likelihood of the polls results' being

99) *Id.*

100) Act No. 4739 (1994), last amended by Act No. 6388 (2001).

101) Constitutional Court, 97 heonma 362, 394 (consolidated), May 28, 1998.

102) *Id.*

103) *Id.*

responded or corrected in good time is getting slimmer.[104]

The Constitutional Court also ruled that the prohibition period for opinion polls was not an overbroad restraint on freedom of expression and the right to know under the Constitution. The Court found the statutory provision a necessary and reasonable restriction due to Korea's "social environment" relating to opinion surveys and the need to ensure fair elections.[105]

In the sole dissenting opinion, Justice Yi Yong-mo was broadly critical of the majority's decision, finding it erroneous not only for failing to fully understand the constitutional and technological issues involved in the case but also for not recognizing the anachronism of the Election Act's proscription against publication of public polls.

Noting that elections are the "most important" means to find a consensus of the public, Justice Yi said publication of the opinion surveys is important to citizens as well as to the political parties and their candidates in identifying public opinion during the election period. The polls provision of the Election Act criminalizes dissemination of the information which Justice Yi said "contains the valuable political contents protected by the Constitution." Banning the political information contradicts the "absolute" principle of the Constitution on the right to know and freedom of expression, according to Justice Yi.[106]

Justice Yi criticized the Court for holding mistakenly that the polls regulation would advance efficiently the asserted government interest in ensuring fair elections. The ban on publication of the survey results, he argued, "does not fit in with the age of globalization and informationalization" and in the process skews reality. Justice Yi wondered aloud whether the Court's thinking was out of sync with the Internet's ability to overcome the traditional governmental control of communication. Citing the Internet and satellite broadcasting as good examples, he pointed out that people are able to access a great amount of information so quickly through various communication media beyond the State control.

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104) *Id.* The Korean Constitutional Court's decision stands in stark contrast to the Canadian Supreme Court's invalidation in 1998 of a similar election statute on grounds that the law was an unjustifiable infringement of freedom of expression under the Canadian Charter of Rights and Freedom. *See Thomson Newspapers Co. v. Canada* [1998] 1 S.C.R. 877.

105) *Id.*

106) *Id.*

About the Internet's enormous impact on informational access, Justice Yi observed: "The explosive supply of the Internet makes it possible to provide not only the results of the opinion surveys we want to know but also those of the surveys which lack in fairness and objectivity. And regulation of this kind of information is technologically impossible." Consequently, he held, the Election Act provision restricts newspapers and the broadcasting media within Korea, but it cannot apply to the foreign news media and the Internet in Korea and abroad. Justice Yi saw a distinct possibility that poll results could be posted on the World Wide Web by anyone who wished to make the survey results public. While the legislative objective of the prohibition might be sound, he concluded, the restriction was inappropriate and unreasonable as a means to attain its stated objective.[107]

I. Access to Government Meetings Not an Absolute Right

While "[g]enerally speaking, legal hotlines for the news media receive more inquiries regarding access to meetings than any other area of communications law" in the United States,[108] access to government proceedings has rarely been a front-line issue for the Korean press and the public for years. Few court decisions in Korea have directly addressed whether freedom of the press and speech encompasses the public's general right of access to government meetings. In this context, the June 29, 2000, ruling of the Constitutional Court [109] was a threshold event in the "sunshine law" history in Korea because it has highlighted assiduous judicial soul-searching about citizens' right to know through attendance in government proceedings.

At issue in the case were the National Assembly Act[110] and the Act on Inspection and Investigation of State Affairs.[111] The Citizens' Coalition for Economic Justice and the Citizens' Coalition for Monitoring of Inspection of Government Offices petitioned

107) *Id.* For a debate on the inexorable impact of the Internet on the voluntary agreement among the major U.S. networks not to release exit poll data until the polls close, *see* Richard Morin, *Is the Exit Poll on Its Way Out?: The Rush to Release Results Jeopardizes a Valuable Journalistic Tool*, Washington Post Nat' Wkly. Ed., March 6, 2000, at 34; Daniel Schorr, *Exit Polling: Why Gag the Media?*, Christian Science Monitor, March 10, 2000, at 11.

108) John D. Zelezny, Communications Law: Liberties, Restraints, and the Modern Media 207 (3d ed. 2001).

109) Constitutional Court, 98 heonma 443 & 99 heonma 583 (consolidated), June 29, 2000.

110) Act No. 4010 (1988), last amended by Act No. 6266 (2000).

111) Act No. 4011 (1988), last amended by Act No. 6267 (2000).

the Constitutional Court to determine whether they were denied, in violation of their constitutional rights, access to a National Assembly budget subcommittee meeting and to the National Assembly's inspections of state administration, respectively.

The Constitution's guarantee of open parliamentary meetings, the Constitutional Court held, stems from citizens' democratic demand that the National Assembly operate according to the will of the people by disclosing the Assembly's deliberations and the Assembly members' activities to the public. "Only when the National Assembly's debates or its policy-making process is open to the public," the Court stated, "the citizens, who are the sovereign of our nation, not only can form political opinions and participate in politics; they also can supervise and criticize the Assembly's lawmaking activities. Further, access to parliamentary proceedings ensures fairness in the proceedings and acts as an antiseptic against political collusions and corruption."[112]

The mandatory openness of the National Assembly's plenary session is implemented through attendance by the public, through the news media's unrestricted reporting, or through publication of the minutes of the proceedings, according to the Constitutional Court. Noting that the constitutional provision on open parliamentary meetings also applies to committee meetings of the Assembly, the Court said the openness requirement is "not absolute" and the meetings may be closed to the public.[113] The Court pointed out that even when the committee meetings are open to the public, the committee chairman may not want the public in on the meetings for a justifiable cause. But the chairman's authority to bar individuals from the meetings is not unqualified. The policy justifications for the open parliamentary proceedings posit that the chairman may choose closed committee meetings only when he must maintain order to resolve the space constraints of the meeting room or make the meetings proceed in an orderly fashion.[114]

112) Constitutional Court, 98 heonma 443 & 99 heonma 583 (consolidated), June 29, 2000. In this light, one U.S. media law scholar's comments on American experience with access to government records especially are instructive: "While our FOI [Freedom of Information] laws, both federal and state, have certainly helped ferret out an occasional instance of corruption by an isolated government official, I don't believe there is widespread corruption among our public officials. Maybe our FOI laws are the reason." Sandra F. Chance, *Freedom of Information in Emerging Democracies*, Media Law Notes, Summer 2000, at 5.

113) *Id.*

114) *Id.*

On the other hand, the Constitutional Court asserted that the committee chairman should be accorded wide latitude, out of respect for the National Assembly's autonomy, in judging whether there is a maintenance-of-order necessity of excluding the public from his committee meetings. If the subcommittee meetings in which professionalism and efficiency are an overriding concern are open to the public, the Court stated, the subcommittee's "substantive" discussions or conclusions most likely will be influenced by the subcommittee members' political posturing, and the subcommittee hardly can reach a political consensus immune from social pressures.[115)]

The Special Budget Settlement Committee's Subcommittee on Coordination of Figures in question cannot reveal its process to government agencies or parties who have a vested interest in budget deliberations. The subcommittee meetings are closed "by tradition" to secure an uninhibited and adequate deliberation of the budget bill among subcommittee members, the Constitution Court stated. Further, when a certain item is transferred from a standing committee to its subcommittee, the subcommittee's deliberation is secret as a matter of procedure under the standing committee's "resolution" or the "understanding" of the entire committee members. Thus, the subcommittee's decision to close its meetings does not overstep the National Assembly's independent authority to conduct its business under the Constitution.[116)]

Likewise, the Constitutional Court ruled that the parliamentary inspection of the administration is subject to non-disclosure under law, and thus the inspection can be conducted behind closed doors, unless otherwise "resolved" by the National Assembly committee involved. The refusal to admit the petitioners to the lawmakers' inspection of the government offices for the maintenance of order was not the kind of abuse of parliamentary discretion that warrants the Constitutional Court's involvement.[117)]

In their strong dissent, three justices of the Constitutional Court took issue with the majority's interpretation of the "maintenance of order" justification and with the Court's unwarranted deference to the National Assembly's autonomous decision on its proceedings. Justices Yi Yong-mo and Ha Kyong-chol argued that the refusal to allow the public to the parliamentary inspections of state affairs exceeded the proper grounds relating to limited space and the need to preserve order during the inspections. The

115) *Id.*
116) *Id.*
117) *Id.*

closure of the inspections was precipitated by the inspecting lawmakers' concern about their "excessive psychological pressure" from the civic organizations' reviews of the lawmakers' performance, according to the justices.

In his separate, lengthy dissent, Justice Kim Yong-il argued that the petitioners' "right to know (right to attend the National Assembly proceedings)" was violated when the Assembly's subcommittee on budget numbers and the Assembly's inspection of administrative agencies were closed to the public. He elaborated on the constitutional dimension of the public's right to attend parliamentary sessions:

> [C]itizens' right to attend the National Assembly proceedings is not an ordinary right to be derived from the open proceedings only, but a fundamental right guaranteed as their right to know under the Constitution. The right to know means the citizens' freedom and right to collect information they need to participate in national politics in a democracy, to promote free development of individuality, and to secure life worthy of human beings .... When Article 1(2) (people as sovereign of the nation), Article 21 (freedom of expression), Article 41(1) (National Assembly representing citizens), and Article 50(1) (public sessions of National Assembly) are read collectively, gathering necessary knowledge and information through attendance in open proceedings of the National Assembly may be viewed as a basic right guaranteed for the citizens as part of their right to know.[118)]

Insofar as the right to attend the National Assembly meetings is guaranteed as the citizens' right to know, Justice Kim stated, the restriction on the right must meet its constitutional and statutory standards. While the legislators' determination of the presence (or absence) of the prerequisites for the restriction deserves judicial deference, the restriction is unacceptable when it is clearly arbitrary and without reasonable grounds.[119)]

Justice Kim was disturbed by the majority of the Constitutional Court's argument that the Court should respect the National Assembly's independent power to make

118) *Id.* (Kim Yong-il, J., dissenting) (citations omitted).

119) *Id.*

legislative decisions. He warned:

> The autonomous authority of the National Assembly does not go so far as to allow the Assembly to close its meetings to the public as it pleases, while ignoring the constitutional and statutory rules on open meetings and the requisites for closed proceedings. Even if it does so, the majority's way of deferring to the National Assembly in legislative proceedings will only eviscerate the constitutional and democratic significance of citizens' right to attend the Assembly proceedings.[120)]

Equally dismaying to Justice Kim was the National Assembly's selective exclusion of civic organizations from attendance in the Assembly's inspection of the administrative offices. Noting that the civic organizations' monitoring of the inspection was not disruptive, he asserted that the civic organizations were entitled to observe and evaluate the inspection for the general public:

> Behind the establishment and activities of the coalition of civic organizations [in Korea] are the trend of the times toward civic communities' push for political participation to serve as a complement to a representative democracy and the citizens' realistic conclusion that the National Assembly does not represent public opinion fully. From this perspective, selectively denying the civic organizations attendance in the National Assembly's inspection proceedings merely because of a [possible] injury to the political standing and reputation of the inspectors from the organizations' published evaluations of their work amounts to rejection of the civic organizations' criticism of the lawmakers' inspection of administrative agencies. This rejection stems from disregard of the constitutional principle of opening legislative sessions to the public, which enables citizens to monitor and review the legislative activities. Even though the civic organizations' review [of the National Assembly's inspection] is feared to create side effects to a certain degree, that kind of negative impact of the open inspections should be left up to

120) *Id.*

the citizens' political judgment.[121]

IV. Discussion and Analysis

The statues on freedom of expression in Korea are rarely an accurate barometer to measure how vigorously or timidly Koreans exercise their right to free expression. Judicial activism or passivism, or both, often conveyed through constitutional litigation of expressive rights is crucial for assessing the status of freedom of speech and the press in Korea. Law professor Pnina Lahav of Boston University offers a cogent proposition: "A court within any democracy, given a healthy and substantive commitment to free speech, can protect the press by conventional methods of statutory interpretation. Indeed, even with a formal constitution and judicial review, the bulk of the judicial work is in interpreting rather than invalidating statutes."[122]

The steady expansion of freedom of speech and the press under the Constitution of Korea is due in large part to the emergence of constitutionalism characterized by an independent judiciary in general and by an active Constitutional Court in particular. The growing assertiveness of the Korean courts is testimony to the functioning operation of the separation-of-powers principle in Korea. In marking the tenth year of its operation, the Constitutional Court stated in 1998:

> As constitutional litigation has taken root and been revitalized, it has enabled constitutional rule to be realized in every sphere in which the official authority of the State is exercised. Thus, the educational impact of constitutional litigation on government agencies, especially on

121) *Id.* Although Justice Kim does not refer to John Milton in Areopagitica, his opinion alludes to Milton on "political energy" essential to "an energetic, adaptive, vibrant society," which Korea strives to be as a functioning democracy. As Vincent Blasi, professor of civil liberties at Columbia Law School, eloquently noted, Milton "valued strength of will, acuteness of perception, ingenuity, self-discipline, engagement, breadth of vision, perseverance; he detested rigidity, stasis, withdrawal, timidity, small-mindedness, indecision, laziness, deference to authority.... [W]hile 'errors in a good government and in a bad are equally almost incident,' what distinguishes a wise ruler is the ability to perceive and correct errors, to accept criticism and to change.... [A]dvice from private citizens can contribute to the process of governmental adaptation and self-correction." Vincent Blasi, Milton Areopagitica and the Modern First Amendment 18, 19 (1995) (quoting John Milton).

122) *Id.*

> lawmakers, is that the National Assembly has been given a moment to take more care in enacting new laws and to reconsider the constitutionality of those on the books.[123]

The Constitutional Court's vigorous use of judicial review deserves credit for institutionalizing free speech and press as a permanent fixture of Korean democracy. As illuminated by a number of Constitutional Court rulings on freedom of expression as a right during the past decade, the Court's surprisingly liberal understanding of free expression is buttressed by the formal commitment of the Constitution of 1987, which reflects the "rule of law"[124] that Koreans pushed hard for during their "people's power" revolution in mid-1987.

The Constitutional Court's distinction between the "concepts" and "conceptions"[125] of free expression in the democratic body politic of Korea is unquestionable. The Court's recognition of the "preferred position" theory on press freedom is an excellent example. It is further illustrated by the unmistakable shift from the authoritarian press theory to a libertarian theory in Korea's constitutional law when the Court held unconstitutional prior restraint on the press when administrative agencies use it to prohibit expression on the basis of its contents.

The Constitution Court's effort to differentiate licensing from registration with respect to periodicals is based upon a logical application of the Court's definition of the "essential" meaning of press freedom under the Constitution. The "internal essence" of press freedom is to protect the contents of expression published by the press. If a regulation such as periodical registration does not directly affect the contents of the

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123) The Constitutional Court, *supra* note 12, at 203. *See also* Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 Pac. Rim L. & Pol'y J. 395, 410 (1995) (noting that the active role of the Constitutional Court "has greatly contributed to changing public and bureaucratic attitudes toward the constitution and toward the powers of government").

124) For a thoughtful discussion of the "rule of law" in Korea since 1988, *see* Joon-Hyung Hong, *The Rule of Law and Its Acceptance in Asia: A View from Korea*, in The Rule of Law: Perspectives from the Pacific Rim 145, 150-53 (2000). For a recent discussion of the nexus between the rule of law and freedom of expression in Korea, see Kyu Ho Youm, *Freedom of Communication: A Rule-of-Law Perspective* (2000) (paper presented at the annual convention of the Association for Education in Journalism and Mass Communication, Phoenix, Ariz.) (on file with author).

125) For a succinct discussion of the fundamental distinction between "concepts" and "conceptions" in constitutional interpretation as Ronald Dworkin proposed in *Taking Rights Seriously*, see Christopher Wolfe, The Rise of Modern Judicial Review 329-30 (1994).

media's publication, it is not censorship or licensing under the Constitution. Restraint through the facilities requirement under the Periodical Act also justifies this perspective.

The Constitutional Court's sensible distinction between obscenity and indecency showcases the Court's insights on the problems inherent to content regulation. The judicial definition of obscenity has been refined over the years, even though it is still evolving. The Court's painstaking discussion of why obscenity is outside the protection of the Constitution while indecency is within signifies how far the Korean judiciary has come in its readiness to tackle the ever complex issues. Particularly, the Court's decision to recognize adults' right of access to indecent material while denying it to minors demonstrates a sophisticated understanding of how extensively or narrowly sexual material can be constitutionally prohibited. And the Court's reasoning follows the American standards on obscenity which have developed during the past 40 years.

So far, the Constitutional Court has yet to rule directly on freedom of expression in cyberspace.[126] It is a matter of time for the Court to confront Internet law issues because a number of lower court decisions have arisen from libel, privacy, and obscenity claims. Justice Yi Yong-mo's dissenting opinion is noteworthy for its lucid analysis of the Internet's impact on the government's traditional regulation of the "old" media. It is one of the more informed discussions engaged in by a Korean jurist about new-communication law issues which defy the conventional approach of weighing the governmental interest in regulating expression against the media's interest in disseminating messages. Justice Yi's forceful dissent foreshadows a useful paradigm on freedom of expression in a new millennium in which the Internet will be a fact of life for everyone in Korea.

V. Conclusion

The constitutional guarantee of freedom of expression carries a more practical meaning for Koreans than ever before. The Constitutional Court's dynamic role in

126) In a March 2001 case involving an Internet advertising agency, the Constitutional Court, rejecting the agency's petition for review of the National Assembly's failure to act on Article 82-3 of the Elections Act on election campaigns by computer networks, reasoned: "Regardless of whether the statutory regulations of election campaigns or advertising agency via the Internet are wanting in details and too restrictive, the petitioner is not allowed to request a constitutional review of the legislature's nonperformance itself on grounds that no related action was taken." The Constitutional Court, 2000 heonma 37, March 21, 2001.

providing a constitutional framework for Koreans' right to free expression has been a guiding light to the Supreme Court of Korea and lower courts when they adjudicate media cases.

The Constitutional Court has been bolder and more innovative than any other court to interpret the free expression clause of the Constitution with a libertarian mind-set. The Court, in the course of reviewing the Periodicals Act and other related statutes, has established several significant constitutional theories and tests for press freedom. On the whole, the constitutional review of various direct and indirect statutes on the Korean press has resulted in an enhanced freedom of expression.

Notable changes have been made in liberalizing the Periodicals Act, the National Security Act, the Military Secrets Protection Act,[127] and the Film Promotion Act,[128] The Constitutional Court's decisions on the "right to know" has led the National Assembly to enact several reform-oriented statutes including the Act on Disclosure of Information by Public Agencies (Public Information Disclosure Act),[129] the Act on Protection of Personal Information Maintained by Public Agencies (Personal Information Act),[130] and the Administrative Procedures Act.[131]

But the Constitutional Court's decisions on the National Security Act define the seemingly ingrained cold-war value judgments of many Korean jurists in ruling on governmental efforts to restrict expression for security interests. The Court tends to be least independent of, and most deferential to, the Korean government's claims when national security is asserted. "Judicial passivism" guides the Court in dealing with politically sensitive cases. The government's claim of a security threat from North Korea especially "can deal a knock-out blow to the main institutional safeguards against government abuse: independence of the courts, due process of law, freedom of the press, and open government."[132]

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127) Act No. 4616 (1993).

128) Act No. 5929 (1999), last amended by Act No. 6186 (2000).

129) Act No. 5242 (1996).

130) Act No. 4734 (1994), last amended by Act No. 5715 (1999).

131) Act No. 5241 (1996), last amended by Act No. 5809 (1999).

132) Sandra Coliver, *Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,* in Secrecy and Liberty: National Security, Freedom of Expression and Access to Information 13 (Sandra Coliver et al. eds., 1999).

Pursuit of Happiness Clause in the Korean Constitution

*Jibong Lim**

Abstract

Korean Constitutional Court has played a fairly active role as the last resort for the protection of Korean people's right since its establishment in 1988. Korean people applauded the Court for its epochal decisions that could hardly have been found in the past decisions by the general courts in Korea. However, as nobody is perfect, some repeated problems are found in the Court's decision. I believe its frequent reliance on the pursuit of happiness clause in the Korean Constitution could be one of them. Can the pursuit of happiness clause be used as a ground to declare a law or a legal provision unconstitutional? To have an answer for that, we will search for the origin of pursuit of happiness clause in the United States because Korean Constitution adopted the clause in 1980 from the constitutional documents in the United States such as Declaration of Independence and Virginia Declaration of Rights by way of Japanese Constitution of 1946. In addition, we will examine court decisions on the pursuit of happiness clause in the U.S. federal courts as well as state courts. Through these explorations, we will delve into whether pursuit of happiness clause has a specific right with real force in it or is just a declaratory political rhetoric.

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I. Introduction

Art. 809 Sec. 1 of Korean Civil Code provided "The kin of same surname and family origin[1] cannot marry each other." This provision has existed since the Korean Civil Code was enacted on February 2 in 1958. It was regarded as the incorporation of the Korean custom prohibiting the marriage between persons with same surname and family origin that had existed in Korea for hundreds of years at least. Although there were several attempts to abolish the marriage limitation by Korean Congress led by feminist groups, the various forms of pressures from conservative groups such as Confucianist groups frustrated them each time. Korean Congress had been at a loss what to do for the provision and taken no action, which eventually meant to give victory to Confucianist groups by maintaining *status quo*. However, in 1995, Korean Constitutional Court did abolish the provision incorporating longtime Korean custom that neither Korean Congress nor the Executive had dared to do, by declaring it "being in disagreement with the Constitution,"[2] practically a judgment admitting the unconstitutionality of the provision.[3]

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1) "Family origin" means the place where the progenitor of the family established the family for the first time. Thus, it is usually a name of town or city. In the same family name, there could be several family origins. Accordingly, family origin is subcategory under the family name. For example, in the surname "Lim," there are three different family origins - *Pyungtaek, Najoo* and *Yecheon.* That means three progenitors whose surname was "Lim," - they could be brothers or relatives who lived long time ago - established and started the Lim family in the three different places. Therefore, among the Lims, there are three different kinds - Lim from *Pyungtaek,* Lim from *Najoo,* and Lim from *Yecheon.* The persons with same surname but different family origin can marry each other. Thus, for example, although a man and a woman are Lims, if the man is Lim originated from *Pyungtaek* and the woman is Lim originated from *Najoo,* they can marry each other. Only the persons with same family origin among same surname cannot marry each other by Art. 809 Sec. 1 of Korean Civil Code.

2) Besides "the Decision of being Simply Constitutional" and "the Decision of being Simply Unconstitutional," Korean Constitutional Court adopted the variational types of decision from German Constitutional Court as its decision types, which included "Decision of Limited Constitutionality," "Decision of Disagreement with the Constitution" "Decision of Urging Legislation" and "Decision of Limited Unconstitutionality." For details on the variational types of decision, refer to Jibong Lim, "A Comparative Study on the Judicial Activism Under the Separation of Power Doctrine" 242 - 48 (JSD dissertation U.C. Berkeley School of Law, 1999).

3) Marriage Limitation case, 95 heonga [constitutional case in file 'a'] 6-13 byunghap [a case from #6 to #13 combined] (Korean Constitutional Court, July 16, 1995). For foreign readers' convenience, "heonga [constitutional case in file 'a']" means a case dealing with the constitutionality of a law or a legal provision referred by general courts. For the English translation of the decision in full text, see Ji bong Lim, supra note 2, at 62-92.

The decision by Korean Constitutional Court raises some controversial issues in itself developing its argument in majority opinion as well as in dissenting opinion.[4] Among the issues, let's focus on examining constitutional bases on which the majority opinion and the dissenting opinions stand. The majority opinion says, "The concerned provision is against Art. 10, Art. 11 Sec.1 and Art. 36 Sec. 1 of Korean Constitution. In addition, it is also against Art. 37. Sec. 2 of the Constitution in that the legislation aim cannot now belong to the category of social order and public welfare that can restrict the right and freedom of the citizen." Art.10 is about the personal right of an individual and the right to pursue happiness, Art. 11 is about equal protection, Art. 36 Sec.1 is about individual dignity and gender equality in marriage and family life, and, in the end, Art. 37 Sec. 2 is about the restriction on the right and freedom of the citizen. The dissenting opinion refutes each and every constitutional base that the majority opinion raised.

Most of all, I am doubtful of the appropriateness raising the right of pursuit of happiness provided in Art. 10 of Korean Constitution as one of the constitutional bases for declaring unconstitutionality of Art. 809 Sec.1 of Korean Civil Code. The way I see it, the right of pursuit of happiness clause is just a declaratory provision having no contents in it rather than that from which any substantial right with really forcible normative power can be derived. Nonetheless, Korean Constitutional Court has interpreted Art. 10 of the Constitution on the pursuit of happiness as having so substantial contents in it that the right of pursuit of happiness is 'a right' that has normative power in real world. Further, the right of pursuit of happiness is frequently used - even seemingly abused - by the Court when it confronts difficulty in raising constitutional bases in many other decisions. From now, we will examine the meaning and function of the pursuit of happiness clause in Korean Constitution focusing on whether it presents a substantial right that has normative force in the adjudication or it is just a political rhetoric that declares an idea in Korean Constitution.

4) For the background and contents of the decision and the reactions toward the decision, refer to Jin-Su Yune, *Comments: Recent Decisions of the Korean Constitutional Court on Family Law*, 1 Journal of Korean Law 133, 145-56 (Seoul National University College of Law BK Law 21, 2001).

5) The whole first sentence of Art. 10 is, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness." Thus, the first sentence prescribes 'human worth and dignity' as well as 'pursuit of happiness.' The second sentence of the article prescribes the duty of government to guarantee fundamental human rights by providing "It shall be the duty of the government to confirm and guarantee the fundamental and inviolable

II. Theories and Precedents Interpreting the Pursuit of Happiness Clause in Korea

The latter part of the first sentence of Art. 10 of Korean Constitution provides "All citizens shall have the right to pursue happiness,"[5] besides its former part on the human worth and dignity. This part has appeared in Korean Constitution since the constitutional revision in 1980 in Korea. At that time, the military regime represented by the President Chun wanted to justify their regime by adopting many apparently-democratic provisions in Korean Constitution and the part on the pursuit of happiness was one of them. It was imitating Art. 13 of Japanese Constitution of 1946 that had adopted 'the pursuit of happiness' in Art. 1 of the Virginia Declaration of Rights and Art. 2 of the Declaration of Independence in U.S. dating back to 1776. Thus, in other words, the pursuit of happiness clause in Korean Constitution adopted that of Virginia Declaration of Rights and Declaration of Independence in the U.S. in 1776 by way of Japanese Constitution of 1946. The current Korean Constitution has been still succeeding this provision since Korean Constitution of 1980 did. Because the provision was adopted in such a political and historical reason at that time without considering the position of the provision in the Constitution and relationship with the other constitutional provisions on fundamental rights,[6] there are many criticisms on this provision by Korean constitutional law scholars.[7]

So far, there is no clearly established theory in Korea on what the right of pursuit of happiness in Korean Constitution concretely means. Particularly, each scholars have

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human rights of individuals."

6) Korean Constitution has provisions on the fundamental rights of the citizen from Art. 10 to Art. 37.

7) Prof. *Young-Sung Kwon* at *Seoul* National University writes in his constitutional law textbook, "The adoption of the pursuit of happiness clause gives rise to confusion in the system and structure of fundamental right provisions in the Korean Constitution, but, as long as it is prescribed in the Constitution, it should be interpreted in the direction of being in harmony with the other provisions on the fundamental rights in the Constitution," and "The adoption of the pursuit of happiness provision in the Korean Constitution of 1980 was the example of the irresponsibility and ignorance of constitutional revision proposal aiming only at catering to public popularity if we consider the whole system of Korean Constitution and the fact that the substance of the pursuit of happiness is vague." Young-Sung Kwon, Constitutinal Law: A Textbook 360 (Seoul: Bubmoonsa, 2001). Prof. *Young Huh* at *Yonsei* University writes in his book, "This provision has been causing many unnecessary controversies due to its vagueness since it was adopted in the Korean Constitution in 1980." Young Huh, Korean Constitutional Law 318 (24th ed. Seoul: Bakyoungsa, 2001).

different opinions on how to understand the interrelationship between the human worth and dignity and right of pursuit of happiness that are prescribed in the same provision, and how to estimate the contents and character of the right of pursuit of happiness in connection with the other fundamental right provisions. Only on the character of the right of pursuit of happiness as a natural law and comprehensive provision, there seems to be an agreement among the scholars. Roughly speaking, the different opinions by the constitutional law scholars in Korea on the pursuit of happiness clause could be classified in three categories.

Prof. *Young-sung Kwon at Seoul* National University in Korea sees the pursuit of happiness as a forcible personal 'right' rather than a general principle on the guarantee of fundamental rights. As the reason, he picks up the fact that the Korean Constitution stipulates in the text of Art. 10 "the RIGHT to pursue happiness." However, he distinguishes the right of pursuit of happiness from the other constitutional rights and positions it to a higher status than the other constitutional rights setting the hierarchical structure to the system of fundamental right provisions. On its relation to 'the human worth and dignity' in the same provision, he explains the right of pursuit of happiness is a means to achieve 'human worth and dignity' that is not a right but a declaration of the aim that all the fundamental rights prescribed in Korean Constitution should pursue. Such a view of his is revealed in the part explaining that the right of pursuit of happiness is not an independent right guaranteeing the right of privacy and environmental right that is separate from the other fundamental rights but a 'comprehensive' right that covers all the fundamental rights needed to pursue the happiness although they are not enumerated in the Korean Constitution. For this reason, when the guarantee of a specific individual fundamental right composing the contents of the comprehensive 'right of pursuit of happiness' is in issue, there comes a problem whether to apply the right of pursuit of happiness or the specific right. He insists the right of pursuit of happiness be applied only in the case there is no constitutional right to be directly applied because the specific right should be applied at its maximum at first in order to keep the specific right from being lack of contents and prevent the idle escape to the general provision-the pursuit of happiness clause. Besides, he sees it as natural right declaring the rights from natural law that is the basis of each fundamental rights prescribed in Korean Constitution, rather than a right from positive law because the right of pursuit of happiness is an indigenous right that is inherent in human being. In the end, he sees it as both a passive and defensive right

like freedom of conscience and an active and claimable right like labor rights because 'happiness' means the substance of a right like the concept of life and conscience but 'the pursuit' implies a means to realize the right.[8)]

Professor *Tcheol-Su Kim at Seoul* National University acknowledges the pursuit of happiness as a forcible right. At this point, his position is same as that of *Prof. Young-Sung Kwon* we have seen just above. However, if we examine his position more closely, there is a big difference in the relationship between 'the human worth and dignity' and 'the pursuit of happiness'; he does not divide 'the human worth and dignity' with 'the pursuit of happiness.' He combines 'the human worth and dignity' with 'the pursuit of happiness' part, and insists that the fundamental right from Art. 10 of Korean Constitution be a comprehensive one combining the two. He classifies the right from Art. 10 in three categories; in the broad meaning, narrow meaning and narrowest meaning. In the broad meaning, he calls the fundamental right from Art. 10 a 'principal' fundamental right in distinction from the 'derivative' fundamental rights. According to him, each fundamental rights prescribed in from Art. 11 to Art. 36 are the derivative rights that are just the subdivisions of the 'principal' fundamental right, the right from 'the human worth and dignity' and 'the pursuit of happiness' in Art. 10 of Korean Constitution.[9)] In other words, he also tries to set hierarchy in the system of fundamental rights, but in a different way with Prof. *Young-Sung Kwon*. Prof. *Tcheol-Su Kim* continues that in the narrow meaning the fundamental right from Art. 10 is divided into the right of dignity that is from 'the worth and dignity' and the right of pursuit of happiness. Again, in the narrowest meaning, he explains that the right of dignity means 'the personal right'[10)] that includes right of fame, right of name, and right of portrait as well as right to know, right to read, right to hear and right for life. Besides, in the narrowest meaning, 'the right of pursuit of happiness' covers the right not to be injured in body, the right of self-decision on his/her fate,[11)] and right to live peacefully. Finally, he also sees the fundamental right from Art. 10 as the declaration

8) For the details of his argument on the character of the pursuit of happiness clause, refer to Kwon, *supra* note 7, at 361-63.

9) Classifying fundamental rights with 'principal fundamental right (in Germany, das *Hauptgrundrecht*)' and 'derivative right' is originated from the decisions of German Constitutional Court. Prof. *Tcheol-Su Kim* borrows this method in explaining the system and structure of Korean constitutional rights and their provisions.

10) German original word is *Persönlichkeitrecht* for 'the personal right.'

11) German original word for 'the right of self-decision on his/her fate' is *Selbstbestimmungsrecht.*

of right from natural law that commonly preexists beyond the nation rather than a positive law that is prescribed by the nation.[12)]

Different from the two positions above, Prof. *Young Huh* at *Yonsei* University in Korea denies the character of the right of pursuit of happiness as an independent forcible right with normative power. As to 'the human worth and dignity' in the same provision, he does not regard it as a 'right' as well but a declaration of the supreme value that all the fundamental right provisions pursue. Coming back to the pursuit of happiness, he regards the provision as the most problematic provision among the constitutional provisions in terms of the system and structure of the fundamental right provisions. He diagnoses that is because it yields unnecessary questions by prescribing such a matter of course. His argument is based on the reasons as follows.

First, 'the human worth and dignity' has necessity to be prescribed in the Constitution as the ideological basis of the fundamental rights that follow Art. 10 because of its character as a value implied in its concept. However, it is difficult that we easily acknowledge the pursuit of happiness as a value because of the relativeness and secularness of the word, 'happiness.' Accordingly, the fact in itself that the pursuit of happiness is prescribed together with 'human worth and dignity' in the same provision has problem in the provision structure of the Constitution.

Second, because 'the pursuit of happiness' is the matter that should be dealt with as a human instinct rather than a fundamental right, it cannot be the object of a norm. Thus, 'the pursuit of happiness' in Korean Constitution could be not the guarantee of an independent fundamental right but the declaration of the directing post of the Korean citizen's life that pursues the realization of 'human worth and dignity' at its maximum. In the context, the character of the pursuit of happiness as a comprehensive and inclusive norm - not an independent forcible norm-could be emphasized. Accordingly, although the pursuit of happiness is prescribed in the form of a fundamental right, we should understand it not as a concrete fundamental right but as putting emphasis on the character of 'human worth and dignity' as an ethical and practical norm.[13)]

Prof. *Dai-Kwon Choi* at *Seoul* National University forms the third opinion with

12) For details of his position, refer to Tcheol -Su Kim, An Introduction of Constitutional Law [Heonbeophak Kaeron] 369-80 (Seoul: Bakyoungsa, 2001).

13) For the details of his interpretation on the pursuit of happiness, refer to Young Huh, *supra* note 7 at 318-21.

Prof. *Young Huh* in the interpretation of pursuit of happiness clause in Korean Constitution. The uniqueness of his position is that he sees 'the pursuit of happiness' combined with 'the human worth and dignity,' both of them are prescribed in Art. 10 of Korean Constitution as shown above, as one. In other words, he does not put dividing line between 'the pursuit of happiness' and 'the human worth and dignity'. He insists that the combined 'human worth and dignity' and 'pursuit of happiness' be the fountainhead and aim of the following individual human rights rather than a concrete human right whose remedy for the violation could be sought through the constitutional procedures such as constitutional complaint. Accordingly, each of the individual rights is the embodiment and realization of 'human worth and dignity' combined with 'pursuit of happiness.' In the context, 'the human worth and dignity' and 'pursuit of happiness' is the ultimate aim of human rights and the individual human rights are means to realize it.[14)]

Korean Constitutional Court seems to raise the hand of Prof. *Tcheol-Su Kim.* The Court does not see Art. 10 of Korean Constitution as just a declaration of fundamental principle and value with no normative power. It acknowledges both the pursuit of happiness from "right to pursue happiness" and the personal right from "the human worth and dignity" in Art. 10 of Korean Constitution as a forcible right although it does not use the terminology of a 'principal' fundamental right and 'derivative' fundamental right as Prof. *Tcheol-Su Kim* does.

Such a position of Korean Constitutional Court has been so firm that it has been shown in the precedents of the Court consistently and frequently. The case concerning the marriage prohibition between the persons with same surname and family origin could be a remarkable example. As shown above, the majority opinion raises 'the personal right (*Persönlichkeitrecht* in German) and right of pursuit of happiness' as a constitutional right that is intruded by Art. 809 Sec. 1 of Korean Civil Code prohibiting the marriage between those with same surname and family origin by saying "In this provision, the Constitution guarantees the personal right and the right of pursuit of happiness that could be the ultimate aim of all fundamental rights as well as nature and indigenous value of human being." Further, the Court got more specified the intruded rights by explaining the narrower meaning of the right of pursuit of happiness; "The

14) For the details of his position, refer to Dai-Kwon Choi, Lecture on Constitutional Law [Heonbeophak Kangui] 226-27 (Seoul: Bakyoungsa, 1998).

personal right and right of pursuit of happiness of an individual from Art.10 premises the right of self-decision on his/her fate(*Selbstbestimmungsrecht* in German). The right of self-decision on his/her fate again includes the right of self-decision of sexual partner, especially the right to decide marriage partner, as its sub-factor." According to this, examined step by step, Art. 809 Sec. 1 of Korean Civil Code intrudes the right to decide marriage partner that is another name of 'the right of self-decision of sexual partner.' The right of self-decision of sexual partner is covered by the right of self-decision on his/her fate that is included in the right of pursuit of happiness.

Besides this case, the Korean Constitutional Court has used in many cases the right of pursuit of happiness as a forcible right on which they reviewed the constitutionality of a legal norm. The famous case having dealt with the constitutionality of Art. 241 in Korean Criminal Code punishing the adultery as a crime in criminal code could be the example.[15] In the case, the Constitutional Court extracted the character of a right from the pursuit of happiness clause by saying, "the pursuit of happiness premises the right of self-decision on his/her faith and the right of self-decision on the faith includes the right of self-decision in sex on whether he/she will have sex and with whom." Thus, the right of pursuit of happiness of the defendants in adultery case could be intruded by the criminal law provision, and that was exactly what the applicants[16] of the judicial review insisted. However, the Court declared the adultery provision constitutional by saying "Art. 241 of Criminal Code punishing adultery is a reasonable limitation of the right of pursuit of happiness because the provision was made in order to maintain good sexual morality and the monogamy system, secure a duty of sexual loyalty in the couple, and protect family life from social evils." Accordingly, the adultery provision was acknowledged as a legitimate limitation of the right of pursuit of happiness.

In addition, on the decision of the constitutional complaint regarding the suspension of indictment by military prosecutor, the Court adduced the right of pursuit of happiness as a constitutional basis of its decision; "the decision of 'suspension of indictment' by the military prosecutor for the suspect intruded the right of pursuit of happiness of the suspect who might clear himself of the stain by a final decision of 'not

15) Adultery case, 89 heonma 82 [constitutional case in file 'e'] (Korean Constitutional Court, September 10, 1990).

16) They were defendants in the criminal case that was the main case asking the constitutionality of the adultery provision in criminal code.

guilty' by the court...because the prosecutorial decision of 'suspension of indictment' is made when the prosecutor does not indict the suspect at his discretion considering various circumstances although there exists suspicion enough to prosecute the case."[17] In this case, the concept and scope of the right of pursuit of happiness is not articulated but vague.

The pursuit of happiness clause in Korean Constitution was also invoked in Korean Constitutional Court's decision on the so-called Billiard Hall case in 1993.[18] The Ordinance of the Sports Installation and Utilization of Sports Facilities Act was passed by the Ministry of Sports on July 12, 1989, and revised on February 27, 1992, to enforce the Sports Installation and Utilization of Sports Facilities Act that regulated the establishment and the maintenance of the sports facilities in its equipments such as scale and sanitary standards. Art. 5 of the Ordinance contained a provision requiring each billiard hall business to post a notice at the entrance door notifying that minors under age 18 are not allowed to enter. The applicant who had recently opened a billiard hall business, filed a constitutional complaint on April 18, 1992, arguing that Article 5 of the Ordinance violated his constitutional rights. The Court unanimously held for the applicant that Art. 5 of the Ordinance was unconstitutional because it infringed upon the applicant's freedom of occupation and right of equality and, further, the right of pursuit of happiness of the minors under age 18. The Court articulated that prohibiting minors under age 18 from entering Billiard Hall would intrude the minors' right to pursue happiness who wanted to cultivate his/her talent for sports including billiard. In this part of the Court's decision, the meaning and character of the right to pursue happiness is so equivocal that the Court seems to regard the pursuit of happiness clause as a cure-all for the constitutional adjudication.

Besides, in the Constitutional Court's decision on Liquor Tax Act in 1996,[19] the Court used the pursuit of happiness clause with other constitutional provisions in its judicial review. Art. 38-7 of Liquor Tax Act prescribed that Director of the Office of National Tax Administration must order wholesalers of *soju* [a strong Korean spirituous liquor popular in Korea] to purchase more than 50% of the total purchase

17) Suspension of Indictment by Military Prosecutor case, 89 heonma 56 (Korean Constitutional Court, October 27, 1989).

18) Billiard Hall case, 92 heonma 80 (Korean Constitutional Court, May 13, 1993).

19) Liquor Tax Act case, 96 heonga 18 (Korean Constitutional Court, Dec. 26, 1996).

amount from a producer located in the same province as the wholesaler's business region, and Art. 18 provided the suspension of their liquor sales in case that the above provision was violated. The applicant who was compelled to suspend his liquor sales due to the violation of Art. 38-7 of Liquor Tax Act put in question the constitutionality of the two provisions to refer them to the Constitutional Court. In the majority opinion by 6 Justices, the Court held that Art. 38-7 and Art. 18 Sec.1 item 9 of Liquor Tax Act were unconstitutional in that the provisions intruded not only *soju* wholesalers' freedom of occupation but also *soju* manufacturers' freedom to fairly compete in the market. Further, the Court emphasized that the provisions in question infringed upon the customers' right to self-decision which is included in the right to pursue happiness. Here, Korean Constitutional Court understood the right to pursue happiness as a general right from which the right to self-decision by the customers could be derived.

Except for the cases enumerated above, Korean Constitutional Court has been incessantly using the pursuit of happiness clause in Korean Constitution so often in the constitutional review as a constitutional clause from which "a constitutional right" with a normative power could be extracted. The way I see it, the Court seems to escape so easily to the general provision - pursuit of happiness clause-whenever it encounters controversial topics and it's hard to find a constitutional provision suitable to the specific case as its standard of judicial review. The more developed the society gets, the more complex and diversified the legal relationship among the members of the society becomes. The more complex and diversified the legal relationship becomes, the more new fundamental rights should appear to protect the citizens from getting legally mistreated due to the complexity of the legal relationship. The Constitutional Court should do this job unless the Constitution is not revised to get more detailed provisions adopting new fundamental rights into the constitutional provisions. However, in Korea, the Constitutional Court does not make efforts to give birth to new fundamental rights by interpreting the existing constitutional provisions creatively and logically. Rather, the Court is relying on the general provision - the right of pursuit of happiness clause - as if it is a cure-all. In my opinion, the pursuit of happiness clause is just a declaratory one that no concrete right is directly coming from. It is just the guiding post in interpreting the fundamental right provisions that follow just right after it. That is why using the word, pursuit of "happiness," as a basic right from which normative power declaring a law unconstitutional directly comes, sounds harsh to my ear.

In order to support my argument, I will examine the origin of pursuit of happiness clause in the United States. That is because if we look over the original meaning and usage of the pursuit of happiness in the U.S. from which this Korean constitutional provision was derived, we can get what it originally meant and how we should interpret and use it. That is how the comparative study is useful for this topic.

III. Pursuit of Happiness Clause in the U.S.

A. Pursuit of Happiness in Constitutional Documents in the U.S.

Before, the phraseology, "pursuit of happiness" appeared in the Virginia Declaration of Rights by Mason and Declaration of Independence by Jefferson in 1776 in America, the terms such as "pursuing" and "happiness" were used in many historical literatures on philosophy and politics in many countries such as England.[20] Between the two, in particular, defining 'happiness' had been a hot issue in ethics and philosophy until the term, 'happiness,' appeared in the American constitutional literatures. The happiness principle is not easy to trace. However, it was a common assumption of Greek political thought generally that 'happiness' was a desirable end. Since there is no reference to Epicurus in Jefferson's book and no mention of Jefferson in the letters until the Jefferson's old age, it is probable that Jefferson was not acquainted with the Epicurean doctrine at the time the Declaration of Independence was written.[21] The phrase, "pursuit of happiness," occurs to the letter in John Locke's philosophical writings.

Among the great thinkers, John Locke (1623-1704) was the one who directly influenced Fathers of American Constitution including Jefferson and Mason, and, more specifically, the one who gave birth to the phrase of 'pursuit of happiness' in a

20) Happiness has established itself as a term of widest yet most precise meaning. Of course, the word prevailed all discussions of politics, ethics and psychology. It was as important yet shifting in its sense as the more studied term "nature." It could tend toward a psychic invisibility, as the mental air men breathed. Yet more technical senses were always recoverable in the ongoing debate, particularly when men made narrow claims upon happiness as the basis of political sovereignty. For the details on the happiness principle, see Garry Wills, Inventing America: Jefferson's Declaration of Independence 250 (Garden City/New York: Doubleday & Company Inc., 1978).

21) In Greek philosophy, "flourish, prosper" meant "happy," so the former were different names of "happiness." On these issues, Prof. Samuel Scheffler at U.C. Berkeley has several researches in terms of philosophy.

full scale. Locke's thought could not be told without explaining his natural law principle. Locke's natural law is the law of reason. Its only compulsion is an intellectual compulsion. The relations that it prescribes would exist if men should follow reason alone. Since reason is the only sure guide that God has given to men, reason is the only foundation of just government. Since governments exist for men, not men for governments, all governments derive their just powers from the consent of the governed. If the philosophy of Locke seemed to Jefferson and his compatriots just the common sense of the matter, it was not because Locke's argument was so lucid and cogent that it could be neither misunderstood nor refuted. Locke did not need to convince the colonists because they were already convinced by the type of government conforming to the kind of government for which Locke furnished a reasoned foundation.[22] In America in late eighteenth century, the concept of natural law like Locke's were very prevalent and it became the basis of the Declaration. Actually, scanning the "Two Treaties on Government"[23] which is Locke's most famous production in the field of political thought, many scholars have pointed out the similarity of thought and expression many times.

The happiness principle is started to come up in connection with government principle in natural law principle above. The phraseology of pursuit of happiness is undoubtedly the most significant feature of Jefferson's theory of rights because it raises government above the mere negative function of securing the individual against the encroachments of others. By recognizing a right to the pursuit of happiness, the state is committed to aid its citizens in the constructive task of obtaining their desires, whatever they may be. The state is to secure, not merely the greatest happiness of the greatest number, but so far as possible the greatest happiness of all its citizens, whatever their condition. Accordingly, it may well mean that many will be restrained from achieving the maximum of happiness, that others less fortunate may obtain more than the minimum.

Conclusively, we could say that the pursuit of happiness clause has its roots in natural law idea of England in eighteenth century that could be represented by John

22) Carl Becker, The Declaration of Independence: A Study in the History of Political Ideas 71-73 (New York: A.A. Knopf, 1953).

23) 'The Two Treaties on Government' was published in the year 1690 in which he brought forth his equally famous contribution to psychology, his "Essay on the Human Understanding."

Locke although happiness principle could trace back further as much as to Greek philosophy.

Influenced by the philosophical legacies above, the first American document that articulates 'the pursuit of happiness' appeared at last. It is 'The Virginia Declaration of Rights' in 1776. Written by George Mason, the Declaration was adopted by the Virginia Constitutional Convention on June 12 in 1776. The section 1 of the Declaration contains the pursuit of happiness principle. It writes, "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

The influence of John Locke is discernible in Mason's writing in the years just prior to 1776. However, Mason was able to apply those principles to local politics and to give them a new meaning in their American application.[24] There is difference between the Mason proposal and the final draft. A comparison of the Mason proposal with the final draft of this far-reaching document indicates the harmony between his thinking and that of the articulate leaders of Virginia in 1776. Mason's original draft contained fourteen articles. In the final plan, only two were added, neither of which Mason himself considered "of a fundamental nature." The preamble declared that this list of rights was set down for the people of Virginia "and their posterity, as the basis and foundation of government." All men are created equally free and independent with certain inherent rights, "namely, the enjoyment of life and liberty with the means of acquiring and possessing property and pursuing and obtaining happiness and safety."[25] Accordingly, the pursuit of happiness principle was not touched by correction. It was there from Mason's first draft to the final corrected version. As to the pursuit of happiness principle, the idea was Locke's, but the felicitous expression was Mason's. A comparison of the statement with Jefferson's wording of the Declaration of Independence that we will look over below suggests that Mason exerted an influence

24) Like many other revolutionary leaders who were his associates, Mason did not seek a host of offices but rather served when his health, his conscience, and his constituents permitted. His career as a public servant reached a pinnacle with the adoption of the Virginia Declaration of Rights. Robert Allen Rutland, The Birth of the Bill of Rights 1776-1791 (Chapel Hill: Univ. of North Carolina Press, 1955) at 35.

25) *Id.* at 38.

upon the final phraseology of that document.[26]

As the most powerful of the American colonies, Virginia amiably had taken a leading role in guiding the passive resistance to England until the abandonment of that strategy for an active rebellion. The Virginia Declaration of Rights broadened the conception of the personal rights of citizens as no other document before its adoption had done. The Virginia Declaration of Rights was widely copied by the other colonies and became the basis of the federal Bill of Rights.

One month later, the pursuit of happiness principle was drawn on by Thomas Jefferson for the opening paragraphs of the Declaration of Independence; "We hold these truths to be self-evident, that all men are created equal. That they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." Jefferson was chosen to draft the Declaration because he was known to possess a "masterly pen."[27] The phrase, "the pursuit of happiness," is seen from the rough draft and it is kept intact all during the three stages although many other parts of the Declaration had to be cut out or replaced. According to a historian named Garry Wills, Jefferson's use of the "pursuit of happiness" as the natural right to rank with life and liberty is not a vague or "idealistic" or ill-defined action, but one consistent with everything else he wrote in the Declaration of Independence and outside of it.[28] Besides, Chares Maurice Wiltse put emphasis on the importance of Jefferson's happiness principle by saying "In a sense all the natural rights are subsumed by Jefferson under his happiness principle, because the right to pursue happiness presupposes the guarantee of life and liberty. But it is not assumed that the rights named in the Declaration of Independence exhaust the list, except in so far as the last named is inclusive. These form the starting point of Jefferson's political creed because they are the rights it was necessary to assert in order to establish the argument for separation from England."[29] There is somewhat different point of view by Herbert Lawrence Ganter who confesses the ambiguity of the meaning of happiness principle

26) *Id.* at 35-36.

27) Carl Becker, *supra* note 22 at 194.

28) Garry Wills pointed out that only when we realize this can we bridge the great disjunction that has haunted all Jeffersonian studies of recent years. Garry Wills, *supra note 20 at 255.*

29) Herbert Lawrence Ganter, *Jefferson's Pursuit of Happiness and Some Forgotten Men,* 16 William and Mary College Quarterly Historical Magazine 422, 559.

with 'life' and 'liberty' by saying "No attempt was made to define precisely, nor in the order of their comparative merit, just what these rights were believed to be; but a sufficiently comprehensive field of human activities and aspirations was embraced within the compass of the three which Jefferson selected - that is life, liberty and the pursuit of happiness."[30]

Comparing with the Mason's phraseology of the pursuit of happiness, many noted the difference between Jefferson's language and Mason's; where Mason referred to "pursuing and obtaining happiness," Jefferson mentioned only "the pursuit." This is said to make Jefferson both more realistic and more idealistic than his model. He is realistic because he knows man cannot arrive at perfect happiness, only aspire to it. He is idealistic because he puts that aspiration among the basic rights.[31] Jefferson uses "pursuit" as Locke does, even when refining Locke's doctrine on freedom.[32] This gives us material enough to remove one misapprehension about Jefferson's phrase. So far as the 'Fathers' were directly influenced by particular writers before 1776, the writers were English rather than French, and notably Locke who is famous for 'treatise on civil government' rather than Rousseau who is represented by 'social contract theory.' Most Americans had absorbed Locke's works as a kind of political gospel, and the Declaration of Independence follows closely certain sentences in Locke's second treatise on government in its phraseology as well as in its form.[33] Jefferson copied Locke and Locke quoted his forebears such as Hooker. In political theory and in political practice the American Revolution drew its inspiration from the parliamentary struggle of the seventeenth century. The philosophy of the Declaration was not taken from the French[34] and it was not even new.[35]

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30) *Id.* at 423.

31) Garry Wills, *supra* note 20 at 245.

32) The Declaration of Independence is essentially of Lockian origin, but it does not ensue that Jefferson had memorized Locke, nor even that he was conscious, when he wrote the document, that he was using a Lockian phraseology. Thomas Jefferson, The Apostle of Americanism 72 (Boston: Little Brown and Co., 1929).

33) This is interesting, but it does not tell us why Jefferson, having read Locke's treatise, was so taken with it that he read it again and again so that afterwards its very phrases reappear in his own writing. Carl Becker, *supra* note 22 at 27.

34) Rather, as is commonly known, the philosophy and phraseology of the Declaration of Independence was taken by the French. The pursuit of happiness phrase is one of them. By the time of Lafayette's draft Declaration of Rights (1788), a further refinement was added. The phrase normally translated as "pursuit of happiness" is *"la recherche du dien-être."*

35) Carl Becker, *supra* note 22 at 79.

Later, Americans came to have their federal Bill of Rights separate from the Declaration of Independence. However, because the federal Bill of Rights was unembellished by assertions of men's original equality or their unalienable rights or the fundamental power of the people or their right to change or replace their government, individuals who found it useful to cite those old revolutionary principles on behalf of some cause in national politics had to turn to the Declaration of Independence.[36] Especially, the pursuit of happiness was excluded in the final version of federal Bill if Rights as a result.

What attracts my attention most of all while I examine the constitutional documents containing pursuit of happiness phrase is that the 'property' and the 'pursuit of happiness' is interchangeably used with 'life and liberty' substituting each other. At first, the property was used following 'life and liberty.' The first Continental Congress in its resolutions of October 14, 1774 declared that the colonists were "entitled to life liberty and property." Less than two months previously, a Boston Committee of Correspondence had stated, "We are entitled to life liberty and the means of Substance." The Massachusetts Council on January 25, 1773, had asserted, "Life, liberty, property, and the disposal of that property, with our own consent, are natural rights." Samuel Adams and other followers of Locke had been content with the classical enumeration of life, liberty, and property. However, in Jefferson's hands the English doctrine was given a revolutionary shift. The substitution of "pursuit of happiness" for "property" marks a complete break with the Whiggish doctrine of property rights that Locke had bequeathed to the English middle class, and the substitution of a broader sociological conception. It was this substitution that gave to

36) Compared to the bills or declarations of rights in state such as Virginia or Massachusetts, the federal Bill of Rights was a sorry specimen, a lean summary of restrictions on the federal government, tacked onto the end of the Constitution like the afterthought it was, with no assertion of fundamental revolutionary principles. At first, James Madison proposed on June 1789, the federal Bill of Rights would have looked more like those of the states. Madison moved that a declaration be "prefixed to the constitution" in the traditional manner, and there was the phrase of pursuit of happiness in it coexisting with right of property; "with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." The first Congress was dominated by Federalists, so it was even less convinced than Madison that the Constitution needed to be amended so soon after it went to effect and cut back and redefined his proposals if at all. It eliminated the "prefix" and sent to the states for ratification twelve amendments that were to be listed at the end of the Constitution. Of those twelve, the states accepted ten by December 15, 1791. At last, those ten amendments are the Federal Bill of Rights.

the document the note of idealism that was to make its appeal so perennially human and vital. The words were far more than a political gesture to draw popular support. They were an embodiment of Jefferson's deepest conviction, and his total life thenceforward was given over to the work of providing such political machinery for America as should guarantee for all the enjoyment of those inalienable rights.[37] Or, based on natural law principle that deeply affected him, possibly, Jefferson used the phrase 'pursuit of happiness' rather than 'property' because he regarded property as a right derived from the state, whereas he was enumerating in the Declaration only "natural" rights, and "it is moot question whether the origin of any kind of property is derived from nature at all."[38]

However, the pursuit of happiness is substituted by 'property' again. The Fifth and Fourteenth Amendments to the Constitution of the United States prohibit deprivation of "life, liberty, or property" without due process of law. Namely, Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger... nor be deprived of life, liberty or property, without due process of law." Besides, the second sentence of the Fourteenth Amendment prescribes, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

The reason that the pursuit of happiness and the property have shown up alternatively in many constitutional documents could be explained connected with slavery system in early America. As shown above, the 'property' was used with 'life and liberty' in England and American colonies. By the way, in early America, slavery was a 'property' in Southern states, so 'property' was a word proving that they have slavery system. Jefferson seems to have refused to use 'property' in this reason. Instead, he used 'pursuit of happiness' borrowing from natural law principle in

37) If the fact that he set the pursuit of happiness above abstract property rights is to be taken as proof that Jefferson was an impracticable French theorist, the critic may take what comfort he can from his deduction. Herbert Lawrence Ganter, *supra* note 29 at 428-29.

38) Edward Dumbauld, The Declaration of Independence and What It Means Today 60-61 (Norman: Univ. of Oklahoma Press, 1950).

England of Eighteenth century. What Jefferson wanted to provide in the Declaration of Independence was not advocacy of slavery. Rather, it was declaration of pursuit of the happiness as the inalienable right to all people regardless of their skin color; Concerned with slavery system and pursuit of happiness, many scholars point out that drafting the Declaration of Independence Jefferson meant to set up a standard maxim for free men which should be familiar to all, and revered by all; constantly looked to, and constantly labored for, and even though never perfectly attained, constantly approximated and thereby constantly spreading and deepening its influence, and augmenting the "happiness" and value of life to all people of all colors everywhere.[39] However, Jefferson's 'pursuit of happiness' was replaced by 'property' again due to the political and historical reason connected with slavery system at that time. In state level, the 'property' and 'pursuit of happiness' was replaced by each other according to the politics on slavery at each time.

If so in federal constitutional documents, what would be the situation in the state level? After the final break with England, most of the new commonwealths gradually fell into line with the Virginia example. By 1784 the sweep of constitution-making had covered every section of the Republic.[40] Besides the protection that the Fifth and Fourteenth Amendment to the Constitution of the United States give to "life, liberty, and property," it should be noted that many states have expressly incorporated in their constitutions to the substance of the Declaration's recognition of the citizen's right to "life, liberty, and the pursuit of happiness." Moreover, the acts of Congress providing for the admission of some ten states to the Union contain provisions requiring that the state constitutions shall not be repugnant to the Declaration of Independence.[41]

Generally speaking, in the long run, no less than thirty-one states[42] of the Union

39) Pauline Maier, American Scripture 203-204 (New York: Alfred A.Knopf, 1997).

40) In the spring of 1784 the New Hampshire convention proclaimed its bill of rights adopted at last among the commonwealths. Robert Allen Rutland, *supra* note 24 at 41.

41) Thus the act of April 19, 1864, for the admission of Nebraska provides "That the constitution, when formed, shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Edward Dumbauld, *supra* note 38 at 62-63.

42) The thirty-one states are Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. Everett V. Abbot, *Inalienable Rights and the Eighteenth Amendment* 20 Colum. L. Rev. 183, 187 (February,1920).

have inserted the substance of that passage from the Declaration of Independence - the pursuit of happiness phrase - with occasional individual modifications of phraseology into their state constitutions and have therefore made it the written law of almost two - thirds of our federated republics.[43] Finally, when concepts like life, liberty, property, reputation, safety and security are enumerated in conjunction with happiness, the inference seems plain that those who wrote these constitutions felt it necessary to enumerate and distinguish happiness from a variety of other general nouns. As an example having the pursuit of happiness phrase in its State Constitution, the state of Ohio could be called. Art. 1 of Ohio State Constitution on inalienable rights provides, "All men are, by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

B. Court Decisions on the Pursuit of Happiness Clause in the U.S.

So far, we overviewed the meaning of the pursuit of happiness clause in the U.S. referring to the constitutional documents and its expositions by many thinkers and scholars. In as much as the right to happiness is guaranteed by the fundamental documents, we shall have to turn to the courts if we desire to comprehend the 'legal' meaning of the phrase. Generally speaking, the courts' interpretation of the pursuit of happiness clause has come and gone between two pivots.

The first pivot could be that judges have been frequently content to leave the idea in convenient obscurity and haven't given any vivid and specific legal meaning to it. Of course, it is not the business of the law to write a critical history of philosophy or of morals, nor is the duty of a judge to reason like a trained metaphysician. When court decisions have turned on the meaning of the pursuit of happiness, judicial dicta have therefore been confined to the common sense of the matter on the whole. Unfortunately, in law as in epistemology, the common sense of the matter is frequently

43) In other words, approximately two-thirds of the state constitutions adopted by the American people from the beginning of their independence to the beginning of the 20th century have solemnly stated a right to happiness, or to pursue happiness, or to pursue and obtain happiness, or to pursue and obtain happiness and safety, or to pursue happiness in some other connection is a remarkable fact. It is likewise notable that many constitutions declare there is a popular right to alter or abolish a government that fails to secure happiness for the people.

a screen for a whole series of difficulties, and, as if conscious of this truth, some judges have spoken as if they wished the wretched thing would quietly go away in pronouncing on the right to happiness. In this position, the common sense of the matter is so different according to the judges and so vague in its meaning that we cannot say that a specific legal right with a normative power could come from the pursuit of happiness clause. The pursuit of happiness clause is not a provision prescribing a specific right that can be the standard of judicial decision and have normative power in a real case but just a declaration of political philosophy on which the nation is standing. Namely, the pursuit of happiness is not legal but political and philosophical. In this position, the pursuit of happiness clause is not vividly introduced in the legal decisions by courts. That is why I cannot find appropriate examples from cases by courts.

The other pivot is the courts' position to give normative power and legal meaning to the 'pursuit of happiness' and interpret it to be same as a 'property' right. As we have seen above, the 'pursuit of happiness' and 'property' was interchangeably used substituting each other in many constitutional documents. Such kind of history in constitutional documents became one of the grounds of this position of the American courts.

Let's see the state court decisions on this position first because there are more state court cases concerning the pursuit of happiness than federal court cases. In the light of this observation, it may be surmised that I have not surely discovered when the problem of defining happiness first appeared in an American state courts. However, as seen above, different from the federal Constitution that substituted 'pursuit of happiness' with 'property', no less than thirty-one states have inserted the pursuit of happiness phrase with occasional individual modifications of phraseology into their state constitutions and have therefore made it the written law of almost two-thirds of the federated republics. Accordingly, in state court level, there have been much more decisions using the pursuit of happiness in real cases identifying the pursuit of happiness with a property right than federal courts.

The two cases from the first half of the nineteenth century, though they are a good many years apart, illustrate the possible extremes of definition, since the first decided in 1810, turns upon the problem of happiness in the world to come, and the second, which dates from 1855, is a vigorous explication of happiness here and now. The former was the opinion of the court as delivered in 1810 by Mr. Chief Justice Parsons of the Supreme Judicial Court of Massachusetts that equated happiness with

Christianity, and not merely with Christianity but with Protestant Christianity, and not merely with Protestant Christianity but with the support of that church by Massachusetts.[44]

The latter that understands the pursuit of happiness as a property right was as follows. In 1855, the Supreme Court of Indiana flatly declared that a state prohibition law was a gross violation of the right to pursue happiness.[45] Asserting that the rights to life, liberty and the pursuit of happiness existed anterior to the constitution, and, as it were, splitting the right to happiness into two parts-a right to enjoyment and a right to acquire and enjoy property. In Kentucky in 1909, this spirit reappeared in *Commonwealth v. Campbell,* when Court of Appeals voided a municipal ordinance forbidding the bringing of liquor into Nicholasville, Kentucky. A typical utterance in this regard is a decision of the Wisconsin Supreme Court in an inheritance tax case of 1906, when the bench remarked that "the inherent rights here referred to are not defined, but are included under the very general terms of life, liberty and pursuit of happiness. It is relatively easy to define life and liberty but it is apparent that the term, pursuit of happiness, is a very comprehensive expression that covers a broad field."[46] However, in later years, there has been a tendency not to confine the inalienable right to happiness to the pursuit of one's calling, but to take a wider range. In *Terr. Washington v. Ah Lim* (24 Pac 588), Ah Lim sued on the ground that a territorial statute-then Territory of Washington-depriving him of the right to smoke opium was an unwarrantable violation of his right to life, liberty and pursuit of happiness through a limitation upon the means and ways of enjoyment. The majority opinion went against Ah Lim saying, "It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of a well defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society." This case was standing on the side against individual rights implying that the state has a moral duty to protect itself against its enemy, the individual.

On the contrary, there have been many state court decisions that stand against the

44) Thos Barnes v. First Parish, Falmouth, 6 Mass. 334 (1810).

45) Herman v. The State, 8 Indiana 545 (1855). For the analysis of the case, see Howard Mumford Jones, The Pursuit of Happiness 36-38 (Cambridge: Harvard Univ. Press, 1953).

46) Nunnenmacher, Trustee v. The State, 108 NW 627 (Wisconsin, 1906).

position above. They insist the pursuit of happiness have neither legal meaning nor normative power to be applied in real cases. The following could be an example. The court cited the Old Testament to prove that Mosaic law bristled with provisions recognizing the right of inheritance. The court presumably had in mind the King James Bible. According to Young's Concordance, the word "happy" or "happiness" occurs in the Old Testament seventeen times, but in no case does happiness refer to property but to life wisely lived according to the percepts of Almighty.[47]

Let's see the federal court decisions on this position next. Although the Virginia Declaration of Rights and Declaration of Independence has the pursuit of happiness in it, as shown above, the U.S. Constitution has not the 'pursuit of happiness' but the 'property' instead of it in its text. Accordingly, in federal courts which mainly interpret federal Constitution, the life, liberty and property in the Fourteenth Amendment are not the same thing as life, liberty and pursuit of happiness, or at least they were not the same thing until the federal judges made them interchangeable by drawing the Fourteenth Amendment under the shadow of the Declaration of Independence and then inferring a definition of happiness as constitutional under a constitution which never mentions happiness.[48] For this legislative reason, as there is no phrase of 'pursuit of happiness' in the U.S. Constitution in a strict sense, the federal cases saying the pursuit of happiness in their decisions are very rare.

Loving case[49] could be the appropriate example on using the pursuit of happiness clause in federal court level in 1960s that is comparatively recent. Particularly, the Loving case has similar facts with the Korean case concerning marriage prohibition between persons with same surname and family origin because both of them are dealing with the issue of prohibition of a certain type of marriage by law.

The fact of this case could be summarized as follows. In 1958, two residents of Virginia, Mildred Jeter, a black woman, and Richard Loving, a white man got married in the District of Columbia pursuant to its law and just after their marriage they returned to Virginia and established their marital residence there. A county grand jury issued an indictment charging the couple with violating Virginia's ban on

47) For instance, Psalm 146:15 reads, "Happy is he that hath the God of Jacob for his help, whose hope is in the Lord his God." Howard Mumford Jones, *supra* note 45 at 58.

48) *Id.* at 47.

49) *Loving v. Virginia* 388 U.S.1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

miscegenation. In 1959, the couple meekly pleaded guilty to the charge to be sentenced to one year in jail. However, the trial judge suspended the sentence for 25 years on the condition that the couple leave the state of Virginia and never return there together for 25 years. After their convictions, the couple held their residence again in the District of Columbia. In November in 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence based on the fact that the violated statutes were against the Fourteenth Amendment and in October in 1964, the couple instituted a class action in the United States District Court for the Eastern District of Virginia requesting the court to declare the Virginia statutes unconstitutional and to enjoin state officials from enforcing their convictions. After passing through many courts in both state level and federal level that denied the couple's motion and affirmed the conviction, the case came to be before the U.S. Supreme Court. The majority opinion delivered by Chief Justice Warren held that the miscegenation statutes adopted by Virginia to prevent marriages between people solely based on the racial classification violate equal protection and due process clauses of Fourteenth Amendment.

After reviewing many issues concerning a facet of the Fourteenth Amendment, an equal protection clause,[50] the Court started to deal with the other facet of the Fourteenth Amendment, due process clause, in which the phraseology of 'pursuit of happiness' is included by saying "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth

50) Actually, the court devoted much more pages to equal protection argument than due process. However, because I am focusing on the issue of 'pursuit of happiness,' I position this part in footnote rather than the text. The issues on the equal protection in this case could be summarized into three issues. First, the Court clarified the meaning of equal protection; the equal protection means more than the equal "application." A Virginia statute prohibits marriage between a white and non-white. The state rebuts an equal protection attack by asserting that the statute "applies equally" to whites and blacks because members of race are punished to the same degree. The Court refuted this as follows. The statute violates equal protection. The statute contains a racial classification and the fact that it has equal "application" does not immunize it from strict scrutiny. Since the legislative history shows that the statute was enacted to preserve the racial integrity of whites, the statute has only an invidious and discriminatory purpose and has no legitimate overriding one. Second, the Court considered whether the statutory classification constitutes invidious and arbitrary discrimination and belongs to the category of strict scrutiny. Racial classifications, particularly in criminal statutes like this case, are subject to the most rigid scrutiny-strict scrutiny-and must be essential to the accomplishment of some permissible state objective to be permitted. Third, to pass through the strict scrutiny, the racial discrimination should be necessary to a compelling state interest. However, the state has failed to show any legitimate overriding purpose for the distinction between one-race and interracial marriages other than invidious racial discrimination, so the statute cannot be upheld.

Amendment." And then, the Court articulated the phraseology, the pursuit of happiness; "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free man. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." In these most important sentences, the Court is declaring 'pursuit of happiness' not as a fundamental right from which a normative power comes, but as the aim that the "life" and "liberty" pursues and as a principle that helps to interpret and limit[51] the meaning of the " life" and "liberty." Here, it is clear that the Court does not understand the 'pursuit of happiness' as a right. Rather, it understands the 'freedom to marry' as a "liberty" which is interpreted by the principle and its aim, the pursuit of happiness, because the Court says "The freedom to marry has long been recognized as one of the vital personal rights essential to the pursuit of happiness by free man." Here, we can tell the clear position of the Court on the pursuit of happiness. The U.S. Supreme Court never acknowledged the pursuit of happiness that was substituted by "property" in some state courts and does even not appear in the U.S. Constitution, as a right but as the principle or aim.

Just after these sentences, the Court continues to explain commingling the due process clause with the equal protection clause of the Fourteenth Amendment; "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." Finally, the Court ends the part concerning the due process clause of the Fourteenth Amendment by saying that the freedom to marry, one of the "liberty," cannot be limited and intruded by the State

51) As fundamental concept in Constitution, "liberty" broadly encompasses interests more far-reaching than mere freedom from bodily restraint, but does not extend limitlessly to every conceivable individual interest that might impinge upon one's pursuit of happiness in free society. About the scope of the meaning of "liberty" limited by the pursuit of happiness of others, refer to Hodge v. Carroll County Dept. of Social Services, D. Md. 1992, 812 F. Supp. 593 (1992). The term, "liberty" denotes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. State v. Louise B. Williams, N.C. 1960, 117 s.e. 2d 444, 253 N.C. 337 (1960). As we could tell from all these cases, the pursuit of happiness is not a right but a principle to draw the boundary of the meaning of "life" and "liberty."

because it is the "liberty" that cannot be deprived without due process of law of the Fourteenth Amendment; "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."

Tracing back to the stream of the time, we can meet some more precedents invoking the power of pursuit of happiness clause in the U.S. Constitution. However, many of them were just mentioning 'pursuit of happiness' as a part of introducing the Declaration of Independence as a whole to their argument. For instance, in *Bute v. People of State of Illinois,*[52] Supreme Court of the United States said, "The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such 'unalienable rights' as those of life, liberty and the pursuit of happiness." However, they did neither focus on the pursuit of happiness nor acknowledge the pursuit of happiness in the Declaration of Independence as an enforceable right.

All the way back to 1920s, there were two important federal cases invoking the power of pursuit of happiness that has been frequently cited in the following federal cases concerned with the phraseology of pursuit of happiness.[53] Those are *Olmstead v. United States*[54] in 1928 and *Meyer v. State of Nebraska*[55] in 1923.

In *Olmstead v. U.S.,* the majority opinion gained weak position because the Justices divided 5 to 4.[56] Roy Olmstead, Charles S. Green, Edward H. McInnis, and others were convicted of a conspiracy to violate the National Prohibition Act and those convictions were affirmed by the Circuit Court of Appeals[57] and they brought certiorari. Judgments of Circuit Court of Appeals were affirmed and mandate was directed under rule 31 by the majority of the Court.[58] However, the famous part of this

52) *Bute v. People of State of Illinois,* 333 U.S. 640, 68 S. Ct. 763 (1948)

53) According to search in Westlaw, there have been 90 Supreme Court cases that use the phraseology of "pursuit of happiness" in its decision since Green v. Biddle (21 U.S. 1, 5 L.Ed. 547, 8 Wheat. 1) in 1821. However, most of the cases since 1920s have used the phrase not in their own argument but just citing these two cases.

54) *Olmstead et al. v. United States,* 277 U.S. 438, 48 S. Ct. 564 (1928)

55) *Meyer v. State of Nebraska,* 262 U.S. 390, 43 S. Ct. 625 (1923)

56) Justice Brandeis, Justice Holmes, Justice Butler, and Justice Stone dissented.

57) *Olmstead et al. v. United States,* 19 F. 2d 842, 53 A. L. R. 1472 (1927)

58) To summarize the fact of this case, the defendants were convicted in the District Court for the Western District

decision is not the majority opinion delivered by Chief Justice Taft but the dissenting opinion of Justice Brandeis. He rejected the evidence obtained by wire tapping applying to the Fourth and Fifth Amendments and Fourteenth Amendment the established rule of construction. In the argument applying the Fourteenth Amendment, he understood the pursuit of happiness not as an enforceable right but as a "condition" the right to be let alone pursues by saying, "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness." He continues to paraphrase the meaning of the pursued condition, "happiness", by saying "They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things." And, finally, he draw out the right to be let alone from the Fourteenth Amendment and conclude that the right to be let alone is intruded by the government in this case; "They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." It is clear from this that Justice Brandeis did understand as a right not the pursuit of happiness but the right to be let alone derived from "liberty" in the Fourteenth Amendment. He even eulogized the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men" in relation to the government.

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of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Olmstead was the leading conspirator and the general manager of the business. Of the several offices in Seattle for their business, the chief one was in a large office building. In this, there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and other places at the city. The information that led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the defendants and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses. The gatherings of evidence continued for many months.

Few years ago from the Olmstead case, the pursuit of happiness had spotlight from Meyer v. State of Nebraska case. In the case, Robert T. Meyer was convicted of an offense,[59] and his conviction was affirmed by the Supreme Court of Nebraska[60] and he appealed to the U.S. Supreme Court. In this case, the Supreme Court invalidated a state law that prohibited the teaching of foreign languages to young children. The Court held that the term, "liberty" in the Fourteenth Amendment, included many academic rights as well as non-academic rights. The right of teachers to teach and the right of students to acquire knowledge were among these. Accordingly, the right of Meyer to teach German, the right of students to learn German and the right of parents to engage him were within that zone of constitutionally-protected liberty. The Court applied what appears to have been a "mere rationality" test rather than any kind of strict scrutiny, but nonetheless concluded that the statute was "arbitrary and without reasonable relation to any end within the competency of the State of Nebraska."

In more details, the Court focused on the Fourteenth Amendment concerned with this case after considering the religious freedom in the First Amendment.[61] Here, the Court focuses on the "liberty" rather than "the pursuit of happiness" in the Fourteenth Amendment and enumerated the denotation of the "liberty"; "Under 14th Amendment of U.S. Constitution, providing that no state shall deprive any person of liberty without due process of law, 'liberty' denotes, not merely freedom from bodily restraint, but also the right of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience." And it continues that the pursuit of happiness is the guideline that helps to interpret and limit the scope of "liberty" recognized at common law; "and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Conclusively and generally speaking, based on the research above, we could say that, in federal court, the pursuit of happiness or happiness itself has been understood

59) Meyer, a parochial school language teacher had been convicted of violating a law prohibiting the teaching of any subject in a language other than English in the first eight grades of public and private schools.

60) *Meyer v. State*, 107 Neb. 657, 187 N. W. 100 (1922).

61) In the long reasoning, the Court denied the application of the religious freedom in the First Amendment to this case.

as an aim that constitutional rights should pursue as a condition to attain as well as a limit interpreting the meaning of "life" and "liberty" in the Fourteenth Amendment in U.S. Constitution, and, in state court, the pursuit of happiness has been understood either of two pivots; the one is to understand it as a political and historical term rather than legal term by interpreting it vaguely, and the other is to interpret it same as 'property right.' Therefore, by and large, the pursuit of happiness has been understood and interpreted by American courts as a declaratory political rhetoric rather than a legal terminology from which normative force directly comes from in federal level as well as in majority of state level.

C. Pursuit of Happiness as a Declaratory Political Rhetoric in the U.S.

As we have seen above, in the United States where 'the pursuit of happiness' appeared at constitutional documents for the first time in the world, the term, whether 'happiness' or 'pursuit of happiness,' has been used by the drafters of the documents and interpreted by the courts as a declaratory political rhetoric rather than legal term that has specific enforceable right in it. Some could bring forth a counter-argument on my position saying that some state courts in the U.S. have extracted property right from it. I want to refute this based on the reasons as follows. First, that is just because, the states that such courts belong to, have the pursuit of happiness in their state constitution different from the federal Constitution that doesn't have it because U.S. Constitution used "property" instead of "pursuit of happiness" after "life" and "liberty." Second, furthermore, even in those states that have pursuit of happiness in its state constitution, more precedents by the state courts interpret it to have no legal meaning; the trend could belong to the first pivot I mentioned before that judges have been frequently content to leave the idea in convenient obscurity and haven't given any vivid and specific legal meaning to it. That trend has been the main stream even in state court level. The theory of happiness as an unalienable right antedates the American judicial system. If the courts have struggled to adapt an eighteenth-century concept to modern times, it may be that their confusion has in part been caused by their failure to study the history of the ways by which this influential concept became central in American political and cultural thinking.

There are some more positions that are on the same side with mine. Howard Momford Jones writes in his book, "In some sense, the norm of happiness being no

longer determined by an elite like Mason and Jefferson, one can say that the concept of happiness has been democratized in proportion as the causes of unhappiness has been popularized, but that this concept has not yet acquired legal or constitutional force."[62] He diagnoses the pursuit of happiness clause as not having legal or constitutional effect yet. Herbert Lawrence Ganter also concludes in his two long articles in the William and Mary Quarterly which was cited above that the phrase was widely and rather vaguely used and that Jefferson was correct when he called his declaration a mere voicing of the age's common sense. Judging from this, even Jefferson, the drafter of the Declaration of Independence which introduced 'pursuit of happiness' to the constitutional documents for the first time in a full scale, did not intend to give it a legal or constitutional force. Besides, Robert Allen Rutland's remark that denied giving legal force not only to the pursuit of happiness clause but also to the whole of Declaration of Independence, draws our attention. He insists in his book, "The Declaration of Independence was an indictment of England's misdeeds, an instrument of propaganda, and the clearest statement of the philosophy behind the American Revolution. However, it was not a bill of rights since it provided not a single legal assurance of personal freedom."[63]

Even though we make maximum concession and admit the legal or constitutional force of the pursuit of happiness clause, it still has problem in itself because of its vagueness. We could not help hesitating to answer if we would be asked, "What constitutes the pursuit of happiness?" There is no standard in applying the pursuit of happiness clause to real cases.[64]

IV. Conclusion: Interpretation of Declaratory Constitutional Provisions

It is not true that each and every provision in the Constitution includes judicially enforceable individual constitutional right for each. In the Constitution, there are some

62) Howard Mumford Jones, *supra* note 45 at 163.

63) Robert Allen Rutland, *supra* note 24 at 41.

64) The other country in the world which has pursuit of happiness clause in the Constitution is Japan. Japan adopted pursuit of happiness clause from the U.S. in Art. 13 of its Constitution in 1946. However, I am confident that Art. 13 of Japanese Constitution could not be the object of comparison with Korean and American ones because it is

provisions that just declare the basic principle and spirit which go through the whole constitution. Also, there are some provisions that declare the ideal the constitution pursues, but its realization should take some time. The framers of the Constitution did not set up those general provisions to enable us to draw some specific right that has enforceable force and normative power in it. The general provisions are made to present the ideal that the whole Constitution should pursue and the standard in interpreting the other provisions that have specific constitutional rights in it. There are many examples of that kind of declaratory constitutional provisions. Usually, preambles of the Constitution belong to this. Many of general provisions in international human right statutes are the declaratory provisions, too. In addition, the constitutional provisions that proclaimed the principle of welfare right are usually declaratory provisions that wait for the time the spirit of welfare could be realized when national finance permits it.

Like these, the pursuit of happiness clause in Korean Constitution is a declaratory provision with no enforceable force and normative power in it. Therefore, the Korean Constitutional Court could not say that the pursuit of happiness prescribed in Art.10 of Korean Constitution is a right that is intruded by the Civil Code provision prohibiting the marriage between the couples with same surname and family origin.

The Korean Constitutional Court's attitude invoking declaratory constitutional provision neglecting the more appropriate and suitable provision for the case, should be criticized. Why are they making vain efforts laying aside an easy and clear way? If the Court unnaturally and unreasonably counts on that kind of declaratory provisions by exaggerating it as a provision with a specific right and it happens on and on without being corrected, the Court could lose the persuasive power to its audiences. Further, it would undermine the dignity of the judiciary and give harmful effect to the development of judicial activism that is, in my opinion, most desirable in Korean judiciary.[65] That is because legitimate judicial activism is based on the persuasive and

recognized and interpreted by Japanese legal scholars and judges as a general provision that includes non-enumerated rights declaring the spirit that the rights that are not expressly enumerated in the Constitution should not be neglected. Therefore, Art. 13 of Japanese Constitution is not just like the pursuit of happiness clause in Korean Constitution and American constitutional documents in spite of its same phraseology, the pursuit of happiness, but just like Art. 37 Sec. 1 of Korean Constitution and Ninth Amendment of the U.S. Constitution that represent the natural law idea opposite to the legal positivism. For the details on this argument of mine, *see*, Jibong Lim, *supra* note 2 at 138-56.

65) For the reasons that Korean judiciary should be more active, *seeid.* at 322-24.

exact development of the logic in decision by picking up and counting on the most suitable provisions for the case in a smooth and reasonable way. Only then, the active conclusion by the judiciary could have trust and support from the people and make the predictable resistance from the administrative branch and legislature silent.

Korean Principle of Proportionality, American Multi-leveled Scrutiny, and Empiricist Elements in U.S.-Korean Constitutional Jurisprudence

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Abstract

The author introduces and explicates the Korean principle of proportionality as a standard of constitutional review and compares it to the multi-leveled scrutiny developed by the U.S. Supreme Court, and further examines the relative weaknesses and strengths of the two systems (Section I). Section II develops, to a higher abstraction, the common thread of the balancing paradigm running through both the Korean principle of proportionality and the American system of constitutional jurisprudence. Section III tries to resolve some of the mysteries of the American system of constitutional jurisprudence using the balancing paradigm. Section IV compares the balancing paradigm of constitutional jurisprudence to the Learned Hand Formula and discovers the empiricist bias of the balancing paradigm, while Section V applies the balancing paradigm thus explicated to important cases of the Korean Constitutional Court.

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I. Korean Constitutional Court's Principle of Proportionality

A. Per se v. Balancing

In constitutional adjudication, two different approaches are possible: *a per se* approach and a balancing approach. For instance, in equality area, *a per se* Court could have defined what 'discrimination' is, and struck down all laws that fit the definition. The same Court could also define what 'abridgement of freedom of speech' is and strike down all laws that fall under that categorical definition. However, modern constitutional jurisprudence unambiguously negates such an approach. It avoids any definition of what discrimination is or what infringement is and instead, balances various interests, protected or infringed by the state action being reviewed. Discrimination is not a separately defined act but a state of affairs whereby an injury to some private interest (this will be defined in the following segment) is so great that it cannot be justified by public good incidental to the injury. Infringement is not defined in isolation but in terms of the pointing of the scale on which the extent of prohibition on human action is balanced against the public good defended by the prohibition.

The reason for the development of the balancing approach is most likely empiricist in origin. A condition of absolute justice is not possible in the real world because there is no system of absolute truths that we have access to, and therefore, we are not capable of categorical definitions of 'equality' or 'liberty.' No Platonic essence or pure form of equality or liberty exists.

Besides empiricism, the approach makes linguistic sense. Given the complex web of causation through which any single state action affects a multitude of interests, the conflict between competing interests of the public and private is unavoidable in the real world no matter how you define the term 'interests.' Such conflict cannot be entirely reconciled under any rule-based system regardless of how you state the rule.

B. Difficulty of Balancing

Balancing itself is practically difficult because the two matters to be compared cannot be converted into easily comparable quantities. For one, measuring the total importance of any 'thing' involves evaluation of a multitude of facts. For instance, if a private person is deprived of possession of a chattel by the state, measuring the total

import of that deprivation involves whether he owns the chattel, whether he made the chattel, what the chattel is, of what use the chattel is to the private person, and so on and so forth. But that is also only one side of the equation. The other side is more complicated in that it requires the measurement of the total moral value of the public good produced by the state action. Initially, the task seems impossible. What is instructive here is the U.S. Sentencing Commission's(founded in 1985 with the mission to seek equality in criminal sentencing) attempt to convert the culpability of each criminal defendant on the basis of a myriad of factual aspects of his/her crime into a quantity for the purpose of sentencing. The Commission ended up giving up the project after it found that it could not do so without involving complex mathematical formulas involving square roots.

C. Quantifiability Postulate

The balancing paradigm breaks down if you do not accept certain postulates, such as the more essential things you violate, the more deeply you are discriminated against, or the more essential things you deprive yourself of, the more deeply your liberties are abridged. In turn, these articles of common sense are in turn based on a not-so-common-sensical hypothesis, i.e., the Quantifiability Postulate, that the infringement of liberties or violations of equalities can somehow be quantified so that they can be weighed against the value of the countervailing public good.

Now, the unspoken postulate that some interests are more important than others or that some rights are more important than others can be probably deduced from an appropriate mixture of social compact theories and natural rights theories. It may very well be deduced from what is usually known as Part I of the Constitution which specifies the republican form of government, federalism, and separation of powers as the orders by which the country is to be constituted.

The Quantifiability Postulate has been accepted virtually without any opposition by the Korean Constitutional Court. The use of language such as "outweigh," "countervailing," "weighed against," "balancing," "tipping the scale" is ubiquitous in judicial opinions of the Korean Constitutional Court. However, the assumption that the value of heterogeneous, abstract things can be converted into, if not homogenous, comparable quantities does not seem to be an American bravado but the empiricists' modesty. It is modest in that the Court relies on beliefs widely shared in the

community that are exposed and discovered though people's reactions to a myriad of fact patterns, and the Court does so without questioning their validity any further philosophically or via any abstract, speculative logic. The Quantifiability Postulate is merely an intellectualized incarnation of the commonly accepted observations that, at any given moment, things can be quantified.

D. The Korean Principle of Proportionality

The Korean systems of constitutional jurisprudence recognizes a *single* standard of constitutional review with the following four components that are equally important: legitimacy of the end (aimed at by the state), appropriateness of the means (employed by the state), proportionality of the legal interests (between those of the private person and those of the state), and finally, minimality of the infringement (of the private person's rights). There are no differing levels of scrutiny because, theoretically, all state actions must satisfy each of the four requirements simultaneously to be constitutional. (Practically, the courts seem to view these as four categories under which each state action is reviewed, and base their decisions on the sum total of their impressions under all the categories, among which lack under one category is compensated by abundance under another.)

Now, the four components of the Korean system are as follows, explained in terms explicable to American readers:

Legitimacy of the end means that the end aimed at by the state in engaging in a particular state action must be legitimate. This is equivalent to the ends analysis of the American rational basis review. One may point out that the American system does not require legitimacy of the end in the higher levels of review, and that this must be quite different from the American concept. But, the legitimacy of the end should be presumed to be applicable also to the higher levels of scrutiny since they must include within them the requirements of the minimum review.

Appropriateness of the means is equivalent to the means-ends analysis applicable to all levels of review, expressed as "rationally related to" in rational basis review, "substantially related to" in intermediate scrutiny, and "necessary for" in strict scrutiny. As stated earlier, in the American framework, the requisite degree of appropriateness of the means rises as the level of scrutiny increases.

Proportionality of the legal interests requires us to take a step back to grasp its

relationship to the overall American framework. This principle means that there must be proportionally great public interest created by the subject state action for it to infringe on a person's basic rights without violating the constitution. Now, the whole purpose of the American multi-tiered scrutiny is to demand proportionally greater public interest to be achieved by the state as the infringed private interest increases. If 'fundamental rights' are infringed upon, 'compelling governmental interest' must be achieved. If no 'fundamental rights' are infringed upon, mere 'legitimate interest' suffices.

Finally, we must clarify what is meant by *minimality of the infringement.* The American counterpart is the requirement of the least restrictive means or the "narrowly tailored means" which apply mostly to strict scrutiny and sometimes to middle-level scrutiny. It is safe to assume that the greater the private interest (greater because 'fundamental rights' are involved) is infringed, the more the minimality of private interest is required. In other words, the bigger the damage to the private interest, the mandate that it should be as small as possible is applied more strictly.

E. American Solution: What Stands Out?

There are other legal systems that define constitutional legitimacy around the balancing paradigm. Going against the perceived odds of developing a balancing model, the U.S. Supreme Court has developed over time a practical formula to facilitate and add consistency to the balancing process. It first surveys the entire field of factual elements presented by each case and identifies those facts that 'stand out' as surrogates for or indicators of reasons for requiring greater public interest to be produced to the state. Of course, the Court merely says that it is applying close scrutiny, but on close scrutiny - no pun intended - the Court does not mean merely a higher evidential standard but a higher level or a larger amount of public good to be produced by the classifying state action.

For instance, in the realm of equal protection, the line by which people are categorized and given differential treatment by the state action has been given priority. At the same time, the subject matter in which discrimination takes place has gained an equally important role. If the line drawn through people is that of race, or the thing unequally distributed over that line is really important, the Court will require the state action to produce 'compelling interest,' as opposed to just 'important' or merely 'legitimate' interest. In the realm of freedom of expression and other areas where the

state action limits a private citizen' actions, the Court will focus on the importance of actions limited, and require heightened public interest upon a finding of very important private actions enjoined. These outstanding facts that trigger heightened scrutiny have been given such names as 'suspect classification', 'fundamental interest', and 'fundamental rights'.

Selection of these 'outstanding' facts has been a curious art involving various heterogeneous considerations drawn from history, psychology, philosophy, politics, etc. For instance, the nation's history of racial discrimination is an important factor in crowning race with the title of suspect classification. The Court decided that any outright classification of people by racial lines is so much suspected of 'invidious discrimination' of the antebellum era that it has to be scrutinized closely. It is as if the Court thinks that in order to compensate for the high likelihood of the state action being 'invidious,' it requires the state to provide some sort of insurance by demonstrating an overwhelming amount of public good to be expected by its action.

The relationship between the outstanding facts and the appreciation of the requisite public good is more straightforward on the liberty-related realm of basic rights. For instance, voting rights have been considered 'fundamental interest' or 'fundament right' triggering strict scrutiny on grounds that the political constitution of this society, i.e., a republican form of government or representative democracy, calls for assigning great importance to the right to express one's preference through an electoral arrangement.

As a side effect of the adoption of the multi-tiered review, the process of determining which facts 'stand out' as deserving to make demand upon the state has assumed supreme importance in constitutional inquiries. Particularly contentious has been which line of division will be considered "suspect classification." For example, in regards to 'homosexuality,' even though the ultimate question remains to be whether a particular homosexual is impermissibly discriminated against, the road to the answer involves an intermediary question-which is seen more important in the larger scheme of things-that asks whether homosexuals as a group are a 'suspect class' that triggers heightened scrutiny.

F. Strict Scrutiny Strictly Scrutinized

We can achieve a better understanding of the Korean principle of proportionality by looking back at American multi-leveled scrutiny.

American constitutional inquiry, both in equal protection and the first amendment areas, seems to involve invariably some sort of balancing between private interest abridged and public interest promoted by a state action. 'Balancing' here is used to denote a broader operation than the one frequently identified with 'balancing tests' or 'intermediate scrutiny' in the Court's lingo. The technical definition can be stated as "comparing quantitatively two subjects for the purpose of deciding which one is greater than the other."

The constitutionality of a state action depends on whether it produces public interest *large* enough to justify the damage to private interest. In other words, the state is allowed to commit a private wrong when and only when it produces public good to a sufficient extent to justify the private wrong.

Naturally, the severity of infringement on private right varies depending on the facts of the case. When state action causes much damage to private interest, the Court must require the state to justify its action by demonstrating the accordingly *large* amount of public good. The Court's varying treatment of state actions according to the amount of private damage done seems to appear in the form of the multi - tiered standard of review. Once the rights infringed are identified as "fundamental," it is logical to assume that the *amount* of private injuries done by the state action is much greater than when they are not "fundamental" (actually, this seems to be the only meaning of 'fundamental rights'). For the state action abridging fundamental rights to be constitutional, it has to produce enough public good that overwhelms the larger private injury. Hence the "compelling governmental interest." If the injuries were done on not so fundamental rights but some important ones, e.g., commercial speech, the state must produce enough public good that can at least match the extent of the injuries done: hence, "important government objectives." If no fundamental right is infringed, the state can do pretty much what it wants to do by a showing of minimal public good produced: hence, mere "legitimate interest" in rational basis review. In other words, the differing levels of scrutiny represents the Court's demand of the varying amount of the public interest to be produced by the state actor, depending on the amount of the infringement on the private interest.

The same logic applies to the 'fundamental interest' prong of equal protection analysis. Once it is established that discrimination is infringement on the disfavored person's right to equal protection, the subject matter in which the discrimination took place is relevant to measuring the extent of discriminatory harm. If the state's violation

of equal protection takes place in the realm of "fundamental interest" as opposed to non-fundamental interest, we owe it to common sense to view that as more violative of the principle of equality. One would normally feel more violated when discriminated in essential things such as the right to livelihood than in peripheral things such as the right to go hunting. The state must then justify it by proving that it can produce an accordingly larger public good: hence, "the compelling governmental interest" test in the fundamental interest prong of equal protection jurisprudence. Where the interest taken away from the disfavored person is not very important, the Court merely requires from the state that the effect of its action be in the form of a public good as opposed to a public wrong: hence, "the legitimate interest" test of rationality review.

The same logic can be extended to the other portion of equal protection analysis which varies in level of scrutiny according to the types of classifications. A suspect classification triggers strict scrutiny. A quasi-suspect classification triggers quasi-strict scrutiny. In other words, some classifications give rise to more suspectness than others. *Assuming that whatever is suspected of is derogation of private interest, the suspectness can equated to the concept of likelihood and then to the more quantifiable concept of probability. The product of the quantifier of the suspected injury and the probability is then equivalent to the expectation value of the private injuries.* Under the balancing model envisaged above, the rising expectation value of private injury increases the requisite countervailing public interest for the legality of the state action.

In short, the multi-leveled scrutiny seems to achieve one of the components of the Korean principle of proportionality, that is the balancing of competing legal interests. Both systems can be visualized in the following paradigm: that of a vehicle through which the Court conducts the balancing between the private injuries and the public good.

G. Which One Slides Better? Korean vs. American

There are strengths and weaknesses in adopting a variable or multi-tiered standard of review as in the United States as opposed to managing a single standard of review with multiple components as in Korea.

The common feature of the two systems is that it allows the judicial reviewer to take into account the country's culture and history in weighing the magnitude of governmental interest aimed at by the state and the value of a certain right infringed.

In the Korean system, the four requirements are simultaneously imposed and at the same intensity for all subject state actions, and have all the ingredients of the American system. The American system, when deconstructed into the concepts of the Korean one, exhibits its potential clearly for the balancing paradigm.

Both the Korean principle of proportionality and the American multi-tiered standard of review seems to be a nice tool to balance on one hand the total moral value of injuries to private interest and the total moral value of the public good that the state action produced. However, the U.S. Supreme Court's refusal of the sliding scale seems to militate against the ideal of the balancing paradigm.

With a single standard format, there is the problem of *judicial paralysis* with a single standard: it slows down the precedential development because the reviewing court is easily paralyzed by a concern that any decision to strike will invite challenges to strike down many other classifications or otherwise limit legislative freedom. Any act of state is limited by available scientific knowledge in fashioning a policy and by available technology in implementing it. In Korea, for instance, the use of the equality principle is severely limited to a single, "arbitrariness" standard. The two-pronged analysis described above allows the court to accord varying weight on different categories of classification, thereby allowing the court to use the policy considerations deemed important by the contemporaries in equality analysis. It can better adopt to the changing time. The need for or the superiority of adopting multi-tiered standard of review in this respect will be analyzed in the context of gender discrimination.

II. Balancing Paradigm Explicated

A. Constitutional Learned Hand Formula

We can better understand the balancing paradigm in mathematical terms.

In torts, we have seen the use of a similar type of the balancing paradigm in the Learned Hand Formula. When the injury (the probability of the happening of which is P and the magnitude of which is L) is about to take place, the tortfeasor is deemed negligent when he fails to take an appropriate precaution, if any (the expenses B of which is smaller than the product of P and L):

If P*L>B, then negligent.

Now, the Learned Hand Formula is a mathematical expression of the indisputable 'reasonable person' standard. In a certain school of thought, a reasonable or rational being is selfish. The Learned Hand Formula requests each private actor to take the contemplated precaution if taking it is less expensive than the *expected* magnitude of his or her legal liability. The Learned Hand Formula basically demands that each private actor acts according to his self-interest.

The balancing paradigm affords us a similarly handy tool. Let's assume that a particular state action produces public interest in the amount of G and causes infringement on private interest in the amount p. The balancing paradigm posits that a state actor's particular action is constitutional if and only if the action produces public interest outweighing the amount of private interest infringed by it.

If G>p, constitutional.
If G-p>0, constitutional.

Of course, this is the same as saying that the state action is constitutional if and only if it increases the total, societal interest (P).

If $\underline{P}$>0, constitutional.

Now, the U.S. system does the balancing by requiring greater public interest to be achieved by the state actor whenever important private interest is infringed upon by the state actor. Firstly, there is strict scrutiny whereby the state is required to justify its action with compelling interest, and show that it is the least restrictive, absolutely necessary means to protect that interest. Secondly, there is intermediate scrutiny whereby the state is required to justify its action with important interest, and show that it has a substantial relationship to that interest. Thirdly, there is rational basis review whereby the state is required to justify its action only with legitimate interest, and show that it has a rational relationship to that interest.

Raising of the level of scrutiny means that the Court requires the government interest to be more important than before, i.e., from "merely legitimate" to "important"; from "important" to "compelling."

There are three different occasions when the raising of the level of scrutiny takes place: fundamental right, suspect classification, and discrimination in fundamental

interest. Now, in the first scenario, heightened scrutiny is triggered when a fundamental right is unduly burdened. Then, the equation G>p can be substituted by:

G > F * E where F is the importance of the right burdened; E the extent to which the right is burdened; G the governmental interest.

If a fundamental right is infringed upon, F is high. For the equation to hold true, the Court must require G to be great, i.e., "compelling" or "important." If a fundamental right is not infringed upon, the Court applies rational basis review because P does not have to be high for the reviewed state action to be constitutional. Also, even if the fundamental right is infringed upon, if the extent to which it is infringed is not serious, i.e., E is low, G does not have to be great and the Court does not apply "strict scrutiny." For instance, even when a state action infringes upon freedom of speech, an unquestionably fundamental right, if it is infringed only to the extent that its means of expression is restricted, then the Court applies merely middle-level scrutiny. Or when a state action infringes upon right to abortion, again a fundamental right, if its exercise was only delayed for 24 hours, the Court applies rational basis review.

In the second scenario and the third scenario, the level of scrutiny is raised when a fundamental right is used as a means of discrimination, or equally when discrimination takes place in the area of fundamental right. Here, we first assume that discrimination is some form of infringement upon private interest. Then, the infringement of that private interest can be quantified as the product of S*F when S represents the degree of suspectness of the classification and F the fundamentalness of the area in which discrimination takes place.

If G>S*F, constitutional.

Therefore, if suspect classification such as race or gender is used, G has to be greater for the discriminating state action to be constitutional, and therefore the Court applies "strict scrutiny." Even if a suspect classification is not involved, if fundamental interest is used as a means of discrimination, increasing F, the Court applies "strict scrutiny" (i.e., demands the state actor to produce at least equally greater public interest).

III. Understanding the American Mysteries in Korean Terms

In this chapter, let us solve some of the mysteries of the American constitutional jurisprudence using the generalizations drawn from the fruits of a comparative-legal study with Korean constitutional jurisprudence.

A. Basic Rights vs. Fundamental Rights

Curiously, Korean constitutional jurisprudence lacks serious discussion on whether a certain action is protected by a basic right or not. This is not only due to a clause in the Korean Constitution that a right shall not be disrespected for the reason of being not identified as a basic right in the Constitution, but also because the Korean constitutional principle of proportionality works smoothly across the entire spectrum of rights without discriminating whether a certain right is considered a basic right or not.

As a matter of fact, when the American system is likely unraveled under the balancing paradigm, there is no reason to distinguish fundamental rights from non-fundamental rights. To the extent that the concept 'fundamentalness' measures the abstract or qualitative importance of a certain right, that qualitative aspect can be always compensated for by the quantitative aspect. A non-fundamental right, if infringed to a great extent, may result in much injury to private individuals that amount to disqualify the state action that caused the injury. Even a fundamental right, if infringed to a minimal extent, may not accomplish a sufficient basis to demand that the state actor achieve compelling governmental interest.

For instance, the U.S. Supreme Court did not apply strict scrutiny in *Casey v. Planned Parenthood*[1], stating that the 24-hour waiting period does not constitute an undue burden. Also, the U.S. Supreme Court has lowered the standard of review for the time, place, and manner of restriction on freedom of speech although freedom of speech is certainly a fundamental right. Also, the U.S. Supreme Court has applied *a per se* rule for a takings analysis if the restriction on the property right involves physical dominion, contrary to its usual announcements that rational basis review

1) Planned Parenthood v. Casey, 510 U.S. 1309 (1994).

suffices in social or economic regulation.

Similarly, in the *Forests Survey Inspection Request case*,[2] the Korean Constitutional Court reviewed the constitutionality of an administrative agency's refusal to disclose forests title records, private forests use surveys, land surveys, and land tax ledgers on government properties when a private party claiming ownership of part of the properties requested them.

Furthermore, the infringement of a non-basic right can directly cause the infringement of a certified basic right. In the same case, the Korean Constitutional Court obviated the distinction between a basic right and a non-basic right by deriving the right to know from freedom of speech. The Court stated:

> Freedom of press and freedom of expression guaranteed by Article 21 of the Constitution envisages free expression and communication of ideas and opinions that require free formation of ideas as a precondition. Free formation of ideas is in turn made possible by guaranteeing access to sufficient information. Right to access, collection and processing of information, namely the right to know, is therefore covered by the freedom of expression. The core of right to know is people's right to know with respect to the information held by the government, that is, general right to request disclosure of information from the government (claim-right).[3]

The causal relationship among basic rights was early recognized by the U.S. Supreme Court in the "penumbra" debate on the right of privacy. The Court, although divided, better articulated the causal relationship in *Plyler v. Doe*[4] where the majority accepted the notion that education, though not a fundamental right, should be entitled to some protection because of its relationship to the exercise of other rights that are clearly fundamental, for instance, right to vote.

This rather lax treatment of the basic vs. non-basic right did not go uncontested by

2) Constitutional court, 88 heonma 22, Sep. 4, 1989.

3) This concept of *claim-right* is contrasted to *liberty-right*: the former implicates a duty of the state to take affirmative action benefiting the claimant whereas the latter is negative in that it merely mandates the state not to infringe on the right of the individual.

4) Plyler v. Doe, 458 U.S. 1131 (1982).

Korean scholars[5] as the American counterpart did not. Abstractly distinct rights are distinct only abstractly and in fact intertwined with one another through a cobweb of causation in the real world. The colors red and blue are of the same substance that vary only in frequency and wavelength.

B. Multi-tiered review: result-oriented?

Constructing the multi-tiered review in this way explains why the results were so closely related to the level of scrutiny, as pointed out by the Korean critiques of the American multi-tiered review. Some commentators argued that multi-tiered standard of review is a mere facade for *post hoc* justification for predetermined results. In other words, when the U.S. Supreme Court does not like something, it goes through the motion of applying strict scrutiny, making sure that the parties expect no other result.

The new paradigm of multi-tiered review presents us with a new picture. The level of scrutiny is not about whether the Court will impose a higher burden of proof or that the Court will look at things closely when the real target for the search can be found or not found in equal likelihood. In the new paradigm, the level of scrutiny is really substantive in that the Court actually demands the state to produce more public good. No wonder most state actions subject to strict scrutiny fail.

Others have, equivalently, argued that the multi-tiered standard of review is only *post facto* justification of the ultimate results that the Court has reached through some other independent (and secret) means. For evidence, they point to the dearth of strictly scrutinized cases resulting in validation and minimally reviewed cases resulting in invalidation.

The critique is valid if we take the concept of "scrutiny" at its dictionary-meaning value. If strict scrutiny really means looking at things more closely, there is no reason that

5) Some found the case rich in the justices' commitment to protection of basic rights but lacking in support of an established, constitutional theory. Kyung Keun Kang, *People's Right to Request Disclosure of Information*, Legal News, No. 1881, October 16, 1989. Others found it logically problematic in deriving from a liberty-right (freedom of press and freedom of expression) a much broader claim-right (right to know). Joon-Hyung Hong, *Right to Information Disclosure Request, and Freedom of Information*, Theories and Practices of Modern Laws.
However, the Korean Constitutional Court reconfirmed its position on the issue of right to know in another case decided on May 13, 1991 (Constitutional court, 90 heonma 133, the Records Duplication Request case). In this case, the Prosecutor's Office refused to allow a former defendant in a criminal trial to inspect and duplicate the records of the concluded trial. The Court found it unconstitutional.

the results of the scrutiny are more likely to lean more to one side than the other. How hard you look at something should not affect your ultimate judgment on that object.

However, the balancing paradigm jettisons the pretension. Strict scrutiny does not mean that the Court scrutinizes things more closely or strictly. Strict scrutiny means that the Court makes a substantively more strict demand to the state actor. The increasing level of scrutiny actually increases the odds of validating the reviewed state action, and does so for a very good reason: it is simply harder for the state actor to come up with the required amount of public interest.

Of course, this view conflicts with the dictionary meaning of such verbiage as "scrutiny" or "standard of review." As a matter of fact, the balancing paradigm itself does not leave any room for justification of such concept as 'level of scrutiny'. Once legitimacy is defined in terms of the relationship between competing legal interests, the only job for the judicial reviewer is to measure the subject state action in light of the requisite relationship *at all cost and with no stone left unturned.* There is no room or need in the Constitution to lower the intensity of scrutiny for any state action. He does not need to, because the balancing paradigm in itself has the element of generosity: the less serious the intrusion on the private interest, the lesser public interest suffices to be created through the subject state action.

The balancing paradigm, defining legitimacy in terms of a relationship between legal interests, provides for variable scrutiny depending on the extent of the private injuries.

C. Means-Ends Analysis and Underinclusion vs. Appropriateness of Means

Korean constitutional methodology again applies the pressure of the appropriateness of means uniformly against all state actions infringing upon private rights. However, in the United States, only strict scrutiny is usually accompanied by or includes within it the refrain that the state action be more closely related causally to the public good aimed at by the state. As the level of scrutiny increases, the descriptive words for the required level of causal relationship rises from "rationally related" to "substantially related" and to "necessary." This can be easily explained by a command of common sense that the public good proposed by the state as the justification for the private injury should be *actually* attained. Therefore, such causal relationship must be closer or at least the proof of causal relationship must be more substantial as the private injuries become greater. In this scheme, *underinclusion* is merely a descriptive word

when the means employed is not appropriate or insufficient to achieve the end targeted by the state.

To leave no doubt, let's look at the left side of our Constitutional Learned Hand Formula, namely, S*F>G or F*E>G. G is the public interest newly produced by the state action. Then, G can be represented as follows:

G = O*P where O is the importance of the governmental goal aimed at and P is the probability that the particular state action can actually achieve O.

Now, we are already familiar with O. O increases as the governmental aim gains importance (from "legitimate," to "important," and then to "compelling").

Then, the appropriateness of the means can be equated to P. The more appropriate the state action is as a means, the more likely it is for the state actor to attain the goal aimed at.

Then, note that it will be easier to achieve G>F*E or G>S*F if P is high. Alternatively, as S, E, or F increases, P should increase for the constitutionality proposition to be true. Of course, P does not have to increase if O advances sufficiently, for instance, to "compelling interest." However, it is easy to see that, even after the Court has already required the state actor to produce sufficiently important public interest, P needs to back up O so that G does not become too small. Increasing P means that the means employed become more appropriate in light of the goals.

Now, if F*E or S*F is great, there is more urgency that P back up O and thereby keep G high to maintain constitutionality of the state action. For this reason, the Court requires a tighter means-ends relationship if suspect classification is involved or fundamental right is infringed. It is for the same reason that under-inclusion is easily forgiven at the rational-basis level while not forgiven at heightened levels of scrutiny. As the private injury becomes greater, the Court requires not only the state's goal to be loftier but also the actual result of the state's action to be greater to balance out the private injury, and therefore imposes a stricter requirement on the appropriateness of the state action as the means to the state's goal.

D. Least Restrictive Means and Overinclusion vs. Minimality of Infringement and Optimization

Again, Korean constitutional methodology involves the ubiquitous requirement that the extent of the infringement on private rights be minimized. In the U.S. system,

only heightened or strict scrutiny includes within it a requirement that the state action be the least restrict means to achieve the state's public interest, or equivalently that the state choose the means that infringe the rights of private persons the least. Phrased differently, the degree to which *overinclusion* is frowned upon increases as the level of scrutiny tightens. The "least restrictive means" principle applies only to strict scrutiny and sometimes to intermediate scrutiny. Weaving this one into the fabric of the above balancing paradigm is not easy.

The appropriateness of means and the minimality of the infringement *together* correspond to the means-ends analysis of the American counterpart. Just as the principle of appropriateness of means, the minimality of the infringement seems not inherent in the balancing paradigm. However, a close analysis reveals that they both facilitate the ultimate conclusion demanded by the balancing paradigm.

The appropriateness of means requires the means employed by the state actor to be appropriate to achieve the stated objectives. That the government's goal is 'compelling' or 'important' does not guarantee that the state actor will actually succeed in materializing that goal. In fact, appropriateness of means is needed to make sure that the justifications for the reviewed state action are true. It is only through appropriate means that the policy goals presented by the state actor as the justifications for the subject state action will actually be accomplished.

The minimiality of the infringement takes some thinking. The minimality of the infringement requires that the extent of the private injuries be limited as much as possible. In the U.S. system, the greater the private injuries are, the more strictly the requirement is imposed. When the state actor infringes upon fundamental rights, its action is reviewed under heightened scrutiny which requires that the least restrictive means be used.

Some mathematics help our thinking about the least restrictive means. Let X be the amount of private injury caused by the reviewed state action and G the amount of public good achieved by the same. Then, as X approaches its minimum, G-X or the increase in societal good will reach its maximum, assuming that G remains the same. The smaller the private injury is, the greater net social good the subject state action will achieve. When the private autonomy is least restricted while the public good achieved remains the same, the net social good achieved by the subject state action will reach its maximum.

Equivalently, the requirement of 'least restrictive means' can be turned into a

requirement that E lands on the minimum in the S*F equation or the F*E equation, bringing down with it the product in the respective equation. The conclusion is the same. G-S*F or G-F*E reaches its maximum when E approaches the minimum, other factors being equal, of course.

Indeed, this is none other than the Korean concept of *optimization*, though not settled as the mainstream legal theory. The requirement of the least restrictive means upgrades the objective of the balancing paradigm, i.e., outweigh private injury with public good to a new level where the net social good is maximized.

E. Legitimacy of Legitimacy of End Questioned

Note that the core of the balancing paradigm can be captured by one principle alone, that of proportionality of the competing legal interests in the Korean system. Other componental principles of the principle of proportionality were discussed above.

But, we need to examine the legitimacy of end more closely. The principle requires that any state action have legitimate governmental interest as its goal or be struck down as unconstitutional. What does it mean for the end to be legitimate? Why do we need such a requirement in the balancing paradigm?

The true believer of balancing will argue, and rightfully so, that the concept of illegitimacy should not be separate from that of the imbalance (i.e., the infringement on the private interest not being outweighed by the public interest created.) If it is, the state action itself also can be declared legitimate or illegitimate and we would not have any need for elaborate constitutional methodology, the very subject of our main inquiry. The idea that there are inherently legitimate interests and illegitimate interests goes against the grain of the balancing paradigm that defines constitutional legitimacy in relative terms, not absolute or enumerated terms.

Even if legitimacy of end is a legitimate requirement, one wonders what would be the standard in judging which interest is legitimate and which interest is not. The corollary of the statement that there are legitimate interests that the state actor may aim as its goals is that there are illegitimate governmental interests. In fact, there are U.S. Supreme Court cases that strike down state actions on the basis of having illegitimate goals. However, these 'illegitimate' governmental interests are not written down in the Constitution itself, nor are the reasons for their illegitimacy logically explained in those cases.

One may argue, and the U.S. Supreme Court has relied on such doctrine, that the constitution enumerates those interests that the legislature or the government may aim at, and that is truly the documentary significance of the constitution. The requirement of legitimacy of the state interest is satisfied by comparing the goal of the subject state action to the list of legitimate goals that the constitution says a government may have.

However, consider a law that compensates residents of Alaska for the natural resources found in the lands that they used to own or at least manage in their natural settings. The stated governmental interest was compensation of residents of Alaska for the natural resources found in the lands that they used to own or at least manage in their natural settings. Now, the Supreme Court in the actual case coldly said that such a goal is not legitimate, and struck down the law under minimal review. Then, if we know that compensation of indigenous groups for the natural resources they commonly owned before annexation is illegitimate for some inherent reason, why can't we *know a priori* that discrimination of a certain racial group is illegitimate without going through any delicate balancing or complicated thoughts about standards of review?

Furthermore, the 'original intent' theory of the U.S. Constitution has proved ineffective in explaining or accommodating such cases as *Brown v. Board of Education*,[6] the Dormant Commerce Clause, and the resolution of the Incorporation controversy. The constitution itself cannot be relied on as an exhaustive list of legitimate or illegitimate governmental interests. Also, legal systems not built on the doctrine of limited government do not enumerate legitimate goals with emphasis (i.e., state constitutions in the U.S., the Korean or German constitutions).

In the above example, the better approach-but maybe not the best-is to *assume* that compensation of the Alaskan residents is a legitimate state interest as long as it is geared toward a higher goal that is more clearly legitimate. We can always justify such normatively ambiguous goals with a yet higher goal that sounds much better *a priori.*

This is not necessarily a matter of phraseology but, more often than not, reflects the true operating mode of the policy-makers. In the real world, one policy goal is causally related to many other policy goals, which are, in turn, related to many other goals. In this cobweb of interlocked policy goals, the state can always choose one that

6) Brown v. Board of Education, 347 U.S. 483 (1954).

sounds best and present it as the state interest that passes the test of 'legitimate interest.' *It is very easy for the state actor to satisfy the requirement of the legitimacy of the end.*

Now, this approach does seem to take teeth out of the requirement of 'legitimate interest.' However, it is indeed consistent with the leading Supreme Court cases, conflicting and outdating the previously mentioned line of cases, which announced that, in rational basis review, they are not required to first ascertain the actual goal of the policy-maker and evaluate its legitimacy. The Court, to the surprise of many commentators, stated that the inquiry is whether there is any conceivable, legitimate interest that may be achieved by the contemplated state action. The Court first allows the state actor to move up in the causal hierarchy of governmental interests and present whatever goal sounds best as the goal of the reviewed state action. Then, the Court usually accepts without the modicum of deliberation the goal that most pleasantly sounds 'legitimate.'

Such reduction of the requirement of 'legitimate interest' does not do so to nullity. As the state actor tries to justify its action with an ever loftier goal, it does so with a certain risk. Some state interests may actually fail as 'appropriate means' for achieving the higher-level objectives of the state that it proposes to achieve through the subject state action. As the state actor points to a loftier and more remote goal as its objectives in justifying its action, the possibility of under-inclusion, or equivalently that of the failure on the 'appropriateness of the means' test becomes greater. Once the state states something as a goal, the state cannot justify all its actions conceivably geared toward that goal unless such actions are objectively appropriate as the means to the end.

F. Korean Principle of Freedom of Legislative Formation

However, this approach, when extended to its full logical potential, abandons any attempt to anchor down the legitimacy of the end on any indubitable foundation. The judicial reviewer, in recognizing the endless chain of causation among different policy goals, will engage in the evaluation of the ever higher policy goals in trying to make the link to a self-evident policy goal that may finally end the inquiry. However, in the strictest sense, the judicial reviewer will be engaged in the act of justification ad *infinitum*, because there will be no self-evidently legitimate policy goal, separately from the test of the balancing paradigm. The act of justification will never be complete.

The balancing paradigm does get rid of the requirement of the legitimacy of the governmental goal.

Under the balancing paradigm, there is no action that is inherently bad. No matter how bad, the action may produce certain consequences that are of so much value that overwhelm the *prima facie* badness of the action itself. Likewise, there is no end that is inherently bad. There is no inherently illegitimate end that the state may aim at. It is not merely because the causal chain of every governmental end is linked to other ends directly or indirectly though the causal chains of other ends. It is because every end that the state actor chooses to accomplish is a good in itself because, when achieved, the state will have acted upon its autonomy. This is analogous to the widely held belief that any restriction on private autonomy is *prima facie* bad.

This is actually the Korean concept of the *freedom of legislative formation.* Just as we consider the grievances of private individuals as a minus on the balance sheet of societal interest without further questioning, we are required to consider the goals aimed at the congregation of our democratically selected representatives as something positive on the societal balance sheet.

Come to think of it, just as any foul calling by any individual is considered a societal harm in the balancing paradigm, it is only fair that the representatives of ourselves are also given the benefit of doubt when they scheme together to achieve something. If autonomy is considered a good in itself on one side of the equation, the collective autonomy of the citizens of the state should, too.

One may argue, for the balancing to work, we have to be assured at least that the aimed governmental interest is at least something positive, or when achieved, increases the balance of the societal interest. In other words, the legitimacy of the end does not require the actual motive of the state actor to be 'legitimate' but it merely requires the state actor to present something positive as its goal to be weighed in the ultimate balancing. In the balancing, the state actor cannot present, for instance, infringement of private interest itself, as the goal. Otherwise, the state actor can always justify its action as net positive. He will argue that we should at least be assured that it is at least not something bad.

Well, that is the whole point of the balancing paradigm. There is no value system that prejudges what is right or wrong. There is only one good, and that is exercise of autonomy. Justice is the maximization of good. If people came together to decide on something, we immediately assume that their having their way is a good in itself.

In summary, the requirement of legitimacy of governmental interest is first diluted by the fact that, in the real world, the accomplishment of one policy goal or the failure thereof is causally linked with many other policy goals, allowing the state actor to choose from an almost infinite array of those policy goals to justify the reviewed state action. What really takes the final tooth out of the already toothless requirement of 'legitimate interest' is the Korean concept *of freedom of legislative formation*. Freedom of legislative formation and the recent Supreme Court cases disarming the legitimate end requirement perfects the balancing paradigm by adding the last ingredient from Empiricist's recipe: exercise of autonomy is a good in itself.

G. Concept of Inviolable Right

A corollary of the balancing paradigm is that there can always be things valuable enough to forego less valuable things or justify deprivation of less valuable things. The corollary of this is that there is no inviolable right because there will always be public interest great enough to justify the infringement thereon. There cannot be *a per se* rule against discrimination of people or infringement on rights because there are always public goods important enough to justify it.

Of course, one may argue that such constitutional balancing leaves room to allow the state to justify such heinous actions as genocide under the name of public interest. It does. It is the challenge of empiricism. In exchange of its flexibility, the empiricist dogma challenges us to keep our conscience and intellect sharp and does not allow us to rely on history, traditions, or other external norms. We have seen the U.S. Supreme Court fall into that pitfall in *Korematsu*.[7] The balancing paradigm, only when used properly, should exclude such possibility.

IV. Korean Cases[8]

The Korean system, because of its openness, can accommodate the *sliding scale*

7) Korematsu v. United States, 324 U.S. 885 (1945).

8) The summarized texts of the opinions of the Korean Constitutional Court that appear in this Chapter are the author's English renditions of the excerpts of Ten-Year History of the Constitutional Court [Heonbeop Jaepanso 10 nyeon Sa].

rejected by the American system. Let's look at some of the examples of the Korean Constitutional Court's tier-less balancing:

In the Forests Survey Inspection Request case,[9] the Court reviewed an administrative agency's refusal to disclose the old forests title records, private forests use surveys, land surveys, and land tax ledgers when a private person disputing the agency's ownership of some lands requested them. Two points are important. First, the Court derived the hitherto unknown right to know from freedom of expression, stating:

> Freedom of press and freedom of expression guaranteed by Article 21 of the Constitution envisages free expression and communication of ideas and opinions that require free formation of ideas as a precondition. Free formation of ideas is in turn made possible by guaranteeing access to sufficient information. Right to access, collection and processing of information, namely the right to know, is therefore covered by the freedom of expression. The core of right to know is people's right to know with respect to the information held by the government, that is, general right to request disclosure of information from the government (claim-right)[10]

After establishing the right to know in the Korean counterpart to the 'penumbra' of freedom of expression, the Court engaged in balancing as follows:

> The right to know is not absolute, and can be reasonably restricted. The limit on the extent of restriction must be drawn by balancing the interest secured by the restriction and the infringement on right to know. Generally, the right to know must be broadly protected to a person making the request with interest as long as it poses no threat to public interest. Disclosure, at least to a person with direct interest, is mandatory.
>
> In this case, the requested estate records have not been classified as secret

9) Constitutional court, 88 heonma 22, Sep. 4, 1989.

10) This concept of claim-right is contrasted to liberty-right: the former implicates a duty of the state to take affirmative action benefiting the claimant whereas the latter is negative in that it merely mandates the state not to infringe on the right of the individual.

> or confidential and its disclosure does not implicate invasion of another's privacy. There is no reason for insisting non-disclosure of the requested documents themselves, or statutes or regulations. Therefore, the government's inaction on the petitioner's request breached his right to know.

Also, in the Periodicals Registration case,[11] the Court reviewed the constitutionality of the Periodicals Registration Act (hereinafter PRA) that required all periodicals to be registered for publication when the statute allowed registration only when accompanied by proof of ownership of at least one rotary printing press and the ancillary facilities.

In this case, the Court also made a distinction between the content restriction and the means restriction as different in the *levels* of infringement upon freedom of press, stating:

> Freedom of press in the Constitution protects the methods and the contents of essential and inherent manifestation of that freedom, but does not protect the objects needed to materialize such expression or the business activities of the entrepreneur controlling the media. Therefore, legally requiring periodical publishers to maintain and safeguard a certain level of facilities for sound growth of the press must clearly be distinguished from interfering with the essential contents of freedom of the press. Registration is not required for formulating and presenting views, nor for gathering and disseminating information--the substantive freedom of press--but is required of the business entity and the facilities that are the means of reporting and periodicals publication. They can be required to register without infringing the essential content of freedom of press and publication.

In other words, the statute restricts the means of expression, not the content. However, the Court further refined the extent of infringement by differentiating among ownership and possession, stating:

11) 4 KCCR 300, 90 heonga 23, etc., June 26, 1992.

> However, requiring proof of ownership of the printing facilities as a precondition of registration is too stringent to be constitutional. The printing facilities can be procured by rent or lease. Reading the ownership requirement out of Article 7(1)[9] is not only an arbitrary construction of the elements of a crime violating the Article 12 principle of nulla poena sine lege; but also an exaggerated construction of 'matters necessary for proper functioning of the press' in Article 21 (3), which violates the Article 37 (2) rule against excessive restriction.

In Election Campaign Participants Limitation case,[12] the Court reviewed a statute that restricted election campaigning both temporally and in terms of who can participate. The statute limited campaigning to a window between candidacy registration and the day before the election.

Here, the Court stated:

> Article 34 of PEA limiting the permitted period of campaign to after candidacy registration and the day before the Election Day has reasonable bases and does allow between twenty-three and twenty-eight days. Considering the pervasiveness of the mass media and the means of transportation bringing every part of the country within a day's trip, such period is not excessively restrictive in view of the Constitution.

Note that the Constitutional Court is clearly trying to quantify the extent of infringement. The Court strikes down the statute.

In the Registration Revocation of Obscenity Publishers case,[13] the Court reviewed a statute that authorized revocation of a publisher's registration for publishing obscene or indecent materials, and for the first time drew a boundary of permissible sexual expressions. It also upheld revocation of registration for obscenities and struck down the same for indecencies.

The Registration of Publishing Companies and Printing Offices Act authorizes the registering authority to revoke the publisher's registration when it is proven that he or

12) 6-2 KCCR 15, 93 heonga 4, etc., July 29, 1994.

13) 10-1 KCCR 327, 95 heonga 16, etc., April 30, 1998.

she has published obscene or indecent materials or cartoons harmful to children, thereby undermining public customs or social ethics.

The Court stated:

> Regulation of press and publication to cure and prevent the ills thereof is necessary and reasonable, but is secondary to the primary regulatory mechanism inherent in the civil society, that is, competition of ideas. If the ills of malignant press and publication can be cured through competition with conflicting ideas and opinions within the civil society, state intervention should be limited to the minimum.
>
> However, if the harm cannot, by nature, be cured even by the self-cleansing mechanism of the civil society or its magnitude is too great to await countervailing ideas and expressions, state intervention is permitted as the primary and freedom of press and publication not protected.
>
> 'Obscenity' is a naked and unabashed sexual expression that distorts human dignity or humanity; it appeals only to the prurient interest, has overall no artistic, scientific or political value, degrades the sound sexual ethics of the society, and causes harms not dissolvable in the mechanism of competition of ideas. Stringently defined, obscenity is not protected under freedom of press.
>
> The definition of obscenity in Article 5-2(5) of the Publishers and Printers Registration Act provides an appropriate standard both for the person subject to the law and the person enforcing it. It is hardly likely to change in meaning due to the individual flavors of the person applying the law, and therefore does not violate the rue of clarity. Revocation of registration may chill publication and supply of even constitutionally protected publications. But, considering the reality of the chain of supply of obscenities, the actual working of the revocation system, and the devices designed to minimize the effects on constitutional materials, the impairment of the basic rights is not severe whereas the public interest and the need for banning and suppressing obscene publications is

> overwhelming. The provision does not violate the prohibition of excessive restriction.
>
> In the mean time, 'indecency' is a sexual or violent and cruel expression, a swearing, or other expressions of vulgar and base content, not reaching the level of obscenity and remaining within the domain protected by the Constitution. The concept of 'indecency' justifying revocation of registration is so broad and abstract that a judge's supplementary interpretation cannot sharpen its meaning, and therefore does not inform a publisher's decision in adjusting the contents of the material, violating the rule of clarity and the rule against overbreadth. Corrupt sexual expressions or overly violent and cruel expressions do need be regulated away from the minds of juveniles, but such regulation should be limited to only juveniles and only such narrowly defined means as blocking the chain of supply to them. Totally banning indecent materials and revoking registration of the publisher is excessive as a means for juvenile protection, and debases adults' right to know to the level of a juvenile's, violating the rule against excessive restriction.

In the Solicitation Ban case,[14] the Court reviewed the old Prohibition on Soliciting Contributions Act (PSCA) and its Article 3, which left approval of soliciting activities to the discretion of administrative agencies, and limited the permissible purposes of solicitation, thereby in principle banning solicitation altogether.

Article 3 of PSCA (revised to the Soliciting of Contributions Act on Dec. 30, 1995 through Act No. 5126) banned solicitation of contributions in principle and provided a number of exceptions that could be applied upon approval of the Contribution Evaluation Committee.[15] Article 11 of PSCA punishes unapproved solicitation with imprisonment of up to three years or a fine up to two million won.

The Court decided that Article 3 of PSCA excessively limits people's right to pursue happiness. Again, the Court makes a distinction between the means restriction and the severer restrictions as follows:

14) 10-1 KCCR 541, 96 heonga 5, etc., May 28, 1998.

15) The approval of the Contribution Evaluation Committee can be sought only by the Mayor of the City.

The right to pursue happiness provided by Article 10 of the Constitution includes, as its concrete manifestation, a general freedom of action and a right to freely develop personality. The acts of soliciting contributions are protected thereunder.

Licensure by an administrative authority does not establish a new right. It restores the basic liberty which was previously restricted for the reason of public interest. Therefore, the procedure of approval should not eliminate the right itself. Anyone who meets all the substantive requirements for approval should be given the right to request that the ban be lifted, which has become only formal by now. Article 3 of PSCA, while specifying the conditions under which approval can be given by an administrative body, leaves the ultimate decision to the sole discretion of the body without specifying when the approval shall be given. It does not provide for one's right to request approval upon satisfying all the requirements, and therefore infringes on the basic right (right to happiness).

Limitations on basic rights can restrict the permissible means of exercising the right or be applied to the question of permission itself. In order to minimize the extent of restriction of basic rights, the legislature should first consider using the means restriction, and resort to a complete ban only when it is found to be insufficient for accomplishing the targeted public interest. The Article 3 limitation on the scope of permissible purpose for solicitation is not a means restriction, and operates on the level of whether or not to allow exercise of the basic right at all. Property rights and stable livelihoods can be sufficiently secured by a restriction on the process and method of solicitation and the use of the collected funds that is less than the limitation on its purposes. Article 3 and its penalty provisions in Article 11 exceed the scope necessary for accomplishment of the legislative intent in restricting basic rights.

In the National Assembly Candidacy Deposit case,[16] the Court found non-

16) 1 KCCR 199, 88 heonga 6, etc., September 8, 1989.

conforming to the Constitution Articles 33 and 34 of the National Assembly Election Act (hereafter 'the Act') which required the candidates to deposit substantial amounts of money in order to prevent too many candidates from running and ensure a clean election.

The Court, having recognized the right to candidacy as a basic right, measures the extent on its infringement as follows:

> Article 33 (1) of the Act (revised by Act No. 4003, 1988.3.17) requires independent candidates to make a deposit of twenty million won to the local Election Management Committee at the time of registering as a candidate and party nominees to deposit ten million won. Article 34 then forfeits the deposits minus some expenses in the event that the candidate resigns, nullifies his registration, or failures to gain one-third of the effective votes.
>
> The average amount of savings of the economically active in this country is 6.93 million won. The deposit requirement of ten or twenty million won is prohibitive to the people of ordinary income; and the requirement amounting to twenty or thirty million permits candidacy only to the wealthy. Therefore, it is excessive. They violate the basic principles of people's sovereignty and of liberal democracy in relation to right of equality (Article 11), right to vote (Article 24), and right to hold public office (Article 25) of the Constitution.

V. Conclusion

The Korean constitutional principle of proportionality and the American multi-tiered standard of constitutional review are equivalently different methods of achieving a balance between the public interest produced by a state action and the private interest infringed by it. When the empiricist bias of each system is pushed to its logical limit, the ultimate constitutional validity depends on whether the public interest produced by the state action exceeds, and therefore justifies the reduction in, the private interest, or equivalently, whether the state action results in a net gain in the aggregate interests of the state (where the interests of individuals are subsumed to that of the state). In that

sense, both systems can be analogized to the Learned Hand Formula in torts, which also requires each actor to be essentially selfish or seeking a net gain in his or her wealth. The component of appropriateness of means, equivalent to 'substantially related', 'rationally related' in the American scheme, is a superfluous requirement geared toward the accomplishment of the ultimate validity said above: It makes sure that the state adopt an appropriate means so that it actually produces what public interest that it purports to produce. The component of legitimacy of ends, equivalent to the element of the same name in the American scheme, is non-sensical under a purely empiricist constitution because the only standard of constitutional validity is whether the scale weighing the competing interests points to the state's favor. Any independent concept of legitimacy will eliminate any need for the constitutional balancing. The component of minimality of infringement, equivalent to 'the least restrictive means' in the American system, is also a superfluous reinforcement geared toward the accomplishment of the ultimate validity. Also, when and after the ultimate validity is establishment, the requirement pushes the goal of the principle of proportionality to the principle of optimization by requiring the net gain to be not only positive but maximum.

The Formation of Four-Generation Ancestor Worship in Early Chosun*

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Abstract

The new ruling elite who played a leading role in the establishment of the Choson Dynasty developed a discriminatory ancestor worship system based on four-generation ancestor worship. They were greatly influenced by Chu Hsi's Family Rituals, the Ming Dynasty system, and such old practices as were found in the Liji. However, they did not adopt Chu Hsi's Family Rituals wholesale, but adjusted it with a view to establishing a stratified society.

In the mid-sixteenth century, as commoners were gaining financial resources and using them to perform rituals basically equivalent to those of the elite class, national laws on discriminatory ancestor worship which were inconsistent with Chu Hsi's Family Rituals became the subject of many heated and politically charged conflicts.

As a result of increasing comprehension of Chu Hsi's Family Rituals and the widespread diffusion of Neo-Confucian values, the discriminatory ancestor worship system began to break down at the close of the 16th century, especially in regions where Neo-Confucianism had been disseminated early. Initially, performing three-generation ancestor worship regardless of social position became common, but by the end of the 17th century, four-generation ancestor worship based on Chu Hsi's Family Rituals had become the norm, and has been recognized as the common ideal form of the sacrificial rites until today.

The intention of the new ruling elite, who wanted to maintain the hierarchical society and the ritual system they established, was frustrated in the end. Regional ritual practices and norms diverged from national and officially sanctioned patterns of ancestor worship, and the discriminatory rituals system was eventually transformed into a more egalitarian system. This transition from uniformity to diversity, from a discriminatory to an egalitarian system for the performance of the most important normative rituals in Choson society, signaled an important step forward in Korea's historical development.

* This Article is a translated version of an article originally published in The Journal of Korean Legislation Research, Vol. 11(Oct. 1996).

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I. Introduction

After the chaotic end of the Koryo Dynasty and the establishment of the Chosun Dynasty, the new ruling elite sought to reform Korean society along Confucian lines. Guided by Chu Hsi's *Family Rituals,* the Chosun bureaucratic elite attempted to mold daily life and social interaction in accordance with the norms and rituals it contained. They undertook a broad and comprehensive reform of the social order, utilizing various institutions and appealing to Confucian religious, moral and ritual sensibilities in order to rebuild society on the basis of proper principles and behavior. Especially important for the elite was this social conduct to take root in the family, thus establishing a firm foundation for social stability as a natural extension of proper family order.

Through extensive research, the historical importance of the *Family Rituals* and the use of other ritualistic ceremonies of the late Koryo and early Chosun period have been documented. Although the influence of the *Family Rituals* on Chosun social propriety laws has been studied extensively, research thus far has focused more on royal worship ceremonies than on ancestor worship. This is unfortunate, for the influence of Chu Hsi's work on ancestor worship reveals many rituals that were crucial to shaping and reflecting the character of the family.

Contemporary texts on ritual and propriety and other sources show the formation and development of four-generation ancestor worship in the 16th century. The 16th century was a transitional period in Korean history, when the social systems under the *Kyung-kuk dae-chun* started to take firm root. Ancestor worship laws were implemented to put the principals of Confucianism and the Family Rituals into practice. During this crucial transitional period, non-Confucian Koryo society was transformed into a society that widely practiced four-generation ancestor worship under the teachings of the *Family Rituals.* Accordingly, the study of four-generation ancestor worship has broader implications that can serve as an important indicator of social change in comparing the early and late Chosun period. In this paper, I examine the compilation of *Kyung-kuk dae-chun* during the dynastic transition, especially the Code of Propriety and the Articles of Ancestor Worship, which have their foundations in the *Family Rituals.*

II. The Establishment of Discriminatory Ancestor Worship

A. Discriminatory and Four-Generation Ancestor Worship

Although ancestor worship had been in existence since primordial times, it was ancient China that codified official ancestor worship rituals and laws which varied according to one's social status. The Chiu Dynasty's ancestor worship laws were based on the importance of blood relationships and lineage, and a system of primogeniture developed in order to ensure the orderly inheritance of ancestor worship responsibilities. The eldest son was responsible for worshiping several generations of ancestors, with secondary descendants responsible for worshiping four-generations of ancestors. With the responsibility of leading ancestor worship ceremonies, the primary descendant was able to have control over the clan.

The ancestor worship laws, coupled with feudalism, were able to extend beyond the royal-centered lineage system to create a system of ancestor worship based on social status. Through this discriminatory process, the ancestor worship laws enabled the government to wield far-reaching control over society. Strict and specific procedural requirements were promulgated and enforced, creating a more rigid social hierarchy and greater opportunity for state interference in family and village affairs. Although the Chiu Dynasty ancestor worship laws disappeared along with the collapse of Chiu feudalism, the concept of class-discriminatory ancestor worship was exerted an important influence on future ancestor worship practices.

Until the Tang Dynasty, laws of propriety were centered on the king and the kingdom according to the five laws of propriety. However, with the rise of the Confucian scholar-officials of the Sung Dynasty, the laws were transformed to suit a different purpose. The laws were used to promote stability of the family order and rural society through strengthening family relationships and raising family and group consciousness. To realize these goals, the elite focused their attention on the descendants who were to conduct ancestor worship ceremonies, reviving the traditional ancestor worship laws and adjusting them to fit Sung society. The practice of four-generation worship (up to the great-great-grandfather) was made into law, compiled in its most coherent and comprehensive form by Chu Hsi into the *Family Rituals.* The institution of legally mandated ancestor worship was considered by the Sung scholar officials to be the most rational way to solve the problems of social

instability, having its roots in the classical system that existed in the Chiu Dynasty. The laws were known as the Ancestor Worship Laws.

However, it is important to note that four-generation ancestor worship as found in the Ancestor Worship Laws did not immediately take over class-discriminatory ancestor worship. Sa-Makwang's *Suh-ui,* considered a formative influence on the *Family Rituals,* mentions only three-generation ancestor worship. The first to advocate four-generation ancestor worship was Chung I-chun. This was his reply to a question explaining the validity of the four-generation arrangement:

> Sa-Makwang's *Suh-ui* calls for ancestor worship up through to the third-generation ancestor (great grandfather). But when someone asked what we should do about people nowadays who do not worship up through to four-generations, Scholar Chung I-chun replied, there is a mourning robe especially prepared for the ceremony of the fourth-generation ancestor (great- great-grandfather), and this would mean that it is wrong for us not to worship up through to the fourth-generation. Scholar Chung added, from the Kings' descendants down to the descendants of concubines, they follow the five laws of propriety up through to their fourth-generation ancestor, and likewise, it would be proper for us to follow the same ways with regard to our ancestor worship ceremonies as well.

Regardless of social status, Chung I-chun permitted four-generation ancestor worship based on the premise that there is a mourning robe prepared especially for the worship of the fourth-generation ancestor. Adopting this line of reasoning, The *Family Rituals* notes that in the room designated for the worship ceremony, four ancestral tablets should be prepared. Particularly noteworthy was the omission of class-discriminatory qualifications for conducting ancestor worship as well as the standardization of the ceremonies centered on the four-generation system. Furthermore, all the ceremonies and procedures under the encompassing four proprieties were also to fall under the fourth-generation system. Research shows the system of four-generation worship already instituted in the *Sung-li Dae-chun* written during the Ming Dynasty. Moreover, four-generation ancestor worship became the standard practice after the Sung Dynasty.

In the Sung Dynasty, the new leadership of the dynasty constructed their identity

through the policy of consolidating family lineage, providing a sense of stability and social identity to the rural community. They also attempted to consolidate their own social power base through the pursuance of such policies. The decision to pursue the four-generation worship system resulted from the recognition that the Ancestor Worship Laws could be the key to raising the family and group identity. Secondarily, the standardization of four-generation ancestor worship was used as a policy of inclusion and conciliation for the commoners. In order to improve the landlord-tenant relationship as well as to provide a sense of social identity, the Ancestor Worship Laws could not be denied to the commoners. Whatever the purpose, the new system was viewed as a top-down instituted step toward social equalization. Although limited in scope, the movement away from the social stratification of class-discriminatory ancestor worship to the more equal standard of four-generation ancestor worship may be seen as social progress.

B. The Formation of the Kyung-kuk dae-chun Propriety System

1. The Ancestor Worship System of the Year of 1390

During the period of dynastic transition in Korea from late Koryo to early Chosun, the class-discriminatory ancestor worship system was firmly established as a legal system. With the advent of Confucianism in the late Koryo period, the Koryo scholar-officials showed interest in the *Family Rituals.* Many of them saw the text as a possible tool for controlling social order. Accordingly, even before official adoption of the *Family Rituals,* some used its teachings to establish family shrines and conduct ancestor worship ceremonies in the home. After some political struggle, the rising elite began to aggressively accept ancestor worship laws based on the *Family Rituals.* Royal decrees were issued in 1390, formally establishing a detailed system of class-discriminatory ancestor worship laws.

The discriminatory ancestor worship laws promulgated by the bureaucratic elite were inherently different from those described in Chu Hsi's *Family Rituals.* Even so, certain aspects of the worship system of the late Koryo and early Chosun period were based on the *Family Rituals.* The ruling elite focused their efforts on adopting many practices of the text, but the parts of the *Family Rituals* transplanted into the new discriminatory ancestor worship laws remained limited to ceremonial procedures.

Consequently, the ancestor worship system which resulted was rooted less in the *Family Rituals* than in older Confucian teachings or in Sa Ma-kwang's *Suh- ui.*

The adoption of discriminatory ancestor worship and domestic shrines shows that the elite did not blindly copy the *Family Rituals* during the late Koryo period. However, it does suggest that the Koryo scholars understood the significance of the *Family Rituals* before the end of the Koryo by themselves.

2. The Formation of the Articles of Ancestor Worship in the *Kyung-kuk dae-chun*

The ancestor worship laws underwent no significant changes after the initial formation of the Chosun Dynasty. King Taejong formed a research institute for the study of ancestor worship systems, and knowledge during King Sejong's reign about the *Family Rituals* and classic ancestor worship laws increased significantly. Accordingly, many questions were raised regarding the merits of the *Family Rituals* as well as the discriminatory worship laws of the late Koryo period.

The year of 1427 is an important year for the development of the legal system for ancestor worship. A scholar named Park Yun recommended to King Sejong the adoption of four-generation ancestor worship and this recommendation began an earnest debate among the scholar-officials regarding four-generation ancestor worship. Although many esoteric arguments were advanced on both sides, which tend to cloud the debate for modern readers, in fact practical concerns were paramount. Those in favor of discriminatory ancestor worship argued that to establish social order requires discrimination based on social identity and class. Those in favor of four-generation ancestor worship argued for the need to combine the *Family Rituals* and the Ming system into one social institution. They pointed out that ancestral tablets were difficult to deal with under discriminatory ancestor worship. Nonetheless, the majority of the officials were in favor of the discriminatory worship system.

In response to recommendations that ancestor worship should be extended to the fourth generation of ancestor, King Sejong replied that "the system of four-generation ancestor worship was not adopted by our Confucian forefathers, and our current laws have been passed down from the classic laws, and therefore we cannot hastily adopt a new system." In addition, King Sejong believed that a move to standardized four-generation worship might threaten social stability, and he refused to adopt the recommendations. Although more realistic issues such as the difficulty of handling the

ancestral tablets used in discriminatory ancestor worship invited more discussions on the merits of change, King Sejong remained in favor of the existing system. Thus, while a number of scholars in early Chosun did point out the problems of discriminatory worship and advocated the institution of the four-generation ancestor worship, the discriminatory system remained in place with the majority support of the officials.

Discriminatory worship, as codified in the *Kyung-kuk dae-chun*, was an institution which aimed to promote social norms and practices appropriate to the reality of the times during the late Koryo Dynasty. The new elite leadership which promulgate the system understood that Koryo society was different from China, and they were guided both by traditional practices and by the *Family Rituals.* In order to cure a disorderly society on the verge of collapse, the new elite leaders extolled the ideal of national and social unity by implementing Confucian-based codes and practices. They solidified discriminatory ancestor worship by utilizing Confucian ideology, but based the practices on both the *Family Rituals* and traditional exercises. This practical and independent approach, with its emphasis on practice over theory, was intended to build a stable society based on ritual duties and obligations. That discriminatory ancestor worship was firmly established in the *Kyung-kuk dae-chun* at this time is clear evidence of the autonomous nature of the new elite leaders of the time.

C. Actual Conditions of Worship

As there are no historical materials which specifically inform us about the actual conditions of ancestor worship during this time, we must understand them indirectly through secondary sources. Although family shrines were already somewhat widely supplied during the early Chosun era, their spread was not completed until the mid-15th century. Family shrines came into appearance during the King Sungjong era mostly in the homes of the elite of Seoul, and became very popular by the mid-16th century during the King Myungjong era (1545-1567). But despite this supply of family shrines, shamanist and Buddhist rituals still prevailed. In addition, although in principle a deceased ancestor must be enshrined with an ancestral tablet in the family shrine, such laws existed merely on paper and were not widely enforced. References to ancestors' tablets in memorials to the throne began in the King Sejong era and persisted through the King Myungjong era, indicating that the family shrine worship was not properly prepared and executed even into the mid-16th century.

During the early Chosun era, the practices of the Koryo period were being conformed to Confucian practices in accordance with the *Family Rituals.* Confucian rituals of ancestor worship were being imposed upon society on a national level. The discussions of four-generation ancestor worship during King Sejong's rule were about enforcing the conduct and practices already encoded in the law, not about transcribing customary practices into law. Therefore, one cannot use these discussions as proof that the four-generation ancestor worship was already being performed by this era. At the same time, one cannot ignore the influence and power of the law, and it is highly likely that many high-ranking and educated people were already practicing Confucian rituals. In addition, during the early Chosun era when national laws were more prominent institutions than customary practices, ancestor worship ceremonies in general were probably more like the three-generation discriminatory ancestor worship ceremonies found in the *Kyung-kuk dae-chun* than the four-generation ancestor worship found in the *Family Rituals.*

III. The Origin and Development of Four-Generation Ancestor Worship

A. Ceremony Dispute during the Chungjong Era

The discriminatory worship and propriety institutions regulated by the *Kyung-kuk dae-chun* were in a way threatened by both the commoners and the followers of the *Family Rituals.* Starting from the King Chungjong era (reign :1506-1544), even commoners were gaining financial resources and using them to perform the *Family Rituals* in order to demonstrate their financial status. Commoners were performing rituals basically equivalent to the elite class, such as placing stone figures on their tombs. Many even went beyond what is outlined in the *Family Rituals* in order to show off their wealth. The situation became severe enough to provoke a strong response from critical scholars and officials. Conflicts arose between the commoners, who wanted to use their financial resources to perform the rituals and vehemently objected when they were forbidden to do so, and the elite, who criticized the extravagance of weddings and funerals and demanded that the distinction between their funeral rites and those of the commoners. The elite were outraged that commoners, without being conferred the right to establish family shrines or to perform

the rituals outlined in the *Family Rituals,* were doing so nonetheless. The egalitarian funeral rituals of the commoners and their practice of the *Family Rituals* indicate that the attempts of the early Chosun authorities to establish a stratified society by means of discriminatory worship were breaking down.

During the course of the often turbulent and sometimes bloody factional struggles for dominance among various groups of scholar officials, rigorous adherence to the rituals and practices outlined in the *Family Rituals* became an important source of political legitimacy. Domination of the political scene depended upon demonstrating moral superiority, and moral superiority was measured against the code of conduct contained in Chu Hsi's formulation of proper ritual and ethical comportment. Failure to adhere to these rituals could undermine one's social and political position, and could even prove fatal. While a detailed description of these factional political struggles is beyond the scope of this paper, their effect was to create an environment in which the underlying principles of the *Family Rituals* were placed beyond question or debate.

In this environment, discriminatory ancestor worship stood little chance of institutional survival, since it is inconsistent with the *Family Rituals* and therefore could not be sustained ideologically. Moreover, due to the general rise of the commoners, discriminatory ancestor worship could no longer be maintained as a practical matter. The beginning of the transformation from discriminatory ancestor worship to four-generation ancestor worship had actually begun already, as commoners increasingly ignored both national laws that did not permit three-generation worship and traditional customary social status distinctions.

B. Inheritance and the Conditions of the Ancestor Worship System

Inheritance documents of the Chosun era can be broken down into several categories (1) those that recorded the distribution of inheritance while the parents are still alive, (2) those that recorded the distribution of inheritance among the children after the deaths of the parents, usually after the observance of three years of mourning, and (3) those that indicated the specific distribution of inheritance to the children. During the inheritance and succession process, arrangements were made for the transfer of burial land for the deceased and memorial preparatory items. Because these arrangements directly reflect the actual conditions of the memorial rites, much can be learned about the system of memorial rites by examining the distribution of ancestral

worship commodities during the inheritance distribution process.

What we learn from these inheritance documents is that the passage of three generations freed funds and commodities marked for conducting ancestor worship services for a particular ancestor. The descendants could then dispose of these funds freely, a clear indication that ancestor worship obligations extended only to three generations. Regardless of status, three-generation ancestor worship was the universal practice of the period, and it was legally codified as such in the *Kyung-kuk dae-chun.*

However, over time, many families attempted to extend this ancestor worship in order to follow Confucian norms more rigorously and in accordance with the *Family Rituals.* Although descendants could legally distribute among themselves the property designated for conducting ancestor worship after three generations, many families attempted to continue the tomb rites. They reasoned that the rites had been performed for a long time, and often constructed family precepts asserting the importance of their continuity.

A substantial level of standardization of the *Kyung-kuk dae-chun's* three-generation worship can be seen for at least the second half of the 16th century. However, as the tomb rites were considered important, those ancestors who were no longer able to receive family shrine service as they passed the third generation were to be worshiped instead in the tomb rites forever. As this practice became universalized, descendants also set aside land for the tomb sites and funds and materials necessary for continuous service for the ancestors. The tomb rites were considered important, with the descendants perpetuating the services generation after generation. This signified the nullification of the discriminatory worship guidelines found in the *Kyung-kuk dae-chun.*

The practice of three-generation worship occurred after the 1560s when the worship propriety debates occurred. This coincides with the study and practice of the *Family Rituals* by certain scholar officials. The understanding and practice of the *Family Rituals,* only partially practiced, ended discriminatory ancestor worship and established the system of three-generation worship based on social equality. This later gave rise to the universal practice of four-generation worship. In addition, the growing importance the concept of serving ones ancestors played was an important factor in making the universal practice of three or four generation worship possible for the people at the time.

The procession from discriminatory worship to four-generation worship evolved in relation to the national laws that regulated discriminatory worship. During the early Chosun period, the national law codes respected and discriminatory worship was

strongly emphasized. Over time, both national law and customary practice were equally recognized, and the rites performers were free to select between the two. Finally, the national laws were superceded by the *Family Ritual's* four-generation worship. This process demonstrates a separation between society and government, with the Confucian bureaucratic elite gaining independence as a separate entity from the Crown, and the development of a bureaucratic national order.

The universalized practice of four-generation ancestor worship in the late Chosun period was formed not by compulsory enforcement through the revision of national laws, but through the practice of the *Family Rituals* by individual elite families, unofficially following the rituals by their free will. These scholar-officials wanted to strengthen their ruling power and take social control from the Crown by practicing the *Family Rituals* to display their moral superiority over the commoners. In the process, four-generation worship began to take hold in general Chosun society. On the one hand, the commoners practiced the *Family Rituals* in adherence to the policies put forth by these officials. On the other hand, as the commoners gained economic clout, they began to practice ancestor worship more aggressively, and to practice the *Family Rituals* in order to place themselves on equal footing with the elite. This historical phenomenon marks the escape from central uniformity to the development of regional diversity, and signifies overall historical progress with the commoners being able to perform ancestor worship on equal footing with the ruling elite.

IV. Conclusion

The introduction of four-generation ancestor worship gave independence to the commoners from the national order as determined by law. Its development signifies social progress, as an institution of equality replaced a system of discriminatory ancestor worship. This development can be used to gauge the role of national law in Chosun society, as the theory of four-generation ancestor worship evolved in tension with national law. It is commonly assumed that although law formally existed in Chosun society, it had no practical application in what was an essentially a lawless society. The evolution of the system of four-generation ancestor worship should provide valuable evidence to the contrary.

There are some areas of inherent weakness in this study, and further research should be conducted to substantiate these findings. In this paper, for example, all of the

documents and inheritance distribution records consulted came from the Kyongsang province and the scholar-official social class. Moreover, societal developments do not usually evolve in distinct stages but are the product of many interrelated phenomena. The theory of four-generation ancestor worship is closely tied to the promotion of close family-group relationships of the Ancestor Worship Law and other laws. However, this brief paper cannot treat all the issues related to the Ancestor Worship Law, and deals only with the section on four-generation ancestor worship, resulting in an incomplete evaluation of the historical entirety of the topic.

In conclusion, changing societal conditions and the influence of universalized ritual propriety studies after the mid-Chosun period were the biggest factors in the popularization of four-generation ancestor worship. Founded on the system of the Ancestor Worship Laws of China and in accordance with The *Family Rituals*, the system of ancestor worship succession and the process of its popularization in society should be examined closely, and placed in its respective historical context. Such studies should be the subject of future research.

Glossary

Chiu Dynasty 周王朝
Chu Hsi's *Family Rituals* 朱子家禮
Chung I-chun 程伊川
King Chungjong 中宗
King Myungjong 明宗
King Sejong 世宗
King Sungjong 成宗
King Taejong 太宗
Kyung-kuk dae-chun 經國大典
Ming Dynasty 明王朝
Park Yun 朴堉
Sa-Ma kwang 司馬光
Suh-ui 書儀
Sung Dynasty 宋王朝
Sung-li Dae-chun 性理大全
Tang Dynasty 唐王朝
Ancestor Worship System of the year of 1390 1390年 大夫士庶人祭禮

Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?

*Chaihark Hahm**

Abstract

The premise of this article is that a nation's constitutional norms must ultimately be supported by its cultural values and political tradition. Although this is one of the basic precepts of constitutional theory, in the case of Korea, the demand for modernization has generally caused Koreans to reject, if not despise, their cultural traditions. By interpreting the political discourse of pre-modern Korea (Chosn) as a form of constitutional discourse, this article attempts to provide a corrective to this situation. It first argues that our conception of constitutionalism must be modified to incorporate non-Western/pre-modern political norms and discursive practices which made it possible to discipline whoever held political power. Next, it shows what the sources of such constitutional norms were in Korea, and in the process, it clarifies the structure of pre-modern East Asian law codes. It then goes on to elucidate the constitutional principles which Chosn bureaucrats and politicians regarded as binding and which they could invoke to discipline their rulers.

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I. Introduction

Most observers of Korea will agree that in recent years Korea has been moving steadily towards becoming a constitutional democracy. Beginning with the constitutional revision that took place in 1987 in response to the citizenry's overwhelming demand for more participation in the political process,[1] Korea started to move away from the authoritarian politics which characterized the better part of its recent past. In 1993, Korea brought into power its first civilian President in thirty years, and in 1998, Koreans experienced the first peaceful transfer of power to an opposition candidate. This period also saw the unprecedented prosecution and conviction of two former Presidents who had come to power through a military coup d'etat. The special law enacted to allow this historic process listed "subverting the constitutional order" as one of the offenses committed by the ex-generals.[2] It appears that, along with democracy, constitutionalism is becoming one of the shared political ideals of Korean people.

For lawyers, one of the most interesting, and frankly unexpected, developments during this period has been the role played by the Korean Constitutional Court that was established under the constitution of 1987.[3] More a product of a political compromise than the result of any principled or reasoned deliberation, the Court not only has

1) For an overview of the political events leading up to constitutional revision, see James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 Harv. Hum. Rts. Y.B. 135 (1988).

2) Special Act Concerning the May 18th Democratization Movement [5 · 18 Minjuhwa Undong e kwanhan Tŭkpyŏlpŏp], Law No. 5029, Dec. 21, 1995. This law itself became a center of controversy as many critics viewed it as a mere legal "cover" for carrying out political retribution. Legally, it also came under attack because it appeared to allow prosecution for offenses on which the statute of limitations had already run, and to violate the principle of double jeopardy. *See generally* David M. Waters, Note, *Korean Constitutionalism and the 'Special Act' to Prosecute Former Presidents Chun Doo-hwan and Roh Tae-woo*, 10 Colum. J. Asian L. 461 (1996).

3) The Constitutional Court itself began operation on September 1, 1988 after the National Assembly passed the Constitutional Court Act earlier that year. *See generally* James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex*, 40 Am. J. Comp. L. 73 (1992); Dai-Kwon Choi, *The Structure and Function of the Constitutional Court: The Korean Case*, *in* The Powers and Functions of Executive Government: Studies from The Asia Pacific Region 104 (G. Hassall & C. Saunders eds., 1994); Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 Pac. Rim L. & Pol'y J. 395 (1995). Kun Yang, *The Constitutional Court and Democratization*, *in* Recent Transformations In Korean Law and Society 33 (Dae-Kyu Yoon ed., 2000).

exceeded all expectations in carving out a secure role for itself in the legal and political life of the nation, but also has contributed significantly to the process of democratization and establishment of constitutionalism in Korea. Through many controversial decisions,[4] in a relatively short period of time, this Court has substantially cut back the power of the state to encroach upon the citizens' basic rights. Through such decisions, it has also been instrumental in changing the people's attitude toward law and the Constitution.[5] It is transforming the Korean legal culture, as it were.

As a result, there is a growing perception that the Constitution is a living norm that can actually be invoked to protect one's rights, a norm that is enforced through the Court's decisions. Frankly, this phenomenon is something new and unfamiliar to most Koreans. It may be fair to say that for decades since regaining their independence from the Japanese, Koreans have lived with a constitution that was more of an ornament than a document with binding force. A brief look at the record of the various constitutional organs that were entrusted with the role of enforcing the constitution is enough to confirm this. During the forty years up until the establishment of the present Constitutional Court, only a handful of legislation has been referred to such organs for adjudication, and even fewer have been held unconstitutional.[6] By contrast, as of February 2001, the Court has held a law or government action unconstitutional in two-hundred three cases.[7] In addition, the Court has found in fifty-one cases that a particular legislation or government action was incompatible with the Constitution.[8]

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4) For discussions of major decisions of the Court, see Yoon, *supra* note 3; Yang, *supra* note 3. *See also* Gavin Healy, Note, *Judicial Activism in the New Constitutional Court of Korea*, 14 Colum. J. Asian L. 213 (2000).

5) *But see* Chan Jin Kim, *Korean Attitudes Towards Law*, 10 Pac. Rim L. & Pol'y J. 1 (2000) (arguing that Korean attitudes toward law have not kept pace with economic development and are impeding transition to democracy).

6) For an account of the history of judicial review in Korea, see Dae-Kyu Yoon, Law and Political Authority in South Korea 150-70 (1990).

7) Statistics regarding the cases adjudicated by the Constitutional Court are available at the Court's website http://www.ccourt.go.kr.

8) The Korean Constitutional Court has developed the practice of rendering decisions other than the black-and-white "constitutional" or "unconstitutional." One of these "altered judgments" (*pyŏnhyŏng kyŏlchŏng*) is to hold a law "incompatible with the Constitution" (*hŏnpŏp pulhapch'i*) which essentially is to recognize the unconstitutionality of the law in question but let it stand until a given deadline for the legislature to enact a new legislation compatible with the Constitution. In case the legislature fails to take the necessary measures to correct the constitutional infirmity, the law will automatically lapse. Modeled after the practice of the German Federal Constitutional Court, this form of decision (*unvereinbar* in German) is based on the rationale that sometimes invalidating a law will bring about a vacuum

There many be several explanations for this change in the way the constitution is perceived and utilized by the people. From an institutional point of view, one could attribute it to the establishment of the system of "constitutional petitions" which allows ordinary citizens to request the Constitutional Court for a remedy to a violation of their constitutional rights.[9] More generally, one could point to the scope of jurisdiction given to the Court as well as the appointment process of the Court's Justices which allowed the opposition party to voice its demands.[10] For more political and sociological reasons, one could of course look to the fact that the current constitution was the outcome of the Korean people's growing desire for democratic politics.[11] Especially, given the fact that Koreans were trying to move away from a regime in which so much power was concentrated on the government, particularly the President, it is perhaps only to be expected that people would make use of the constitution which they revised in order to limit the power of the government.[12] Whatever the direct cause for this nascent constitutionalism in Korea, it is generally understood as a novel development in the political history of Korea.[13]

In this article, I would like to query the meaning of the statement that constitutionalism is a new phenomenon in Korea. I begin in Part II by suggesting that that statement is problematic if we take a longer view of Korean political history. By redefining constitutionalism from a comparative perspective, I seek to establish in Part

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and unnecessary confusion in the legal order, and that the principle of separation of powers requires the Court to respect the National Assembly's power and freedom to legislate.

9) Constitution, Art. 111(1). In accordance with this provision, the Constitutional Court Act prescribes two types of constitutional petitions: one allows redress for unconstitutional state action or inaction which is not amenable to ordinary court proceedings (art. 68(1)), and the other permits citizens to request the Court to review the constitutionality of a law when an ordinary court has refused to refer the issue of the law's validity to the Court (art. 68(2). Though basically modeled on the German system of *Verfassungsbeschwerde,* the Korean system of constitutional petitions departs from that of Germany in providing for this second type of petition.

10) According to the Constitution, a third of the Justices must be appointed from candidates nominated by the National Assembly. Constitution, Art. 111(3). At the time of the Court's inauguration, the opposition party held the majority in the National Assembly, and as a result it was able to influence the composition of the Court by nominating people who in their view would actively promote democracy and human rights.

11) West & Baker, *supra* note 1, at 140-51.

12) For a view that regards the current Constitution as still concentrating too much power on the President, see Jong-Sup Chong, *Political Power and Constitutionalism, in* Recent Transformations, *supra* note 3, at 11, 16-20.

13) Kun Yang, *supra* note 3, at 45 (" This is quite a new phenomenon.")

III the plausibility of understanding the political history of Korea as an instance of constitutionalism. Proceeding on such a revised definition of constitutionalism, I investigate in Part IV the sources of constitutional norms in pre-modern Korea. I also argue that some conventional ideas concerning Korean legal history must be revised. In Part V, I attempt an interpretation of the terms and principles of the constitutional discourse of pre-modern Korea.[14] I shall close with some thoughts on the relevance of such constitutional history for the flourishing of constitutionalism in modern Korea.

The underlying premise of this article is that constitutionalism in any country must be supported by its cultural and political traditions. One anxiety that runs throughout this article is that in Korea, constitutional discourse is currently proceeding in a state of isolation from its cultural and political traditions. By providing a constitutional perspective on Korean political history, it is hoped that a small contribution might be made to remedy this situation.

II. How Long Has Korea Had Constitutionalism?

As mentioned, with the enactment of the 1987 constitution, Korea is generally regarded as finally learning to practice constitutional politics. There is, however, an alternative way of looking at the burgeoning constitutionalism in Korea. It could be seen as the culmination of at least four or five decades of experimenting with constitutionalism. If we take a look at the popular Korean textbooks on constitutional law, most scholars begin the history of constitutionalism in Korea from the period following liberation, which saw the promulgation of the first constitution of the Republic of Korea in 1948.[15] Similarly, in 1998, Seoul National University held a conference to commemorate the fiftieth anniversary of Korean constitutionalism. According to this view, Koreans have been attempting to establish constitutionalism in Korea for at least a half-century. The recent "novel development" might be better seen as the fruition of a painful, decades-long process of trying to implement constitutionalism.

14) A fuller discussion of the claims I make in Parts IV and V require illustrations through copious historical examples. In the interest of economy of space, however, I have had to keep such historical cites to a minimum.

15) E.g., Huh Young, Korean Constitutional Law [Hanguk Hŏnpŏpnŏn] 101-30 (2000). Kwon Young- Sung, Constitutional Law: A Textbook [Hŏnpŏphak Wŏllon] 91-102 (2000).

Perhaps a more "nationalistic" historical narrative would posit the Provisional Constitution of the Korean Government in Exile, which was established in 1919 right after the March First Independence Movement, as the starting point of Korea's constitutional history. This constitution, subsequently revised numerous times until the end of the Japanese occupation, proclaimed the first republican form of government of Korea and is sometimes seen as the first "modern" constitution of Korea. Apparently, the drafters of the current Constitution took this position also, for in the Preamble, the Constitution lays claim to political legitimacy by declaring itself to be the successor of the Provisional Government's constitution.[16] If one wished to push back even further the origin of Korean constitutionalism, one might even look to the famous Kabo Reforms of 1894, with its fourteen-point *Hongbŏm* [Great Plan] which, among others things, proclaimed Korea's "independence" from China. This was followed in 1899 by the promulgation of *Tae Hanguk Kukje* [National Institutions of the Great Korea] according to which King Kojong was declared an "emperor," as the head of a state with equal status in the community of nations according to public international law of the time.[17]

It is not my intention in this article to identify the "correct" starting point of constitutionalism in Korea. Instead, I am more interested in the concept of constitutionalism itself and how that term should be understood in the Korean context. I should note, of course, that even among Western scholars of constitutional law and political theorists, constitutionalism is not a well-defined term. As Louis Henkin says, "constitutionalism is nowhere defined."[18] Therefore, I do not pretend to have discovered a universal and uncontroversial definition of the term. My intent in the following pages is much more modest: I wish to offer some thoughts on how we might go about thinking about constitutionalism in relation to the entire span of Korean political history. My hope is to spur more reflection and discussion on the issue of how to conceptualize constitutionalism from a comparative perspective.

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16) Contitution pmbl.

17) In his textbook, Professor Young-Sung Kwon includes this 1899 code as the "pre-history" of Korean constitutionalism. Kwon, *supra* note 15, at 91. For English translation of the *Hongbŏm*, see 2 Sourcebook of Korean Civilization 384-85 (Peter H. Lee ed., 1996); For the Provisional Government's constitution, see *id.* at 435-36. The Korean text of these early constitutions are available at the Constitutional Court's website http://www.ccourt.go.kr.

18) Louis Henkin, A *New Birth of Constitutionalism, in* Constitutionalism, Identity, Difference, and Legitimacy 39, 40 (Michel Rosenfeld ed., 1994).

To return for a moment to the three possible starting points for the history of Korean constitutionalism mentioned above, it is obvious that the each of them are supported by different historical narratives according to which a radical change took place at the respective dates. That is, to claim that constitutional history began in 1919 rather than in 1894 or 1948 requires some showing that that year marked a more significant break with the past than the other years. Similarly with the other positions. Participants of this imaginary historiographical debate[19] would therefore argue about and disagree on which set of events was more significant in terms of Korea's political and legal development.

For all their different interpretations and disagreements regarding the past, however, the three positions all share one crucial assumption, namely, that constitutionalism was something unknown to Koreans prior to some identifiable point in time-however difficult it may be identify that point. The very fact that one could debate about which year deserves to be marked the inaugural year of Korean constitutionalism indicates that there was a time when constitutionalism did not exist in Korea. Yet, as soon as we start to unpack this assumption, a troubling situation emerges, which is in turn related to problematic assumptions underlying our conception of constitutionalism.

At the core of constitutionalism as a legal and political concept lies the idea of opposing arbitrary or absolute power. Despite the theoretical disagreements among theorists and historians of constitutionalism, they all agree that at bottom constitutionalism is an expression of the desire to limit or at least regulate political power. In short, to define it negatively, constitutionalism is the opposite of despotism or tyranny.[20] Now, if we combine this admittedly crude, negative definition of constitutionalism with the assumption that Korea did not have constitutionalism until late nineteenth century, at the earliest, we are forced to conclude that Korean politics was defined by despotism or tyranny up to that point. That is, until constitutionalism was introduced (from the West), Koreans must have had nothing to restrain absolute power and nothing to protect people from the arbitrary exercise of such power.

19) I do not mean to represent this as an actual debate among historians of Korea. To the best of my knowledge, this has not been the subject of any serious scholarly debate among Korean academics.

20) *E.g.,* Charles Mcilwain, Constitutionalism: Ancient and Modern 21 (1947) ("it [constitutionalism] is the antithesis of arbitrary rule; its opposite is despotic government").

Yet, it is highly doubtful whether that is a defensible conclusion. Indeed, one need not be a hot-headed Korean nationalist to see that there is something wrong with portraying the entire couple of millennia of Korean political history as one of domination and oppression under absolute power. To be sure, Korea had her share of despotic rulers, but the idea that Korea for centuries knew *only* such rulers runs counter to one of the few themes of Korean history on which most people agree. It is generally accepted that, aside for a couple of exceptions, rulers of traditional Korea were quite weak in their relation to their subjects. In comparison with the emperors of China or the shogun of Japan, the position of Korean kings generally was not the object of abject exaltation, and rarely commanded absolute power.[21] One of the salient features of the political history of Chosŏn dynasty (1392-1910) is the prominence of the scholar-officials' position relative to the throne.[22] Moreover, it is highly unlikely that Korea would have led a continued existence for so long if its politics were pervasively arbitrary and authoritarian.[23]

What, then, does this imply for our understanding of constitutionalism? And, for the assumption that Koreans did not know constitutionalism until 1894, or 1919, or 1948? If Korean political history cannot be characterized as one of unmitigated despotism, then is it legitimate to use the term "constitutionalism" in describing it? If so, did Koreans practice constitutionalism without knowing it?[24] Surely, Koreans of

21) At least on two occasions, Chosŏn bureaucrats deposed their kings and installed substitutes who were more pliant and amenable to their biddings.

22) It is a well-known feature of Chosŏn history that a considerable number of the Confucian scholar-officials (*sadaebu*) regarded the throne as not much more than first among equals. According to one historian, traditional Korea was known in China as the land where the "king is weak and his ministers strong." Sung-Moo Yi, *Discourse on li and Factional Strife During 17th Century* [*17 Segi ŭi Yeron kwa Tangjaeng*], *in* A Comprehensive Review of Late Chosŏn Factionalism [Chosŏn Hugi Tangjaeng ŭi Chonghapchŏk Kŏmt'o] 9, 74-75 (Sung-Moo Yi et al. eds., 1992).

23) In the words of a noted Korean jurist:

> It is difficult . . . for us to find a constitution as we know it today in the political life of our ancestors prior to the opening of the country in 1876. And yet, we would be making a grave mistake if we were to assert simply that our ancestors had no fundamental law. The fact that they had maintained a politically organized life for more than two thousand years belies such an assertion.

Pyong-Choon Hahm, The Korean Political Tradition and Law 85 (2d ed. 1971).

24) The easy answer is that when we argue about when to mark as the inaugural year of constitutionalism, we are talking about the history of "modern" constitutionalism in Korea. That is, even if traditional Korea did not necessarily have a despotic government, it did not operate in terms of a constitution in the sense of a written document that lays down the powers of the government and the rights of the individual. On this view, constitutionalism is an achievement

Chosŏn dynasty did not know of the term "constitution," although the current term *hŏnpŏp* does appear in some of the Chinese classics known to the scholar-officials of the time.[25] Did they then have a different term for their political system and ideal?

III. Redefining Constitutionalism

Now, this of course is an age-old problem in the study of comparative law. That is, when we find a practice, institution, or concept in another legal tradition that is similar to but different from a well-known one in one's own tradition, is it legitimate to use one's familiar label to refer to the one found in the foreign setting? Especially when doing so will not only "enrich" one's own legal lexicon but also make it messier and more confusing? In other words, should we revise our understanding of constitutionalism to include political practices and institutions that do not have their roots in the familiar modern political experience of the West?[26]

Obviously, there are quite legitimate scholarly reasons for *not* doing so. For example, in order to preserve intellectual and theoretical consistency, it might be advisable to limit the use of "constitutionalism" to only Western or West-inspired political and legal arrangements. Also, describing something foreign with a label that refers to something functionally similar in one's own tradition may cause one to "read

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of modernity, and as such, cannot be discussed in the pre-modern context. To be sure, constitutionalism as we know it derives most of its inspiration from the American constitutional "experiment," the spirit of the French Revolution, or the lessons of the Weimar Constitution. In that sense, it is hard to think about constitutionalism without invoking modernity. This, however, is problematic to the extent that how to understand "modernity" itself is the subject of serious debates nowadays. For a critique of the utility of "modernity" in understanding Korean law, see Chul-Woo Lee, *Modernity, Legality, and Power in Korea under Japanese Rule, in* Colonial Modernity in Korea 21 (Gi-Wook Shin & Michael Robinson eds., 1999). Moreover, as will be argued below, the story of constitutionalism even in the West goes back much further than the period of so-called Enlightenment.

25) For example, the term (pronounced *xianfa* in Chinese) appears in such books as *Guoyu*, *Guanzi*, and *Huinanzi*, but its usual referent is either an abstract term like "the fundamentals of a state" or a more narrow idea of "regulation." The use of that term as the translation for the Western concept of constitution is said to have become fixed when the Japanese government sent emissaries to Europe in 1882 to study the constitutions of those countries. Chong-Ko Choi, History of the Reception of Western Law in Korea [Hanguk ŭi Sŏyangpŏp Suyongsa] 294 (1982).

26) In view of the fact that Korean research on constitutional law is predominantly influenced by Western scholarship, I am here assuming that the perspective of the Western scholars will also be that of Koreans. That is, " we" and "our" in this context refer not only Westerners but also most Koreans who are similarly more familiar with the Western concept of constitutionalism than with the native political and legal traditions of Korea.

into" the foreign practice one's own values, assumptions, and beliefs which simply don't apply in the foreign case. In other words, it may contribute to "ethnocentric" distortions in representing the foreign political and legal practices.

Nevertheless, I think we should at least be equally mindful of the political import of such a decision. We should also beware that restricting the use of a term to its original context may sometimes have the effect of implicitly casting negative judgment on the practice, institution, or concept found in other legal and political traditions. This is particularly the case with a term like "constitutionalism" which has now become a highly valued ideal for virtually all states everywhere. It is an "honorific term" nowadays which confers on a nation the status of being a member of the civilized world community.[27)]

By insisting that we apply the term constitutionalism only to institutional arrangements having roots in, say, the Enlightenment context, we may be unintentionally perpetuating another kind of ethnocentrism, namely, an attitude of condescension and disdain toward non-Western countries. It is tantamount to refusing to regard the people of these countries as worthy of equal respect and dignity as Westerners. True, in some cases, their politics are in fact worthy of less respect. Nevertheless, that cannot justify a blanket dismissal of their entire political history.

Of course, another option might be to create a new category that is neither constitutionalism nor despotism, and use it to describe the political history or experience of non-Western countries. The goal would be to reject the binary opposition between constitutionalism and despotism and to use a third term which is at least as "respectable" as constitutionalism. Yet, this option has its own difficulties. Creating an unfamiliar, *sui generis* category will more likely than not contribute to the needless mystification of non-Western politics which will only inhibit mutual understanding. Moreover, it may even provide occasions for new "orientalist" interpretations, which may end up demonizing the unfamiliar.[28)]

I therefore believe that it is best to go ahead and use the concept of

27) This explains why in the imaginary historiographical debate above, the nationalist would wish to push back the starting point of Korean constitutionalism. It is grounded in the desire to represent Korea as a civilized country by bestowing upon it this honorific term. In order to portray Koreans as having entered the civilized world sooner, it becomes necessary to claim that Korean constitutionalism began at an earlier time.

28) As originally used by Edward Said, "orientalism" refers to the process by which Europeans of the early modern period essentially created the idea of the "Oriental" and filled its content with images and values opposite to

constitutionalism to refer to non-despotic political arrangements in non-Western worlds as well. This means broadening the definition of constitutionalism beyond its usual referent of legal limitations on government powers through judicial review and other mechanisms codified in a written constitution. We must modify our understanding of constitutionalism to include political institutions, practices, and discourses that do not necessarily operate in terms of principles like the separation of powers, representative democracy, or even the rule of law.

Granted that this is an unusual way to define constitutionalism. Indeed, it might even appear to take away all the necessary elements that go into making constitutionalism work. Yet, for anyone who might be alarmed or skeptical about understanding constitutionalism this way, I would just point out that in fact historians of Western constitutionalism have also used the term in a similar fashion. That is, it is important to keep in mind that although the "modern" type of constitutionalism cannot do without those principles I just mentioned, historians have identified constitutional politics in pre-modern contexts where these principles were never invoked, such as Renaissance Venice, Ancient Greece and Rome, or even Medieval Catholic church.[29)]

Now, the problem is, even among Western scholars, there is little communication or exchange between the historians on the one hand and the constitutional lawyers on the other, such that we do not yet have a suitable definition of constitutionalism that can accommodate both the modern and pre-modern species of constitutionalism. I therefore would like to propose a definition that would do justice to both, and which would also accentuate the distinctive features of constitutionalism vis-à-vis other related concepts.

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their own (e.g., backward, immoral, and unenlightened). According to Said, the creation of this "Other" of Europeans' self-image in turn provided ideological justification for imperialist policy of subjugating and exploiting the people of the Orient (i.e., the Middle East and India). Edward W. Said, Orientalism (1978).

29) *E.g.*, Scott Gordon, Controlling the State: Constitutionalism from Ancient Athens to Today (1999); R.C. van Caenegem, An Historical Introduction to Western Constitutional Law (1995); Brian Tierney, Religion, Law, and the Growth of Constitutional Thought 1150-1650 (1982). *See also* Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983) (arguing that the Papal Revolution of 1075 effectuated through the reforms of Pope Gregory VII introduced the first constitutional form of government in the West); Quentin Skinner, 2 The Foundations of Modern Political Thought 113-85 (1978) (describing the Conciliarist Movement of the Catholic church which sought to restrain the power of the pope through the council of bishops).

30) On Foucault's notion of "discipline," see generally Michel Foucault, Discipline and Punish: The Birth of the

My proposal is to define constitutionalism simply as the practice of disciplining political power. Here, I'm loosely borrowing the term discipline from the works of Michel Foucault and I use it to refer to a set of institutional and discursive practices designed to control and regulate through a combination of both external incentive structure as well as internal, educative, processes of character formation.[30] The end-state, or goal, or discipline is self-surveillance through internalization of a variety of control mechanisms. When applied to political power, discipline means restraint and control of its exercise. Understood in this way, constitutionalism is still about opposing despotism, but it means opposing it in a disciplined manner.

Obviously, discipline of political power can be achieved in various ways. The more familiar way is to take a sort of mechanistic, or Newtonian, approach of checks and balances, or division of power. This approach in a way assumes a preexisting power that needs to be checked or balanced. Power is viewed as a physical entity which has a weight and a size, and therefore can be divided into smaller parts or balanced with another power of equal weight and size. Some historians describe American constitutionalism as the most representative of this approach.[31] In one of the *Federalist Papers*, James Madison famously wrote: "Ambition must be made to counteract ambition."[32]

Another approach might be to take a more constitutive, or formative, perspective and focus more on the control and restraint that results from molding both the power and the power-holder in a specific way. This approach would emphasize the continuous process of educating the power-holder by putting him or her under a constant state of surveillance and supervision. In my view, the ideal of Confucian political philosophy was to implement this second type of discipline. Contrary to the popular perception of Confucianism which views it as an authoritarian ideology, Confucian political philosophy was deeply concerned about disciplining the ruler.[33] At

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Prison (Alan Sheridan trans., 1979) (1975); Michel Foucault, *Two Lectures, in* Power/Knowledge 78 (Colin Gordon ed., 1980); Michel Foucault, History of Sexuality (Robert Hurley trans., Vintage Books 1980) (1976).

31) There is actually an ongoing historiographical debate about the extent of the influence of Newtonian thinking on the American founding generation and consequently on the American constitutional design itself. *See generally* Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture (1994); Michael Foley, Laws, Men and Machines: Modern American Government and the Appeal of Newtonian Mechanics (1990).

32) The Federalist No. 51.

33) By saying that Confucianism was not authoritarian, I am not thereby claiming that it was democratic.

least as practiced by the scholar-officials of Chosŏn dynasty, Confucianism provided the institutional and discursive resources that enabled them to discipline the monarch through constant surveillance and supervision.[34] This means that Koreans of Chosŏn dynasty aspired to practice constitutionalism by taking this constitutive and formative approach. They may not have known or bothered to take the Newtonian approach, but they were aspiring to implement constitutionalism nonetheless.[35]

In order to evaluate the claim that traditional Korean politics can be understood as a form of constitutionalism, we need to know, among other things, what operated as the constitutional norms of that period.[36] In other words, what were the sources of Korea's pre-modern constitutional law? It might be thought that asking this very question is to prejudice the analysis, for this presumes that Korea had something called "constitutional law." If we were to adhere to a narrow, positivist definition of "law," as

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Confucian philosophy did not envision the people as their own masters, except in a very extenuated and rhetorical sense. That, however, should not lead one to think that it legitimated the use of absolute power or fostered "authoritarian personalities." One of the common mistakes is to equate "anti-democratic" with authoritarian and despotic, and to assume that anything which predates the appearance of democracy was *ipso facto* supportive of authoritarian politics. Yet, as was alluded to above, historically constitutionalism was not necessarily predicated on the existence of democratic politics. Today, we are prone to regard the two as, if not identical, at least complementary, as is indicated by the expression "constitutional democracy." In fact, democracy and constitutionalism can be, and often are, in tension with each other. For, constitutionalism is about disciplining and restricting the sovereign power, even if people are the sovereign, whereas democracy is about giving people what they want.

34) I am painfully aware of the danger in trying to generalize about Confucianism, for claiming that such and such was "the Confucian position" necessarily risks ignoring the remarkable diversity of positions within the Confucian tradition. An analogy would be trying to summarize Christianity in one sentence disregarding the vast difference of outlook, tenor, and issues that characterized different people at different stages of its history (think of Aquinas, Luther, Kierkegaard, and Latin American liberation theology). Nevertheless, if it can plausibly be argued that these different Christians shared at least some common symbols, vocabulary, or rhetorical strategies, I think it is also plausible to assume the same with regard to Confucian thinkers. In this article, I intend only to describe certain terms which I believe were widely shared and used in political disputations among Chosŏn dynasty Koreans.

35) In this regard, we should also be cautious about the simplistic dichotomy between "constitutional monarchy" and "absolute monarchy" and the use of the latter term to describe Chosŏn dynasty. In common parlance, the former term refers only to those forms for government where the power of the throne is limited by or shared with some elected officials. As a corollary, all monarchy that lack this "democratic" element are assumed to have authorized the use of absolute power. According to my interpretation of the Chosŏn dynasty Confucian politics, this is overly simplistic. In other words, although Chosŏn had no democratic government, there are many problems in calling it an "absolute monarchy."

36) Detailed examination of this issue is taken up in Part IV.

a type of norm that can be enforced through independent courts, we naturally will not find any such thing in Chosŏn dynasty Korea. Yet, according to my definition of constitutionalism as the practice of disciplining political power, constitutional norms need not be enforced solely through the courts. To assume this would be to confuse constitutionalism with judicial review.

Granted, today some form of judicial review is considered an indispensable element of constitutionalism.[37] Yet, I submit that to equate the two is both inaccurate and anachronistic. One must remember that judicial review was "created" through an imaginative legal maneuvering at the start of the nineteenth century by an American jurist named John Marshall.[38] He "read into" the American Constitution a power that was not even specified in the text.[39] By contrast, as is well known, American constitutional discourse itself was an outgrowth of centuries-old British constitutionalism.[40] To this day, the United Kingdom has maintained a constitutional polity without having adopted the principle of judicial review.[41] Thus, judicial review is a relatively late-comer in the story of constitutionalism.[42] In fact, even in the U.S.

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37) *See generally* Mauro Cappelletti, Judicial Review in the Contemporary World (1971).

38) Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

39) Writing almost a century after the *Marbury* decision, Harvard law professor James Thayer noted that judicial review was still an anomaly among world constitutions. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 130 (1893). To this day, American constitutional scholarship is plagued by whether judicial review was "really required" by the Constitution, and whether it can be justified on democratic grounds. The classic text on this issue is Alexander Bickel, The Least Dangerous Branch (2d ed. 1986).

40) Even in their fight for independence, American colonists used the terms of the British constitutional discourse to support their cause against the British. *See* Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. Pa. L. Rev. 1157 (1976).

41) This is not to deny that there has been a steady growth in Britain of judicial review, in the sense of court's review of administrative action, i.e., checks on the executive by the courts. *See* Geoffrey Marshall, *Lions Around the Throne: The Expansion of Judicial Review in Britain, in* Constitutional Policy and Change in Europe 178 (Joachim Jens Hesse & Nevil Johnson eds., 1995). Moreover, courts have recently been given further power to pass judgment on acts of the legislature as the Human Rights Act of 1998, which incorporates the European Convention on Human Rights into domestic law, finally entered into force October 2, 2000. Yet, this Act still does not establish full judicial review, as the courts are only empowered to make a "declaration of incompatibility" with the ECHR, rather than being able to strike down the offending legislation. Human Rights Act, 1998, 4(2) (Eng.).

42) Of course, it is sometimes argued that the American "invention" of judicial review was also a development of certain elements in British constitutionalism. Some trace its genealogy to the famous *Doctor Bonham's* Case in which Edward Coke opined that whatever is contrary to common law is null and void. It is noteworthy, though, that in Britain the doctrine of Parliamentary sovereignty has eclipsed any notion that the courts can override the will of the legislature.

where judicial review is seen as the core of constitutionalism, there are constitutional norms which are not enforced through the courts. An example can be found in the congressional impeachment proceedings against the President and other civil officers prescribed in the American Constitution.[43] This is a system devised for enforcing constitutional norms in which the courts do not take part. The Constitution itself specifically entrusted that job to the House and the Senate, i.e., the legislative branch.[44]

The case of British constitutionalism is actually quite instructive in conceptualizing the political discourse of traditional Korea in constitutionalist terms. Even though Britain does not have a single written document, called the Constitution, that has the status of a higher law, and although its courts cannot strike down legislation for reasons of unconstitutionality, no one can reasonably deny there is something called the British constitution or that the U.K. is a constitutionalist state.[45] Similarly, I believe the lack of a single document constitution or judicial review need not preclude an understanding of Chosŏn political system as a constitutional regime.

It is often pointed out in many characterizations of the legal history of Korea and other East Asian countries that independent courts failed to develop which could annul or inhibit arbitrary acts by the government. The usual inference made from this fact is that those governments did not have the institutional arrangement necessary to practice constitutionalism.[46] Yet, the British constitutional tradition calls into question the

43) U.S. Const. Art. II, 4.

44) U.S. Const. Art. I, 2, cl. 5 ("The House of Representatives shall have the sole Power of Impeachment."); U.S. Const. Art. I, 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). For an argument that there is nothing logically inconsistent with entrusting the legislature with the responsibility of enforcing constitutional norms, see Thomas C. Grey, *Constitutionalism: An Analytic Framework, in* Nomos XX: Constitutionalism 189 (J. Roland Pennock & John W. Chapman eds., 1979) (describing judicial review as but one instance of "special enforcement" of constitutional norms).

45) The classic statement of British constitutionalism is of course A. V. Dicey, The Law of the Constitution (1885). A work by a non-lawyer which is in some ways more informative is Walter Bagehot, The English Constitution (1867). For more recent works, see generally Geoffrey Marshall, Constitutional Theory (1971); T.R.S. Allan, Law, Liberty and Justice (1993); Eric Barendt, An Introduction to Constitutional Law (1998).

46) *See, e.g.*, Dai-Kwon Choi, *Development of Law and Legal Institutions in* Korea, in Traditional Korean Legal Attitudes 54, 65, 70-72 (B. D. Chun et al. eds., 1981) (noting the lack of differentiation in government functions and the absence of public law principles like judicial review). Professor Choi does state that "Confucian moral principals [sic] were the functional equivalents of public law," thereby suggesting that Chosŏn monarch was subject to some form of restraint. *Id*. at 72. For China, see Wm. Theodore de Bary, Asian Values and Human Rights 94-97 (1998) (noting the

assumption that constitutionalism requires the courts' possession of the power of judicial review. Put differently, constitutional norms need not always take the form of law, in the strict narrow sense of the word. Indeed, in most countries, constitutional norms comprises, in addition to judicially enforceable rules, a range of norms including political rules, precepts, conventions, and even tacit understandings about what is deemed proper in matters of government. And, it is in this broader sense that I am using the term "constitutional law."[47]

To identify the sources of constitutional law of traditional Korea, we must then look for not only strictly legal norms that may have been promulgated by the government, but also the seemingly vaguer and more ineffectual norms which informed the political discourse of the period. In this regard, again, comparison with the British system highlights, and facilitates our understanding of, another aspect of traditional Korean constitutionalism, namely, the importance of tradition as a source for constitutional norms. The British have developed a distinct terminology for this: "constitutional conventions." These refer to the unwritten rules of the constitution.[48] They are not enforceable at a court of law, but that does not diminish their importance or normative force. In fact, in Britain, the term "unconstitutional" means that something is contrary to constitutional convention, rather than simply illegal.[49] Although the fact that they are "non-legal" have led some commentators to characterize them as simply moral or ethical rules of governance,[50] many constitutional conventions do not derive their force from their moral persuasiveness.[51] Rather, their normative force derives from the fact

absence in Chinese history of separate and independent courts to resolve "constitutional" issues).

47) I believe this is similar to the sense in which Professor Park Byung Ho understands the word "legal" when he discusses the "legal restrictions" (*pŏpchŏk cheyak*) on the royal power during Chosŏn dynasty. Byung Ho Park , The Law and Legal Thought of Modernity [Kŭnse ŭi Pŏp kwa Pŏpsasang] 444-52 (1996) (arguing that even though the king was considered the author of law, he was not at freedom to disregard it).

48) On British constitutional conventions, see generally Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (1984). *See also* Nevil Johnson, *Law, Convention, and Precedent in the British Constitution, in* The Law, Politics, And the Constitution 131 (David Butler et al. eds., 1999) (noting the trend toward increased reliance on written rules in British constitutionalism).

49) Vernon Bogdanor, *Britain: The Political Constitution, in* Constitutions in Democratic Politics 53, 56 (Vernon Bogdanor ed., 1988) (stating that in the British constitutional tradition, "unconstitutional" cannot mean contrary to law; "instead it means contrary to convention, contrary to some understanding of what it is appropriate to do.").

50) *E.g.*, Marshall, *supra* note 48, at 214.

51) In the words of the noted legal philosopher Jeremy Waldron:

that tradition has made them hallowed and sacrosanct. Violation of a constitutional convention therefore will occasion a major political controversy, in which the political legitimacy of the violator will be seriously impugned and compromised. In any such controversy, the point of reference will always be what had been done in the past, and arguments will turn on how much authority is to be conferred on tradition. Tradition, in another words, is an important source of constitutional norm. In Canada, the Supreme Court actually made it explicit that sources of Canadian constitutional norms consist of not only the constitutional documents (i.e., the Constitution Acts, and the Charter of Rights and Freedom), but also the constitutional traditions of Canada.[52)]

Indeed, constitutional discourse in any country is pervasively a traditionalist discourse. This is so even in America, where constitutionalism is usually seen as part of the project of refuting tradition, for to the framers of American Constitution, "tradition" represented hierarchy and oppression. This common image notwithstanding, it is undeniable that constitutional discourse in the United State is marked by an attitude of extraordinary deference to its tradition. For example, invoking the authority of the founding generation is a common way of arguing constitutional issues. Even when not focusing on the framers' "original intent," the discursive style of American constitutional discourse forces constitutional lawyers, both conservative and liberal, to rely on tradition to justify their arguments.[53)]

That the normative force of many constitutional norms should depend on tradition

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> They are not merely habits or regularities of behaviour. . . . But they are not merely subjective views about morality either. They have a social reality, inasmuch as they capture a way in which people interact, a way in which people make demands on one another, and form attitudes and expectations about a common practice with standards that they are all living up to. . . . Politicians refer to them when they are evaluating one another's behaviour. They are social facts, not mere abstract principles, because they bind people together into a common form of life.

Jeremy Waldron, The Law 63-64 (1990).

52) In the Matter of '6 of The Judicature Act, [1981] S.C.R. 753. Cited in Walter Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 La. L. Rev. 91, 114 (1991).

53) *See* Frank I. Michelman, *Super Liberal Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va. L. Rev. 1261, 1312-20 (1991) (differentiating between conservative and liberal uses of tradition in constitutional interpretation). Sanford Levinson distinguishes between the Protestant and the Catholic approaches to constitutional interpretation, wherein the former emphasizes the text and original intent, and the latter stresses the doctrines formulated through the Supreme Court's decisions. Sanford Levinson, Constitutional Faith 27-53 (1988). In my view, the two approaches are but different species of traditionalist discourse, emphasizing different aspects of the constitutional tradition.

is hardly surprising. Whereas the binding force of an ordinary law is ultimately dependent on the threat (real or potential) of coercive force of the state, a constitutional norm cannot rely on the coercive force of the state because, in this case, it is the state itself which is being subjected to the norm. It is the state itself that is being disciplined, and therefore the normal grounds of normative force does not apply here. As the wielder of the coercive force, the state, if it wanted to, could refuse to conform to constitutional norms. The fact that it does not and cannot so flout constitutional norms must be explained in other terms. Some explain it in terms of "persuasion" as another source of the binding force of laws in general.[54] Others seek to explain it by analogizing it to H.L.A. Hart's idea of the "rule of recognition," according to which people are able to identify what are to count as law in their society-a rule whose own source of normative force can only be located in the precarious fact of people's acceptance or readiness to regard themselves as bound by this rule.[55] While these explanations are not wholly incorrect, they do not account for the temporal dimension of constitutional law. I submit that the power of tradition is in fact a dominant force in making people and the state accept the constitutional norms and arrangement that have been handed down by the preceding generation. Moreover, it is my contention that this is dramatically exemplified in the case of the constitutional discourse of traditional Korea.

IV. Sources of Constitutional Norms in Traditional Korea

Before turning to examine how the power of tradition was played out in the constitutional discourse of Chosŏn, it is important to have a clear understanding of what we mean by "constitutional law" in traditional Korea, or any other Confucian society.[56] The standard approach to Korean legal history has noted the existence of a national code, *Kyŏngguk Taejŏn* [Great Canon for Governance of the State], that was

54) P. S. Atiyah, Law and Modern Society 81-91 (2d ed. 1995) (noting that any law, especially constitutional law, must be supported by both compulsion and persuasion, if it is to be effective).

55) Waldron, *supra* note 51, at 64-67. "It is the fragile readiness of those involved in political life to order their conduct by certain implicit standards that forms the basis of whatever claim Britain has to be a constitutional regime." *Id.* at 67.

56) For a more in-depth analysis of the issues discussed in this and the next Parts of this article, readers are referred to Chaihark Hahm, Confucian Constitutionalism 107-240 (2000) (unpublished S.J.D. dissertation, Harvard Law School).

promulgated in the early part of Chosŏn period.[57] Scholars generally tend to regard this code as "the constitution" of the Chosŏn dynasty. Koreans also tend to be proud of the fact that throughout the history of Chosŏn, the government was constantly involved in the project of codifications. The implication is that Koreans were from a very early period deeply concerned about governing in accordance with the law-that Koreans practiced their own kind of "rule of law."

Yet, if we examine the contents of *Kyŏngguk Taejŏn*, we find that the vast majority of the rules contained therein pertained to the administration of the government bureaucracy. The primary audience to whom they were directed was the officials who staffed the various ministries, bureaus, and offices. Very little of it is directly concerned with disciplining the power of the ruler. In modern terminology, most of them were "administrative" law rather than "constitutional" law.[58] Faced with this fact, it is all too easy to make either of two mistakes: On the one hand, this could be used as "evidence" that constitutionalism did not exist in traditional Korea, that Korea had no legal means of restraining the power of the ruler.[59] On the other hand, this fact could be "explained" by invoking the standard description of traditional Korea as an absolute monarchy, in which all power was concentrated at the center and which allowed no medium for restraining that power. In fact, the two moves tend to reinforce one another to form an essentially circular argument-since Chosŏn was an absolute monarchy, it was only natural that its so-called constitution would not provide for any mechanism for disciplining power, and the fact that its constitution did not include such mechanism was "further" evidence that Chosŏn was an absolute monarchy.

The critical element that undergirds this type of historiography is the assumption that the code *Kyŏngguk Taejŏn* was "the constitution" of Chosŏn. To test the soundness of this assumption, we need to have a clear understanding of what

57) Promulgated in 1485, this code was the culmination of a series of codification efforts that begin with the founding of the dynasty in 1392. For a review of the codification process leading up to the enactment of this code, and its subsequent revisions, see Park, *supra* note 47, at 81-87. *See also* William Shaw, *Social and Intellectual Aspects of Traditional Korean Law, 1392-1910, in* Traditional Korean Legal Attitudes, *supra* note 46, at 15, 29-32.

58) Of course, a code containing such rules might be called constitutional law in the sense that it lays out the duties, capacities, and composition of the various government offices. But, that is not the sense that we are interested in when we speak of norms for disciplining the ruler. Moreover, it is hardly clear that the mere existence of such a code of government organization will have a disciplining effect on the ruler.

59) A notable exception is Park, *supra* note 47, at 435-53.

constituted the proper subject matter of codes under Confucian regimes. This may inevitably lead us to thorny debates about how to understand "law" in traditional East Asia. For decades, there have been debates as to whether the word *pŏp* (Chinese: *fa*) accurately translates the Western term "law." A related debate has been how to understand the conceptual relationship between the words *pŏp* (commonly translated "law") and *ye* (Chinese: *li*, commonly translated "ritual"). Rather than continuing these tired and interminable debates (which inevitably involves the philosophical question of what law is in the first place-something that is far from settled even among Western scholars), I believe we should take a less conceptual and more historical approach. That is, our understanding of Chosŏn constitutionalism will be better served by inquiring into the issue of "What were the sources cited by political actors engaged in disputes which we would describe as constitutional?" Here, I am again using the term constitutional to refer to matters relating to the disciplining and regulation of the ruler.

The conventional answer to this question is that, given the primacy of Confucian ideology, people cited from the classics to urge that the king become morally virtuous. According to the conventional image of Confucianism, moral virtue on the part of the ruler was all that was needed to bring peace, harmony, and justice in the state. While there are passages in the Confucian classics which could be read to support this,[60] I believe this is at best a partial and imperfect understanding of the Confucian political discourse as it was actually conducted in history. Indeed, if moral exhortation and admonition were all there was to Chosŏn political discourse, we would not be justified in regarding it as a form of constitutionalism. It is my contention that it was a far more structured discourse with its own discursive principles and institutional backdrop.

To get at the more concrete and institutional aspects of Confucian constitutionalism, then we need to examine the kinds of "codes" that the government compiled for various purposes. For, in actual political debates relating to constitutional issues, scholar-officials did not merely cite passages from the classics. They actually cited provisions from various "codes" compiled by the government. This means we need to

60) For example, in the *Analects*, Confucius says: "To govern means to rectify. If you lead on the people with correctness, who will dare not to be correct?" Confucius, Confucian Analects, The Great Learning & The Doctrine of the Mean 258 (James Legge trans., Dover Reprints 1971) (1893). Also: "When a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed." *Id.* at 266.

query if the *Kyŏngguk Taejŏn* can really be regarded as Chosŏn's constitution, and whether other codes of similar authority and breadth might not have been compiled by its government.

In order to find out what other codification projects might have been undertaken by Chosŏn, we must first know what was considered proper subject matters for codification. In a study of the early codification projects of Ming dynasty China, historian Edward Farmer has made the following comment, which I believe is equally relevant for Korea:

> Law in Ming China was really a combination of elements that included penal law but shaded off in one direction toward administrative regulations and in the other direction toward ritual. In fact one can draw no firm line between these elements. When we speak of Ming law we should keep the ritual elements in mind and not divorce them from our definition.[61)]

Here, he is using the term "law" to refer to legislation, i.e., codified documents. In other words, the subject matters of early Ming codes included administrative rules, penal law, and ritual regulations. Indeed, in any given code we can probably locate materials of all three types of norms. It would be reasonable to expect that their compilers did not make a sharp distinction among them. The fact that administrative rules, penal law, and ritual regulations could all be legislated means that "law" to the Confucians encompassed these three types of norms. They represent different points on a continuum which make up the Confucian conception of "law."

On the other hand, we can also identify a certain correspondence between these three types, or categories, of law and the types of codes that were compiled by the government. It is a historical fact that ever since the Tang period in China (618-907 A.D.), each dynasty compiled three types of codes: ritual, penal, and administrative. Within a period of five or six years, the *Tang* government enacted in seriatim, *Da Tang Kaiyuan Li* [Ritual Code of the Kaiyuan Reign-period of the Great Tang] (732), *Tang*

61) Edward L. Farmer, Zhu Yuanzhang and Early Ming Legislation 13 (1995). *See also* Edward L. Farmer, *Social Order in Early Ming China, in* Law and State in Traditional East Asia 1, 6 (Brian E. McKnight ed., 1987) (including within the definition of Confucian law such diverse items as "criminal law, rules governing the imperial clan, tables of organization for the bureaucracy, warnings to officials and commoners about improper conduct, rules applying to the management of local affairs, and on the proper way to conduct rituals.")

Lü Shuyi [Tang Penal Code with Commentaries and Subcommentaries] (737), and *Tang Liudian* [Six Canons of Tang] (738).[62] The first code specified the state ritual system to be observed by the government, the second was the penal law of the state, and the third was the administrative code modeled after a classic text, *Zhouli* [Rituals of Zhou].[63] Historically, the completion of these three codification projects represents the establishment and flowering of Tang political institutions.[64] They served as the model for later dynasties of China. For example, the Ming dynasty shortly after its founding commenced upon the codification of the three types of laws. These codification projects culminated in the enactments of *Da Ming Lü* [Penal Code of the Great Ming] (1397), *Da Ming Huidian* [Collected Canons of the Great Ming] (1503), and *Da Ming Jili* [Collected Rituals of the Great Ming] (1530).

We are now able to put the legislations of Chosŏn period in perspective. We know that in compiling the *Kyŏngguk Taejŏn*, Chosŏn consciously took the *Zhouli* as the model. Thus, it is more appropriate to regard the *Kyŏngguk Taejŏn* as the administrative code of Chosŏn, which represents only one part of a tripartite code structure. For its penal code, as is well known, Chosŏn adopted the Ming dynasty's penal code (*Da Ming Lü*) as its own, instead of compiling a separate independent code. Obviously, in order to implement it in an alien environment, it had to be modified and "localized" in various ways to fit the Korean context.[65] However, in principle, the Ming Penal Code was understood to be the general penal law of Chosŏn. In fact, the

62) All were compiled during the reign of emperor Xuanzong (r. 712-756 A.D.). Of these three, the *Tang Liudian* and the *Tang Lü Shuyi* were completed under the leadership of the same chief minister, Li Linfu, while the compilations of *Kaiyuan Li* and the *Tang Liudian* appear to have commenced during the regime of the same chief minister Zhang Yue. 3 Cambridge History of China 390-91, 414-15 (Denis Twitchett ed., 1979).

63) The *Zhouli* was purportedly a description of the government structure of the ancienty Zhou dynasty (1027-771 B.C.). According to Confucius and his followers, Zhou culture and society had attained a level of perfection that had never been surpassed by later generations. Its government institutions as laid out in the *Zhouli* were therefore idealized by most Confucian scholar-officials, including the compilers of *Kyŏngguk Taejŏn*. The *Introduction* to this code specifically refers to the *Zhouli* as its model. 1 KyŏnggukTaejŏn 3 (Pŏpchech'ŏ ed. & trans., 1962).

64) *See* Zhu Weizheng, *Coming Out of the Middle Ages, in* Coming Out of the Middle Ages: Comparative Reflections on China and the West 3, 23 (Ruth Hayhoe trans. & ed., 1990) (referring to the trio of Tang legislations as having laid the framework for later state structure). Unfortunately, Zhu's discussion is impaired by the indiscriminate and inapposite use of terms like "feudal," "autocratic," and "Middle Ages" in reference to China.

65) For a detailed analysis of the adaptation of the Ming Code by Chosŏn, see Byung Ho Park, Legislation and Social Conditions of Early Chosŏn [*Chosŏn Ch'ogi Pŏpchejŏng kwa Sahoesang*], 80 Kuksagwan Nonch'ong 1 (1998).

administrative code, *Kyŏngguk Taejŏn*, contains an explicit provision which incorporates the *Da Ming Lü* as the penal part of Chosŏn legal system.[66] As for its ritual code, Chosŏn did enact a separate code, which it began to compile very soon after its founding. In 1410 a special bureau for specification and determination of rites (*Ŭirye Sangjŏngso*) was established for this purpose, and a ritual code containing the state ritual program called *Kukcho Oryeŭi* [*Five Rites and Ceremonies of Our Dynasty*] was completed in 1474. And for this, too, there is a provision in the *Kyŏngguk Taejŏn* that specifies the use of this code in matters concerning ritual.[67]

As mentioned above, these three types of codes roughly corresponded to the three types of norms that comprised the Confucian conception of law. There was not, however, a perfect match. For example, an administrative code might well contain provisions on ritual matters or on penal matters. Similarly, the penal code also contained regulations of administrative nature. This perhaps was inevitable given the conception of law which was basically a continuum that ran from the administrative, to the penal, to the ritual. Thus, while each code would have a point of emphasis, corresponding to different points on the continuum, each unavoidably contained other types of norms as well.

With this conceptual framework in mind, we can now ask what types of provisions from which codes would have been invoked by Chosŏn scholar-officials in their constitutional disputations. Which type of norm and which type of code had the force of a constitutional norm-a norm that disciplined the ruler? The simple answer is: the ritual norms and the ritual codes. Of the three types of norms, it was only ritual regulations that could be directly applied to the ruler himself. Indeed, the ruler's observance of ritual regulations was of paramount importance in Confucian political theory, much like the duty of a modern-day president to uphold the constitution. In *Liji* [Record of Rituals], one of ancient classics, it is written, "If he act [sic] otherwise [i.e., contrary to ritual], we have an instance of the son of Heaven perverting the laws, and throwing the regulations into confusion."[68] Ritual was a norm that even the king was expected to obey.

It should be clear that penal law could not be directly applied to the king for the

66) 2 Kyŏngguk Taejŏn, *supra* note 63, at 149.

67) 1 Kyŏngguk Taejŏn, *supra* note 63, at 250.

68) 1 Li Chi: Book of Rites 375 (James Legge trans., University Books reprint 1967) (1885).

purpose of restraining his power. Almost by definition, penal law was directed at the commoners, and sometimes at the scholar-official, but never at the monarch.[69] As for the administrative code, its main audience was the bureaucrats. Indeed, the administrative code was in its origin a collation of previous edicts issued to the bureaucrats by the king, a collection of those edicts which were considered to have enduring validity.[70] It would have been therefore difficult to invoke the administrative code for purposes of disciplining the king, unless it was a ritual provision contained therein.

Of course, both penal and administrative norms could be involved in constitutional issues. Scholar-officials wishing to discipline the monarch might argue that these norms must be interpreted or applied in a certain way. By insisting on a specific manner of interpretation and application, scholar-officials might have been able to put a check on the discretionary power of the king, thereby achieving a certain constitutional effect. As we shall see in Part IV, they might have argued that these codes must be understood in a way that is consistent with the relevant precedents.[71] Even so, those norms themselves were not directed at the monarch himself. The only part of Confucian law that applied directly to the ruler and his family were the ritual norms and ritual codes.

What then were these norms called "ritual" or, in Korean, *ye*? While we cannot explore all of the philosophical and cosmological aspects of this uniquely Confucian concept, it should suffice for our purposes to understand the "disciplinary" aspects of it. The first thing to understand about the idea of *ye* is that, according to Confucian political thought, observance of *ye* conferred legitimacy on the ruler. The Confucian classics were replete with remarks to the effect that no state that disregarded *ye* would endure long, or that the ruler himself must conform to the dictates of *ye* in order to govern properly.[72] Therefore, every political leader had an incentive to at least appear

69) This does not mean that the penal code in its entirety was inapplicable to the ruler. To the extent that it contained ritual regulations, it could also be considered directly applicable to the ruler.

70) Bong Duck Chun, *Legal Principles and Values of the Late Yi Dynasty*, *in* Traditional Korean Legal Attitudes, *supra* note 46, at 1, 7-8.

71) On the principle of respecting precedents, see *infra* Part IV.

72) *E.g.*, "Thus the sages made known these rules [ritual], and it became possible for the kingdom, with its states and clans, to reach its correct condition." 1 Li Chi, *supra* note 68, at 367. The *Zuo Commentary* to the *Spring and Autumn Annals* provides: "It is ritual that governs the states and families, establishes the foundation of the country, secures order among people, and benefits one's future heirs" (My translation based on James Legge's in The Ch'un

to be abiding by the precepts of ritual. That is why every regime deemed it necessary to engage in a codification project to specify the correct ritual regulations.[73]

The second thing to keep in mind in understanding *ye* is that its contents are not confined merely to the procedural rules of ceremony. To observe ritual norms is not merely to follow some fixed set of rules that explain how to perform sacrificial rites, although it is that too. To follow ritual means to subject oneself to the "restraining mold of minutely prescribed ceremonial behavior."[74] Ritual is a "formative" norm in the sense that, it works by regulating the person's bodily movement and psychological temperament.[75] The idea is to make one's life a series of ritualized actions, so that one will know how to comport oneself in any given situation, and is able to do what is expected of one without even thinking about it. In Foucaultian terms, it means to go through continuous training, observation and surveillance so that one ends up internalizing the "normalizing gaze."[76] For the Confucian, this also meant the process of learning to become truly human, for according to Confucian philosophy, one's true humanity could only be attained through such a process of "ritualization."[77]

This should not, however, lead us to think that *ye* is basically about cultivation of moral virtue. This can be seen in the sanctions prescribed for its violation. Violation of *ye* resulted in much more than mere moral condemnation or social censure. For example, the *Liji* warns: "Where any ceremony [ritual] had been altered, or any instrument of music changed, it was held to be an instance of disobedience, and the disobedient ruler was banished."[78] It was understood that "violations of ritual entail

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Ts'ew With The Tso Chuen (5 The Chinese Classics) 33 (James Legge trans., SMC Publishing Inc. reprint 1991). Another passage states: "Ritual is the stem of a state; reverence is the vehicle of ritual. With no reverence, ritual will not observed; with no observance of ritual, status distinctions will be confused. How can such a state last many generations? (My translation based on *id.* at 158).

73) For example, in his coronation edict, the founder of Chosŏn, T'aejo (Yi Sŏnggye), declared that his government should rectify ritual practices and ordered the Ministry of Rites to research the classics and past practices and to establish the proper ritual institutions. 1 Sourcebook of Korean Civilization 481-82 (Peter H. Lee ed., 1993).

74) Noah E. Fehl, Li: Rites and Propriety in Literature and Life 183 (1971).

75) "When one disciplines himself to conform externally to the letter of the *li* [ritual] he will by its conditioning come to an inner sense of courtesy and propriety." *Id.*

76) Foucault, Discipline and Punish, *supra* note 30, at 177-84.

77) Tu Wei-ming, *Li as Process of Humanization,* 22 Phil. E. & W. 187 (1972). "In the Confucian context it is inconceivable that one can become truly human without going through the process of "ritualization"." *Id.* at 198.

78) 1 Li Chi, *supra* note 68, at 217.

submission to punishment."[79] In another classical text, *Xunzi*, ritual is described as a legislative innovation by the ancient mythical sage kings to deal with the social fact of scarcity of material goods in relation to human desires.[80] Ritual was an institutional form of norm that required formal legislation, rather than a moral norm whose enforcement depended on informal and social sanctions. Therefore, it should be recognized that ritual was as much a legal category as the other two types of norms.[81]

Next, it should be remembered that *ye* was not just a "personal" norm that regulated the conduct of the king; it pertained to the operation of the entire government.[82] In addition to defining the personal ritual responsibilities of the king and the royal family (e.g., weddings and coming-of-age ceremonies), Chosŏn's ritual code, *Kukcho Oryeŭi*, also prescribed ritual norms applicable to the more public aspects of the government. For example, it contained norms that regulated the conduct the state's foreign relations with the neighboring states, as well as the conduct of its military forces.[83] This is also apparent in the nomenclature for government bureaus. The Ministry of Rites (*Yejo*) was the government department that was in charge of foreign affairs and legislation. It was the *Yejo* that was responsible for all the codification projects noted above. Yet, *Yejo* was not the only government office in charge of ritual matters. The importance of ritual for Chosŏn government went well beyond that. In a sense, the whole business of government was to ensure the proper observance of ritual norms.[84]

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79) *See generally* Fan Zhongxin Et Al., Sentiments, Principle, Law and the Chinese People [*Qing, Li, Fa* yu Zhongguoren] (1992).

80) 3 John Knoblock, Xunzi: A Translation and Study of the Complete Works 55 (1994).

81) *See* Seung-Hwan Lee, A Reconsideration of Confucian Thought as a Social Philosophy [Yuga Sasang ŭi Sahoe Ch'ŏlhakchŏk Chaejomyŏng] 169-77 (1998).

82) *E.g.*, "Therefore to govern a state without the rules of propriety [ritual] would be to plough a field without a share." 1 Li Chi, *supra* note 68, at 390.

83) The ritual code of Chosŏn, like that of other Confucian regimes in China, was structured around the traditional system of Five Rituals (*Orye*; Chinese: *Wuli*) of the state. They were: (i) Rituals for Auspicious Occasions (*Killye*; Ch.: *Jili*) dealing with various sacrificial ceremonies offered to numerous "deities" of the state; (ii) Rituals of Ill Omen (*Hyungnye*; Ch.: *Xiongli*) concerned with illness and other sad occasions at court; (iii) Guest Rituals (*Pillye*; Ch.: *Binli*) regulating the ceremonies dealing with state visits by foreign emissaries; (iv) Military Rituals (*Kullye*; Ch.: *Junli*) regulating the conduct of military exercises and expeditions; and (v) Rituals for Felicitous Occasions (*Karye*; Ch.: *Jiali*) dealing with ceremonies such as wedding and coming of age within the ruling house.

84) The statement of historian Charles Hucker in relation to the Ming government is equally applicable to Chosŏn:

Lastly, in terms of our understanding of the constitutional function of ritual, it is extremely important to note the Confucian scholar-officials' relationship toward ritual. Historically, the word "Confucian" (*yu*; Chinese: *ru*) signified a person with expertise in ritual matters. Indeed, it is only a slight exaggeration to say that the whole Confucian tradition is a product of the intellectual and political triumph of a certain group of specialists on ritual who were able to transform their expertise into the dominant political discourse, the terms of which defined the regime's legitimacy as well as the values people should aspire to. Of course, even among Confucians, some were more adept at ritual matters than others. Yet, almost by definition, a Confucian scholar-official was assumed to be knowledgeable about ritual and the classics.

Given the fact that a regime's legitimacy depended on observance of ritual and the fact that Confucian scholar-officials were universally regarded as specialists on ritual, it was natural for them to consider themselves as the custodians of political legitimacy. Since it was they who defined what was political proper for the king to do, the king could not but be constrained by the Confucian scholar-officials. They were, in a sense, "disciplinarians" of the ruler.[85] For example, codification projects were occasions to use their expertise to influence the exercise of political power according to their ideal. Of course, these were also occasions on which competing understandings of ritual vied for political power through royal recognition in the form of official legislation. When the process of codification was finished, Confucians continued to set the terms of political discourse through their interpretations of these codes, as well as their arguments based on classical texts. Although the ritual codes were intended to be

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"Performance of proper rituals was one of the most notable obligations of the government," such that "proper government in the Ming view was largely a matter of performing proper rituals." Charles O. Hucker, The Traditional Chinese State in Ming Times (1368-1644) at 97-98 (1961).

85) Institutionally, they disciplined the king through such mechanisms as the censorate and the royal lectures. Unlike its Chinese counterparts, the Chosŏn censorate was more interested in disciplining and remonstrating against the king than in impeaching misconduct on the part of the officials. Some historians regard the censorate as a separate branch of the Chosŏn government which checked the powers of the throne and the "executive." JaHyun K. Haboush, *The Confucianization of Korean Society*, *in* The East Asian Region: Confucian Heritage and Its Modern Adaptation 84, 96 (Gilbert Rozman ed., 1991). The royal lectures, which by definition was an educative and therefore disciplinary institution, also developed a highly constitutional function. Beyond the usual role of exposition of classical texts, it took on the role of a forum for policy deliberation. *See generally* Yon-Ung Kwon, *The Royal Lecture of Early Yi Korea (1)*, 50 J. Soc. Sci. & Hum. 55 (1979); Yon-Ung Kwon, *The Royal Lecture of Early Yi Korea (2)*, 51 J. Soc. Sci. & Hum. 55 (1980).

permanent laws, they were also subject to frequent revision. And any debate concerning a perceived need for revising or amending the established ritual codes was thus necessarily a highly political activity with constitutionalist significance.[86] Discourse on *ye* was constitutional discourse.[87]

This allows us to understand the particular intensity and vehemence with which debates on ritual matters were conducted in the Chosŏn government. The famous Ritual Controversies of 1659 and 1670 were but the more conspicuous of such debates.[88] Correct observance of ritual rules being an issue of constitutional importance, it naturally evoked impassioned arguments in every scholar-official who had an opinion about ritual. Again, it is important to remember that these were not simply moral arguments urging the king to be virtuous. In putting forth their arguments, they would cite from the ritual provisions contained in the various codes. Therefore in order to appreciate the texture of Chosŏn constitutional discourse, we need to understand the various principles according to which disputants justified the correctness of their positions. It is to these discursive principles of Chosŏn constitutionalism that we now turn.

V. Discursive Principles of Chosŏn Constitutionalism

It might be objected that characterizing Confucian political philosophy as a constitutional theory is an exaggeration and/or misrepresentation. For, according to the conventional view, the Confucian position promoted a personalistic approach to politics, thereby neglecting the more stable and lasting institutional aspects of politics. In other words, Confucianism failed to distinguish between politics and morality.

86) Patricia B. Ebrey, Confucianism and Family Rituals in Imperial China 34-37 (1991); Wechsler, Offerings of Jade and Silk: Ritual and Symbol in The Legitimation of The T'ang Dynasty 9 (1985) ("Confucians served as experts in the field of ritual, discoursing on its proper forms and manipulating it for political ends, both on behalf of and against monarchical power.").

87) For a similar interpretation of the ritual discourse in China during Ming dynasty, see Ron Guey Chu, *Rites and Rights in Ming China, in* Confucianism and Human Rights 169 (Wm. Theodore de Bary & Tu Weiming eds., 1998).

88) *See generally* JaHyun K. Haboush, *Constructing the Center: The Ritual Controversy and the Search for a New Identity in Seventeenth-Century Korea, in* Culture and the State in Late Chosŏn Korea 46 (JaHyun K. Haboush & Martina Deuchler eds., 1999). For an exposition of these ritual controversies from a constitutional perspective, see Hahm, *supra* note 56, at 221-38.

Being generally disdainful of law, Confucianism was, the story goes, naturally inimical to the "rule of law" and preferred to practice the "rule of man." [89]

However, in light of the foregoing interpretation of Confucian law, and of ritual in particular, I believe these conventional wisdom must be radically revised. To further support my claim that Confucian political ideals as they were theorized and practiced by Koreans of Chosŏn dynasty warrant their designation as a form of constitutionalism, I shall in this Part examine the principles-constitutional discursive principles- that were invoked by Confucian politicians for the purpose of disciplining their ruler. In the eyes of someone conditioned to look for judicially enforceable norms, these may appear to be "mere" conventions or rhetorical devices, but as was seen above constitutional norms often rest on grounds no firmer than the fact that they are accepted as normative by the force of tradition.

Particularly, when examining the politics of traditional Korea, it is exceedingly important to recognize the "traditionalist" element of its constitutional culture. In order to appreciate how constitutional issues were argued by Chosŏn scholar-officials whose political language was informed by Confucianism, we need to understand that in the moral and political discourse of Confucianism, tradition occupied a place of fundamental importance. More importantly, we must understand that the authority of tradition could be, and in fact was, invoked in various ways for the purpose of disciplining political power. In other words, the vocabulary and arguments deployed in political disputations derived their normative and justificatory force from tradition.

Indeed, in some ways, the whole Confucian outlook is one that is steeped in a deep respect for tradition. For example, Confucius himself once described himself as a preserver and transmitter of tradition.[90] He idealized the cultural traditions of the Zhou dynasty and lamented the decay and corruption of those traditions.[91] For that, he is sometimes portrayed as a hopeless reactionary or at best a conservative. Yet, the reason

89) The origins of these stereotypes are very old. In the West, one might even trace them as far back as to Montesquieu, who described the Chinese government as one committed to a rule by morality. Montesquieu, The Spirit of the Laws 317-21 (Anne M. Cohler et al. trans. & eds., 1989) (1748). East Asians too adopted this view in their self-descriptions. *See, e.g.*, Liang Chi-Chao, History of Chinese Political Thought During the Early Tsin Period (L. T. Chen trans., 1930) (contrasting Confucian "rule of man" with Legalist "rule of law").

90) Confucius, *supra* note 60, at 195.

91) *Id*. at 160 (proclaiming himself a follower of Zhou culture); Id. at 162-63 (lamenting the transgression of Zhou ritual regulations by usurpers).

that he wished to transmit the Zhou cultural traditions was because, for him, they embodied the constitutional framework[92] required for civilized human existence. Therefore, for later Confucians, it was natural to emulate their Master in wishing to preserve (and sometimes even revive) ancient traditions.

One powerful principle that informed their political discourse, and which represented this strong disposition toward tradition is the concept of the "way of the former kings" (*sŏnwang ji do*; Chinese: *xianwang zhi dao*). "Former kings" here refer to the ancient mythical sage kings of China such as Yao and Shun, who were said to have laid down the basic framework of human civilization. Indeed, whatever they did (in matters of personal morality, friendship, family, politics, economics, criminal justice, etc.) were regarded as the perfection of human possibilities. As mythical figures, they obviously predate Confucius, and Confucius himself talked about emulating them. They were perennial models for later generations.[93]

The significance of the term "way of the former kings" for understanding Confucian constitutionalism lies in the fact that scholar-officials of Chosŏn were able to use this to discipline their king. They constantly urged the monarch to discipline himself by taking the ancient sage kings as his model. They capitalized on the ancient past as the criterion by which to judge and criticize the present.[94] If there was a disruption of peace and order in the realm, it was attributed to the current king's deviation from the way of the former kings. And it wasn't just because the former kings were perfections of personal moral virtue. Matters of policy, such as tax, agriculture, and commerce, were also to be judged according to the model set by the former kings, which were often referred in the discourse as "ancient institutions" (*koje;*

92) The Confucian term for this is *ye-ak-hyŏng-jŏng* (Chinese: *li-yue-xing-zheng*), which literally means "rituals-music-punishments-regulations" and is often used as a shorthand for a state's entire social and political arrangements. *See, e.g.*, 2 Li Chi, *supra* note 68, at 93 ("The end to which ceremonies, music, punishments, and laws conduct is one; they are the instruments by which the minds of the people are assimilated, and good order in government is made to appear."); *id.* at 97 ("When ceremonies, music, laws, and punishments had everywhere full course, without irregularity or collision, the method of kingly rule was complete.")

93) *E.g.*, 1 Li Chi, *supra* note 68, at 367 ("Confucius said, 'It was by those rules [ritual] that the ancient kings sought to represent the ways of Heaven, and to regulate the feelings of men."); Mencius 4A:1 ("There has never been anyone who has abided by the way of the former kings and fallen into error.").

94) What Professor William Alford has aptly described as the "power of the past" pervading all intellectual discourse of traditional China was also in operation in Korea. William P. Alford, To Steal Book is an Elegant Offence: Intellectual Property Law in Chinese Civilization 20-28 (1995).

Chinese: guzhi) or "ancient rituals" (*korye*; Chinese: *guli*). Invoking such terms therefore had great rhetorical power because they represented the normative force of tradition which the current king was required to follow. They were the reference point to which later kings were expected to look for guidance and enlightenment. In other words, the government and laws of the former kings were to serve as a model for the present-day ruler.[95]

In order for the current king to follow the way of the former kings, he had to have access to records of the former kings. Since those records were to be found in the Confucian classics, this meant that the current ruler had to be educated in the classics. The government of Chosŏn therefore had specialized offices dedicated to the education of the ruler, starting from his days as the crown prince. These were specifically provided for in the administrative code.[96] While it is difficult to generalize or summarize the classics without great distortions, it is safe to say that an important aspect of them were the idealized representations of the ancient past in which sage kings maintained peace and harmony through constant self-discipline.[97] And, although it may be difficult to regard them as constitutional documents in themselves,[98] the Confucian classics such as the Five Classics and the Four Books did function as

95) Park, *supra* note 47, at 401-04.

96) One of these was the *Kyŏngyŏn*, or Royal Lecture, mentioned above. Whereas this office was in charge of lectures to the king, another office *Seja Sigangwŏn*, or princely lecture, was in charge of the crown prince's edification and enlightenment.

97) Obviously, not all classics purported to be records of the former kings' exemplary deeds. Some contained highly metaphysical discourses on human nature, while others were very mundane instructions on how to perform specific ritual ceremonies. Nevertheless, their authority as classics and as sources of constitutional norms were inextricably related to the claim that they all derived from antiquity and thus connected to the sage kings. By the time of Chosŏn dynasty, the scholar-officials were all familiar with the Five Classics (*Book of Poetry, Book of Documents, Book of Changes, Record of Rituals, Spring and Autumn Annals*) and Four Books (*The Great Learning, Analects, Mencius, Doctrine of the Mean*).

98) *But see* E.A. Kracke, Jr., Civil Service in Early Sung China 960-1067 (1953). Describing the political outlook of the Song dynasty's ruling elite, Kracke wrote:

> The Confucian classics became a fundamental part of the state constitution, with a force which neither the Emperor or his subjects could venture to deny. . . . This function of the classics was not formally stated in the legal codes; it was accepted as an assumption so basic that it required no statement.

Id. at 21. *See also* Herrlee G. Creel, The Origins of Statecraft in China 94-95 (1970) (describing some parts of the classics such as the *Book of Documents* as "a kind of constitution" that "defin[ed] both the duties of rulers and the grounds upon which . . . they might rightfully be deposed."). While it is certainly true that the classics were

sources for political norms whose meaning was to be re-presented and made relevant to the contemporary context. In other words, in order to ascertain the way of the former kings, one had to investigate and interpret the classics.

This points to another important aspect of Confucian constitutionalism, namely, the thoroughly "interpretive" nature of its constitutional discourse.[99] For, the classics had to be interpreted in order to be made relevant to one's own particular situation. Indeed, every Chosŏn scholar was aware of the enormous gap-temporal, spacial, social, cultural, and technological-that lay between themselves and the former kings. They recognized that in most cases the historical context had changed to such an extent that the laws of the ancient sage kings could not be applied without modification or adaptation. Depending on one's estimation of this gap, a range of views were possible. At one end of the spectrum, one could think that just a minimal amount of adaptation was required to follow the laws of the former kings. At the other extreme, one could think that no amount of calibration would be sufficient to make them relevant to the present context. Of course, short of rejecting the entire Confucian outlook (and adopting a Legalist perspective), ignoring the dictate to follow tradition and creating outright new institutions or policies would not have been an option for Chosŏn scholar-officials. Nevertheless, disagreements on how to assess the gap (i.e., how to interpret the classics) were certainly a common feature of Chosŏn political history. They often fueled sharp contention among different political factions and sometimes even

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authoritative, to say that they themselves were the constitutions of a Confucian state is unhelpful. As mentioned above, they included many matters of non-political nature, which had nothing to do with disciplining the ruler. To regard them as the constitution would be like claiming that, since Americans were predominantly Christians at the time of the Revolution, the Bible should be viewed as their constitution.

99) For readers familiar with American constitutional theory, my use of the term "interpretive" might be confusing. As used by some American scholars, "interpretivist" refers to the position that denies the need to look anywhere other than the "four corners of the text," whereas "non-interpretivist" refers to the view that argues for the need to accommodate for the changed circumstances that distinguishes us from the original drafters of the Constitution. *E.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L.Rev. 703 (1975); John Hart Ely, Democracy and Distrust 1-2 (1980). Fortunately, in recent literature, scholars have largely abandoned this distinction, preferring instead to speak of "textualist vs. non-textualist" or "originalist vs. non-origialist" approaches. *See, e.g.*, Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984) (acknowledging the confusion caused by his earlier categorization). There seems to be a general recognition that law is an unavoidably interpretive exercise. On the significance of the "interpretive turn" in legal scholarship, see generally *Interpretation Symposium*, 58 S. Cal. L. Rev. 1 (1985).

amounted to a major crisis in the constitutional order.[100]

Another principle that was based on the authority of tradition, and repeatedly invoked within the constitutional discourse of Chosŏn was the concept of "ancestral precedents" or the "established laws of royal ancestors" (*chojong ji sŏnghŏn*; Chinese: *zuzong zhi chengxian*).[101] The idea was that whatever had been established by preceding kings had to be respected. Needless to say, the justificatory power of this idea stems from the core Confucian value of filial piety (*hyo*; Chinese: *xiao*). As a filial son, the ruler had the duty to honor and preserve his dynastic patrimony, and this meant that he could not make changes lightly to the laws, institutions, and policies of his forefathers. Any departure from ancestral precedents was severely criticized by remonstrating officials as a violation of the king's filial duty. In countless memorials to the king, Confucian scholar-officials urged him not to make new laws but to preserve and enforce the laws of his ancestors.

This principle was formally enunciated very early on in the history of Chosŏn dynasty. Ever since the third king, T'aejong (r. 1400-1414), ordered that provisions of a later code that altered the laws of the dynastic founder be struck out, ancestral precedents were treated with the utmost reverence.[102] When change in the law was unavoidable, it was ordered that the new law be appended as a footnote to the original law which remained on the text even if it was no longer in force.[103] In the Introduction

100) Certain aspects of the famous Ritual Controversy of the seventeenth century can be understood in this light. One faction (*Sŏin*) favored the position that the ritual prescriptions found the ancient classics, according to which the ordinary scholar-officials and royalty were to observe different rules, were not directly applicable to Chosŏn. The opposing faction (*Namin*) tried to argue that ignoring the class distinction prescribed in the ancient classics (i.e., "ancient institutions") was a grave mistake and that making the royal family observe ritual rules originally prescribed for the scholar-officials was tantamount to contempt of the throne. For more on this, see Hahm, *supra* note 56, at 227-34.

101) Park, *supra* note 47, at 51-52, 85-86, 404-06, 411-12 (1996); Chun, *supra* note 70, at 9.

102) Professor Byung Ho Park states that the establishment of this principle so early in the dynasty discouraged the practice of looking to foreign (i.e., Chinese) laws for either reforming or refining Korean laws. Park, *supra* note 47, at 51-52, 85-86. From this, it might be tempting to infer that this principle of respecting ancestral precedents was somehow a Korean invention which contributed to Korean "nationalism." Such inference, however, would be unwarranted in light of Chinese imperial history. It is well-known that the founder of the Ming dynasty, ordered his descendants and officials to honor his own laws and prescribed the death penalty to anyone who dared to suggest an alteration. *See* De Bary, *supra* note 46, at 94-97. De Bary writes that through "threats and imprecations Ming Taizu confirmed in blood the tradition of ancestral law as a "constitutional order"." *Id.* at 97.

103) In a way, this is similar to the amendment process of the American Constitution, in which older provisions

to the *Kyŏngguk Taejŏn*, future monarchs are admonished to abide by the established laws contained in that code and never to alter or forget the code.[104]

Beyond the Confucian virtue of filial piety, however, there were more practical considerations behind this principle. Confucian scholar-officials were concerned about the effect that frequent changes in the law might have on the people's trust in the government.[105] Also, they were deeply worried about setting a precedent by making an exception to the ancestral laws. Consequently, they repeatedly memorialized the king that departing from the ancestral laws in a given case will become a precedent, which less scrupulous future kings and officials could cite as authority for disregarding the entire "established laws of royal ancestors."

Obviously, the principle of unalterability and permanence of ancestral laws could not be observed to the letter. That is, even in a tradition-bound constitutional culture, changes in the law were inevitable and indeed necessary. One scholar of Korean legal history suggests that the principle of respecting the "established laws of royal ancestors" were actually more often honored in its breach.[106] As evidence, the fact is cited that throughout the dynasty, the government of Chosŏn was constantly engaged in the process of revising and updating their laws. Nevertheless, invocation of precedents were a permanent feature of the constitutional discourse of traditional Korea. In a way, it was due to this principle that Chosŏn had to constantly struggle with codification projects.

In this connection, we must revise another conventional view that is common among Western scholars of East Asian legal history, namely, the view that there was no doctrine of binding precedent like that of *stare decisis* in the Anglo-American tradition.[107] As we have seen so far, Korean law, or at least constitutional law, was

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that have been altered or even repealed by later amendments continue to stay on the text as part of the document. The most obvious example would be the amendment that enforced Prohibition (of alcoholic consumption) and the later amendment that repealed it. U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

104) The writer of the introduction goes on to boast that observance of the ancestral laws will bring about enlightened government whose brilliance will even surpass that of Zhou, the dynasty which always served as the ideal for all Confucians.

105) Park, *supra* note 47, at 412-15

106) Shaw, *supra* note 57, at 29. *See also* Park, *supra* note 47, at 52, 86, 415.

107) The Western views described here deal with Chinese legal history, rather than Korea. I believe, however, they would be applied *mutatis mutandis* to the case of Korea if anyone were to theorize about its legal history.

pervaded by a sense of being bound by precedents. The two principles of "way of the former kings" and "ancestral precedents" are nothing if not a call to respect and follow precedents. What then is the source of the conventional view? I believe this is due to an assumption about what constitutes "law" in traditional East Asia, an assumption which effectively excludes from the scope of scholarly discussion anything that could be called traditional constitutional law. In other words, due to the assumption that there was no constitutional law, the discussion only focuses on either criminal proceedings or civil disputes among ordinary people. And in both cases, Confucianism is put forth as an explanation for the lack of *stare decisis.*

For example, one scholar attributes this to the Confucian preference for ritual over "law" (*pŏp*). Because *ye* was inherently a flexible norm, as opposed to the rigidity of *pŏp*, and because all disputes were to be resolved in accordance with *ye* rather than *pŏp*, Confucianism could not tolerate a doctrine that insisted on being bound by precedents. In other words, since *ye* required sensitivity to the specifics of each individual case, it had no need for a doctrine like *stare decisis.*[108] Although this view is right in emphasizing the importance of *ye* in Confucian legal and political thought, it fails to consider the fact that many dictates of *ye* were also incorporated into penal codes and hence became rigid rules themselves.[109] Moreover, as seen above, the governments of Confucian regimes compiled ritual codes in order to justify their mandate to rule. With the passage of time, the need also arose for handbooks and casebooks that could guide the administration of justice by the magistrates. Perhaps out of practical necessity, like cases were expected to be decided alike.[110] Of course, this is still different from a legal doctrine which requires the invalidation of a decision which failed to follow relevant precedents. Yet, it does call into question the thesis that Confucianism had no need for a doctrine of binding precedents.

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108) R.P. Peerenboon, Law and Morality in Ancient China 125-32 (1993).

109) Often called the "Confucianization of law," this process refers to the utilization of rigid and coercive measures to enforce the requirements of ritual. Ch'ü T'ung-Tsu, Law and Society in Traditional China 267-79 (1961). For an argument that Chosŏn ruling class's outlook was at once thoroughly Confucian and harshly legalistic, see William Shaw, *The Neo-Confucian Revolution of Values in Early Yi Korea, in* Law and the State in Traditional East Asia 149 (Brian E. McKnight ed., 1987).

110) For studies in English of such handbooks, see Derk Bodde & Clarence Morris, Law in Imperial China (1967) (analysis and translation of *Xingan Huilan* [Conspectus of Criminal Cases] of Qing dynasty); William Shaw, Legal Norms in A Confucian State (1981) (examination of *Simnirok* [Records of *Simni* Hearings] of Chosŏn).

Another eminent scholar of Chinese law refers to the Confucian demand that all cases be decided according to the universally valid moral principles embodied in the classics as the reason why Confucianism was incompatible with *stare decisis*. That is, since those moral principles were accessible to anyone who studied the classics, there was no reason to look to previous cases for guidance.[111] While this view does take notice of the "power of the past" as manifested through the classics,[112] it neglects to consider the same power of the past that becomes visible in political discourse. That is, while it may be that in ordinary civil and criminal cases the judge could not really be faulted for not following precedents, in constitutional matters, failure to follow precedents (of either ancient sage kings or royal ancestors) was deeply problematic for that implied a disrespect for the Confucian tradition or an unfilial attitude toward the dynastic forefathers. As one historian of China has written, precedents "served to hold the Emperor's power within limits and to prohibit any decline into absolutism."[113] I believe there is sufficient grounds to say that the doctrine of binding precedents was a constitutional principle in a Confucian polity.

It was mentioned that the way of the former kings were accessible through interpretations of the classics. In the case of ancestral precedents also, the process of ascertaining the requirements of ancestral laws was similarly an interpretive task. In the first place, they were to be located in the codes that were promulgated by the royal ancestors. In addition, they were also found in individual edicts issued by previous kings, or historical records of the royal ancestors. These texts all needed to be interpreted in order to be understood, and in many cases, there were interpretations of intervening generations which also demanded attention as ancestral precedents. In some cases, there were multiple precedents which would not necessarily be consistent among themselves. Also, for later generations, the gap between themselves and the royal ancestors might have been too great to allow a literal application of the ancestral laws. As in the case of the way of the ancient sage kings, adjustments and adaptations were necessary.

111) Alford, *supra* note 94, at 22.

112) *Id.* (suggesting that the absences of binding precedents may be a reflection of "an even greater embracing of the past").

113) Karl Bünger, *Genesis and Change of Law in China*, 24 L. & State 66, 80 (1981).

More significantly, there could be discrepancies between the dictates of the ancient sage kings found in the classics and the ancestral laws found in the dynastic codes and historical records. Perhaps, in an ideal Confucian world, this would not happen. In the real world of less than sagely rulers, however, the precedents set by the royal ancestor might not always be worthy of compliance or respect. In such instance, someone claiming to be more faithful to the classics, and therefore a "purer" Confucian, could invoke the principle of adhering to the way of the former kings to "override" the authority of the ancestral precedents. On the other hand, anyone wishing to preserve the institutions, policies, or practices handed down from the more recent past could always invoke the Confucian virtue of filial piety to argue for maintenance of the status quo. This does not mean that the principle of respecting ancestral precedents had an inherently "conservative" orientation, or that the principle of following the ancient sage kings necessarily served a "radical" interest. What counts as conservative or radical would depend on which principle better justified the existing state of affairs. That is, depending on the baseline, either principle could be invoked to criticize the status quo and argue for a reform.

To a cynic, the fact that there was no "objective" way to adjudicate between the two principles of traditional authority might imply that these were "mere" rhetorical flourishes that could be utilized to justify any and all arguments. Yet, by the same logic, we would then have to conclude that the modern constitutional principles of, say, majority rule on the one hand and protection of minority on the other are "mere" rhetorical flourishes employed on an ad hoc basis to justify whatever happens to fit one's interest. Likewise with the ideals of equality and liberty, or of individual freedom and the claims of community, which tend to pull in opposite directions, with no "objective" criterion for adjudicating or prioritizing the demands of the two. In the end, the answer to such issues depend on one's constitutional philosophy. A person with a liberal outlook will reach different resolutions than one who subscribes to socialism. In the field of comparative constitutional law, each state is said to reach its distinct resolutions to these and other issues, which in turn reflect their constitutional cultures. The crude, conventional view is that Americans have generally tended to give more priority to freedom and individual liberty compared to other nations. Yet, even in one country, these are ongoing issues and it is more realistic to expect that whatever resolution that obtains at the moment will likely change over time, with the change in the constitutional philosophy of the nation.[114)]

The adjudication between the two constitutional principles of traditional Korea can be expected to be similarly dependent on the prevailing constitutional vision of the moment. No doubt, the constitutional vision of the era was Confucianism. And, unlike modern states, traditional Korea had an official state orthodoxy, in the form of the state-required curriculum for the civil service examination. Ever since the fourteenth century, governments in both China and Korea adopted the Song dynasty master Zhu Xi's commentaries on the classics (particularly the Four Books) as the authoritative and orthodox interpretation of the Confucian learning.[115] This certification of the school of thought represented by Zhu Xi-commonly known as Neo-Confucianism in English-as the official ideology of the state continued at least nominally until the end of the monarchy at the turn of the century.

This meant that for rulers and scholar-officials of Chosŏn dynasty, Zhu Xi's doctrine operated as a third source of traditional authority, in addition to the former kings and ancestral precedents-a third constitutional principle, as it were. Everyone was expected to abide by Zhu Xi's interpretation of the classics and anyone who dared to disagree was criticized as a heretic. In constitutional discourse, the authority of Zhu Xi's thought could always be invoked to discipline the actions of the king. Historians generally agree that the authority of Master Zhu (as he was commonly called by his disciples) was even greater in Korea than in China. Whereas in China later political developments and intellectual trends seriously challenged the authority of Zhu Xi and his school, Koreans of Chosŏn continued to revere Master Zhu, even to the point of criticizing their Chinese contemporaries for failing to defend the orthodox teachings of Zhu Xi. In other words, the Zhu Xi orthodoxy in Korea was quite palpable to a degree never achieved in China.[116] Thus, to a certain extent, the issue of adjudicating between

114) One recent example in American constitutional law is the issue of the proper line between the powers of the federal and state governments. After a period of steady expansion of the federal government, there has been a reversal in the direction of more autonomy for state governments.

115) Zhu Xi (1130-1200) lived during the Song dynasty, and although his views and interpretations of the classics were already quite influential during his lifetime, at the time of his death they were actually banned by the Song government as heterodox. In 1241, however, his teachings were given imperial sanction, and in 1313, his texts were adopted as expressions of official state doctrine by the Yuan (Mongol) dynasty. Hoyt C. Tillman, Confucian Discourse and Chu Hsi's Ascendancy (1992). Korean scholars also had their first encounter with Zhu Xi's teachings during the Yuan period, and many scholar-officials who actively participated in the founding of Chosŏn in 1392 are said to have been motivated by a desire to reorganize the nation in accordance with Zhu Xi's interpretation.

116) *See generally* The Rise of Neo-Confucianism in Korea (Wm. Theodore de Bary & JaHyun K. Haboush eds.,

the principles of respecting the ancient sage kings and adhering to ancestral precedents, and of the potentially conflicting dictates of tradition generally, would have been resolved by relying on Zhu Xi's interpretations.

It must be added that even though Zhu Xi's interpretation was regarded as the definitive statement of the Confucian position on everything from politics, morality, to metaphysics, that hardly meant that everyone had the same views. There were variations among the followers of Master Zhu, which soon developed into distinct schools of thought, and opposing political factions.[117] Moreover, even though hardly anyone dared to openly criticize Zhu Xi's interpretations of the classics, Korean scholar-officials, particularly of the later period, began to form their own independent opinions on the soundness of Master Zhu's commentaries.[118] While nominally professing to follow his interpretations, many achieved a level of scholarship that enabled them to view them critically, in light of their own understanding of the classics.[119]

Thus, in order to understand the constitutional discourse of Chosŏn, we must keep in mind that these three partially overlapping and partially distinct sources of authority were at work all at the same time. One's constitutional vision was necessarily the result of how one negotiated these three sources. Political and constitutional conflicts were the result of different people prioritizing them in different ways. Just as constitutional disputes can arise today through a clash among different people holding different answers to the problem of how to weigh the demands of equality and liberty, Chosŏn constitutional disputes arose from disagreements among people who assigned different weights to the dictates of ancient sage kings, ancestral precedents, and Zhu Xi's orthodoxy.

For example, in the seventeenth century Ritual Controversy alluded to earlier, one group based their arguments on the authority of ancestral precedent, or more precisely ritual provisions found in the *Kyŏngguk Taejŏn*, and the orthodox of Zhu Xi. Their

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1985).

117) For a short genealogy of the political factions of Chosŏn and their different interpretations of the classics, see Mark Setton, Chŏng Yagyong: Korea's Challenge to Orthodox Neo-Confucianism 21-51 (1997).

118) For a study of the very few who in fact went against the orthodoxy of Zhu Xi, see Martina *Deuchler, Despoilers of the Way-Insulters of the Sages: Controversy over the Classics in Seventeenth-Century Korea, in* Culture and the State in Late Chosŏn Korea, *supra* note 88, at 91.

119) *See generally* Setton, *supra* note 117.

opponents tended to emphasize the authority of the former kings, whose teachings were found in the ancient classics. This, however, did not mean that the latter group was free to ignore the authority of Zhu Xi. In fact, they claimed that they were the more faithful followers of Zhu Xi. Similarly, invoking the authority of ancestral precedents should not be seen as rejecting the way of the former kings, for ancestral laws themselves drew their authority from being modeled after the "ancient institutions."[120]

One way of understanding the relationship between the three sources of authority is to regard both ancestral precedents contained in the various codes and Zhu Xi's orthodoxy as different interpretations of the same former kings of antiquity. Zhu Xi was quite conscious about giving a contemporary and more relevant interpretation to the dictates of rituals found in the ancient classics. Faced with the realization that there were numerous gaps between the prescriptions of the former kings and the practices of his own time, he made numerous adjustments and compromises to fit the exigency of his day.[121] As seen above, the ancestral codes were also based on the ritual prescriptions of the former kings, but were also the product of a similar process of adjustments and compromises necessitated by the gap between Zhou dynasty China and Chosŏn Korea. In sum, for Chosŏn Confucians, the way of the former kings was the primary source of authority, but they also had very pressing political and intellectual reasons for respecting Zhu Xi and the ancestral codes.

Sometimes the calculus became even more complicated because another source of authority had to be respected. For the government of Chosŏn, which regarded itself as a "kingdom" in relation to the "empire" that existed in China, the laws and institutions of the current Chinese court had to be accorded certain presumptive authority. Thus, the laws and institutions of the Ming dynasty, which was a rough contemporary of Chosŏn, were often referred to and cited in political debates. In fact, Korean scholar-officials began consulting Ming practice from the beginning of Chosŏn until even after the Ming had fallen in China and been replaced by the Manchu regime of Qing. In some constitutional disputes they were also held up as authority, especially when domestic laws were unclear.

120) *See* Hahm, *supra* note 56, at 236-37.

121) For a description of reinterpretations and modifications of the ancient rituals by Zhu Xi and his predecessors, see generally Patricia B. Ebrey, Confucianism and Family Rituals in Imperial China (1991).

The rationale for according such respect to the Chinese practice was not simply related to considerations of international politics such as the fact that China was the more powerful of the two nations. Confucian theory itself dictated a certain respect for the "institutions of the current king" (*siwang ji je*; Chinese: shiwang *zhi zhi*).[122] Although they might not be as worthy as the ancient sage kings, there was a theoretical presumption (however unjustifiable in reality) that the current occupant of the throne would be the legitimate recipient of the Heaven's Mandate to rule,[123] and this in turn made his institutions presumptively worthy of some consideration. If we count this as another source of authority in Confucian political discourse, it might be regarded as the fourth principle of Chosŏn constitutionalism.

In practice, however, this demand for respecting the Ming practice was always tempered by the awareness that Korea was in important ways very different from China. Some Korean scholar-officials criticized some of the Ming practice for misunderstanding the way of the former kings. Others even claimed that some laws and institutions of the Ming were "corrupt" because they originated not from the ancient sage kings but from degenerate tyrants of later generations.[124] Nevertheless, Chosŏn government continued to accord presumptive weight to the institutions of Ming.

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122) According to Zhu Xi, the reason why Confucius chose to preserve and follow the practices of the Zhou dynasty was because for Confucius they represented the "institutions of the current king" (*shiwang zhi zhi*). Zhu Xi, Sishu Zhangju Jizhu [Collected Commentaries on the Four Books in Chapters and Verses] 36 (Zhonghua Shuju edition 1983) (commentary on Chapter 28 of *Zhongyong* [Doctrine of the Mean]).

123) According to the theory of the Mandate of Heaven, a political ruler had a right to rule only because Heaven had given him a Mandate, the implication being that Heaven could always revoke the Mandate and give it to someone else if the current ruler was not worthy of it. In the Confucian classic, the *Book of Documents*, this theory is invoked numerous times by the Duke of Zhou to justify Zhou's conquest of the Shang dynasty (1766-1122 B.C.). The Shoo King [Shu Jing] 425-32, 453-63, 492-507 (James Legge trans., reprint ed. 1991) (1865). For discussions on the idea of the Mandate of Heaven, see Creel, *supra* note 98, at 81-100 (1970); Benjamin I. Schwartz, The World of Thought in Ancient China at 46-55 (1985). Though sometimes discussed as a Confucian analogue to the Western idea of natural law, and often mentioned for its potential for restraining the power of the ruler, it seems to have been used throughout history more often in a retrospective manner, to legitimize the rule of a new ruler or a newly founded dynasty, rather than as a constitutional argument for disciplining the ruler. For a summary of views that regard the Mandate of Heaven as a functional analogue of natural law, see William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 Tex. L. Rev. 915, 935-37 (1986).

124) For example, during the Ritual Controversy of 1659, one side argued that the Ming regulation relied on by their opponents was unworthy of respect because it originated from the period of the evil usurper Empress Wu (Wu Zetian) (r. 690-705) of Tang dynasty China.

In sum, Chosŏn Confucians seeking to discipline the ruler could avail themselves of a number of discursive principles, which manifested different aspects of the authority of tradition. The fact that there were no guidelines as to how to prioritize them or which should take precedence in case their requirements were mutually inconsistent should not lead us to regard them as mere rhetorical formulae. They defined the terms of the Chosŏn constitutional discourse, and through their interaction they produced a political culture in which the authority of tradition had to be adduced in the form of some concrete provision or precedent.

VI. Conclusion

The main argument of this article has been that constitutionalism is actually not a novel development in the history of Korea. To support that claim, I have described how Koreans of Chosŏn dynasty tried to implement constitutionalism, and what resources and discursive principles were available to them. Yet, despite this historical experience in conducting constitutional politics, Korea during the past century has undergone such a profound change that the modern constitutionalism that is being slowly implemented by the Korean Constitutional Court is quite different from the Chosŏn dynasty's Confucian constitutionalism. In a way, there *was* a radical break from the past, and it is hard to find traces of the Chosŏn constitutionalism in the present.

Without intending to belittle the profundity of the change that took place, however, I submit that it is still important to understand that Koreans have known and aspired to practice constitutionalism for many centuries. This is so because in order to practice the modern type of constitutionalism correctly and effectively, Koreans must be able to draw on their history and culture, for constitutionalism in the end depends on the existence of a certain culture, or shared symbols and strategies for action, which make discipline of power possible.[125] Without a culture and a tradition to support it and to hark back to, Korean constitutionalism will always remain a "derivative" practice, an

125) Lawrence W. Beer, *Introduction to* Constitutional Systems In Late Twentieth Century Asia 1, 16 (Lawrence W. Beer ed., 1992) (constitution of a state must be connected with "the most important, most binding ideas at the heart of that culture"). *See generally* Political Culture and Constitutionalism (Daniel P. Franklin & Michael J. Baun eds., 1995).

epiphenomenon dependent on the constitutional experience of Germans or Americans.[126]

The importance of cultural support for a flourishing constitutionalism points to another aspect of constitutionalism as the practice of disciplining power, namely, that constitutionalism is very much an educative project. It is in fact educative in a double sense. First, it is educative in the sense that constitutionalism requires educating citizens about their constitutional tradition and culture.[127] It requires citizens who are socialized into a constitutional culture. This in turn calls for conscious efforts to highlight and interpret the national culture in constitutional terms. I submit that Korean tradition and culture has many elements which conduces to the disciplining of political power. For example, the Confucian tradition of institutionalized remonstrance is something that is very familiar to every Korean.[128] More generally, as mentioned above, Chosŏn was a period in which the throne was constantly checked and even browbeaten by the ministers. In other words, contrary to the popular view which portrays Korean culture and tradition as having inhibited the growth constitutionalism, I believe there are many historical and symbolic resources that can be mobilized to educate modern Koreans about their constitutionalist tradition.

Secondly, constitutionalism is educative in the sense that the experience of living under a constitutional regime will have a formative effect on the characters of the citizens.[129] As mentioned earlier, the activities of the Korean Constitutional Court is

126) Given that an overwhelming majority of Korea constitutional law scholars are German-trained, the German influence on Korean constitutional law scholarship needs no elaboration. For the relatively smaller, though by no means negligible, influence that American constitutionalism has had on modern Korea, see Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. Ill. U. L.J. 71 (1997).

127) This need for educating citizens is not limited to what I have called the "formative" approach to constitutionalism. Even in the U.S., where the Newtonian approach is said to be prevalent, this need has always been recognized. On the American experience with educating constitutional citizens, see Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy (1999).

128) By institutionalized remonstrance, I am referring to the role of the censorate in Chosŏn government alluded to above. *See supra* note 85. It is interesting to note that under the so-called "modern" government structure instituted by the Kabo Reforms, the office of the censorate was abolished. The rationale seems to have been that the office of the censorate was contributing to factional strife within the government. Yet, it is still ironic that at the beginning of modern constitutionalism in Korea, one of the major organs responsible for disciplining power was eliminated.

129) Stephen L. Elkin, *Constitutionalism's Successor, in* A New Constitutionalism 117, 122-24 (Stephen L. Elkin & Karol E. Soltan eds., 1993) (discussing the formative function of institutions).

having a transformative effect on the citizens outlook. Seeing that the discretionary power of the prosecutors is subject to constitutional limitations, or that the government cannot claim a privileged status in its relation to ordinary citizens have contributed to educating the people about their rights and roles as citizens of a constitutional regime. In the U.S., the famous constitutional law scholar Alexander Bickle has noted that the U.S. Supreme Court should play the role of a teacher in an "national seminar" on constitutionalism.[130)]

I believe that, if constitutionalism is to take root and flourish in Korea, this doubly educative aspect of constitutionalism must be taken seriously. If Koreans are able to combine an understanding of constitutionalism as disciplining of power with a proper understanding of the constitutionalist elements in their tradition and culture, they will have at their disposal a particularly rich cultural resource from which to draw.

One such resource is the concept of ritual (*ye*), which was described above as a constitutional norm of Chosŏn dynasty. Although Korea is no longer an officially Confucian state, ritual is still a very important and familiar concept to modern Koreans. It still provides the means by which Koreans interpret and evaluate each other. People learn to relate to one another and define one's place in family and society in terms of *ye*. A person who does not observe *ye* properly becomes a social outcast. Recently, even the Korean Constitutional Court had an occasion to note the important role played by *ye* in Korean society.[131)]

Given this centrality of ritual norms in Korea, it can help promote a constitutional culture among Koreans. This is because *ye* is essentially an educative norm. All Koreans understand that to be proficient in *ye* in interpersonal relationship, one must undergo a constant process of training and cultivation of a sense of what is proper to do in a given situation. *Ye* is about education and self-discipline. Unfortunately, it has become de-politicized today so that its historical role of disciplining political rulers has

130) Bickel, *supra* note 39, at 26. In a similar vein, one historian of the Court has said that one of its important function since the American founding has been that of a "Republican Schoolmaster." Ralph Lerner, *The Supreme Court as Republican Schoolmaster, in* The Thinking Revolutionary 91 (1987).

131) 98 heonma 168, 10-2 Hŏnpŏpjaep'anso Pallyejip 586 (Oct. 15, 1998) (holding unconstitutional a provision in the Law of Family Ritual Standards which criminalized the practice of serving "unreasonable" amount of food and drinks at weddings). The Court criticized the government for attempting to "legislate" morals and manners by imposing legal penalties. The Court also commented that traditional family rituals like weddings and funerals are part of the nation's cultural heritage which the state has a duty to sustain and develop.

been largely forgotten.

I believe constitutionalism in Korea today will be given a firmer cultural grounding when this aspect of *ye* is retrieved and translated into the modern context. The goal would be a cultural awareness that being adept at the requirements of *ye* means not only being courteous to others, but also having the ability to discipline political leaders. Korean constitutionalism will flourish when citizens of Korea are able to make an outcast of a political leader who fails to observe the requirements of *ye*, when a government that fails to be disciplined in the exercise of its power will automatically be regarded as illegitimate. When Korean Constitutional Court is able to speak about *ye* in terms of its original constitutional role, and not just in terms of its ceremonial aspects, I believe constitutionalism in Korea will cease being a derivative practice.

New Conflict of Laws Act of the Republic of Korea

*Kwang Hyun SUK**

I. Introduction

The Law amending the Conflict of Laws Act of The Republic of Korea("Korea"), which had taken two years to prepare, was promulgated on April 7, 2001 and finally took effect as of July 1, 2001. The name of the Conflict of Laws Act has been changed from "*Seoboesabeop*" to "*Gukjesabeop*". In fact the Old conflict of laws Act("Old Act") was promulgated in 1962. However, since the Old Act was modelled after the German Private International Law (*EGBGB*) and the Japanese International Law (*Horei*) which had been promulgated toward the end of the 19th century, the Old Act was viewed as outdated from the moment of its promulgation. Now at the beginning of the new Millennium one can say that through the promulgation of the New conflict of laws Act("New Act"), Korea has succeeded in reflecting in its codification substantial parts of the major developments of the private international law which the advanced countries achieved during the last century.

The purpose of this memo is to make a brief presentation of the New Act without discussing its individual provisions. An English language translation of the New Act prepared by myself is attached at the end of this memo.

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II. Salient Features of the New Act Compared with the Old Act

A. Change of the Structure

The Old Act had 47 articles under the following three chapters: "General Provision," "Provisions on Civil Matters," and "Provisions on Commercial Matters." The New Act rearranged the existing provisions together with new provisions and has in total 62 articles under the following nine chapters: "General Provisions," "Person," "Juridical Act," "Rights in rem (Real Rights)," "Claim (*chaekwon*)," "Kinship," "Succession," "Promissory Note · Bill of Exchange · Check," and "Maritime Matters."

Chapter 3 of the Old Act, namely "Provisions on Commercial Matters" consisted of "Special Provisions on Commercial Matters," "Provisions on Promissory Note · Bill of Exchange · Check" and "Provisions on Maritime Matters." Since the Special Provisions on Commercial Matters were heavily criticized as unnecessary and unreasonable, most of those provisions have been deleted and several surviving provisions such as Articles 29 and 31 of the Old Act were moved to the relevant chapters of the New Act, with some modifications.

B. Orientation Toward a Complete Conflict of Laws Act and Filling of Lacunae

The Old Act was not complete since it did not have any express provisions on capacity of natural person, legal person or association, voluntary agency, means of transportation, *res in transitu,* security interest on claim (*chaekwon*), intellectual property, transfer of claim (*chaekwon*) by operation of law, assumption of obligations, legitimation, etc. By introducing new provisions on governing laws of the foregoing subject matters, the New Act purports to enhance legal certainty and predictability, and has made a step forward toward a more complete private international law regime of Korea.

C. Equal Treatment of Men and Women in Conflict of Laws Act

As to the area of international family law, the Old Act was criticized for violating the principle of equality between men and women, one of the paramount principles

guaranteed by the Constitution of Korea because it designated as governing law the *lex patriae* of the husband with respect to the effect of marriage (Article 16), the matrimonial property regime (Article 17) and divorce (Article 18), and the law of father with respect to the legal relationship between parents and child (Article 22).

In order to be consistent with the principle of equality between men and women, the New Act has designated firstly the common *lex patriae* of the spouses, secondly the law of the common habitual residence, and otherwise removed the factors which may be viewed as discriminatory against women, thereby eliminating the possibility of unconstitutionality (Articles 37 to 39).

D. Expansion of Provisions on International Jurisdiction

The settled court decisions and majority views of Korean legal commentators have taken the position that Korea has no written law regulating international jurisdiction to adjudicate. In fact the rules on international jurisdiction to adjudicate have been mainly developed by a series of court decisions. The Old Act contained provisions on international jurisdiction, but only in a limited number of noncontentious matters, such as quasi-incompetency and incompetency, declaration of disappearance and guardianship. However, the New Act introduced in Chapter 1 (General Provisions) a new provision (Article 2 which sets forth general principles on international jurisdiction to adjudicate) and in Chapter 5 (Claims) special provisions to protect the interests of consumers and employees who are regarded as socio-economically weaker parties (Articles 27 and 28).

It is true that the provisions on international jurisdiction to adjudicate of the New Act are not complete and only fragmentary. However, legislators have intentionally done so and the provisions on international jurisdiction to adjudicate are expected to be supplemented or completed in due course by subsequent legislation.

E. Strengthening of "the closest relationship" Principle

The New Act designates as governing law the law of the country which has the closest connection with the various subject matters. For example, in determining the objective governing law of an international contract, the New Act has replaced the mechanical "place of conclusion of contract principle" with designating as governing

law the law of the country which has the closest connection with the contract (Article 26). Other examples are Article 32, Paragraph 2 which provides that tort shall be governed by the law of the country of the common habitual residences of the tort feasor and the victim if they had their habitual residences there, and the so called accessory connection (Article 30, Paragraph 1, proviso of Article 31 and Article 32, Paragraph 3) which provides that management of affairs without mandate, unjust enrichment or tort shall be subject to the governing law of the existing legal relationship between the parties if such causal event has occurred with respect to such legal relationship.

In addition, the New Act purports to strengthen "the closest relationship" principle by introducing a general exception clause (Article 8) which requires a Korean court to apply the law of the country which clearly has the closest connection with the case if the application of rules of the New Act would lead to a result inconsistent with the closest connection principle. The exception clause has been modeled after Article 15 of the Swiss Private International Law.

F. Introduction of Flexible Connecting Principles

The Old Act provided for an alternative connection only with respect to the form of juridical act and did not provide for a so called subsidiary or cascade connection. However, the New Act has diversified connecting factors by expanding the alternative connection with respect to the form of juridical act and by newly introducing (1) the alternative connection with respect to the formation of relationship between parent and legitimate child, and parent and illegitimate child (Articles 40 and 41), to legitimation (Article 42), and to the form of will (Article 50, Paragraph 3), and (2) the subsidiary or cascade connection with respect to the general effect of marriage (Article 37) and the matrimonial property regime (Article 38), thereby enabling more flexibility in determining connection by courts.

In addition, the New Act has expanded the scope of application of renvoi (Article 9). Unlike the Old Act which permitted remission only when the lex patriae of a person is designated as governing law, the New Act permits the remission generally save certain exceptions. However, the transmission is still not permitted except for the capacity of a person to bind himself by a bill of exchange, promissory note or check (Article 51, Paragraph 1), which was also the case under the Old Act. The rationale

behind the expansion of permissibility of renvoi is to afford more flexibility to courts in determining the governing law in a particular case at hand, and that courts will be able to apply Korean law, thereby being relieved from the burden of examining and proving foreign law in case the remission is permitted.

G. Maintenance of Principle of Lex Patriae and Introduction of Habitual Residence as a New Connecting Factor

The New Act maintains in principle the principle of *lex patriae* in the area of personal status, family law and inheritance law. However, the New Act has diversified the connecting factors in an effort to follow the international trends in the relevant area. For example, the New Act has introduced the law of the common habitual residence of the spouses as a subsidiary connecting factor with respect to the general effect of marriage (Article 37), the matrimonial property regime (Article 38) and divorce (Article 39). The New Act also has introduced the habitual residence of the testator as an alternative connecting factor with respect to the form of a will (Article 50, Paragraph 3).

H. Consideration of the Value of Substantive Law

Following the ideals of traditional conflict of laws principles, the Old Act only designated governing laws that are geographically most closely connected with the case at hand and was not concerned about the content of the substantive law so designated. However, the New Act has introduced some special connecting principles in order to further the interests and welfare of children, and to protect the interests of consumers and employees who are generally regarded as socio-economically weaker parties. This means that the New Act takes into account the value of substantive laws and that such value has been elevated to the level of the conflict of laws.

For example, as a means of promoting the interests of child, the establishment of relationship between a parent and an illegitimate child, and legitimation may now be governed by the law of the habitual residence of the child (Articles 41 and 42). As a means of protecting the interests of consumers and employees, a choice of law made by the parties cannot deprive the consumer or the employee of the protection afforded to him by the mandatory rules of the law of the country in which (in the case of

consumer) he has his habitual residence or (in the case of employee) the employee habitually carries out his work (Articles 27 and 28). The New Act has also introduced special rules on international jurisdiction to adjudicate to protect the interests of the consumers and employees.

In addition, as a means of protecting the maintenance (or support) creditor, the New Act designates as governing law of maintenance obligations the law of the habitual residence of the maintenance creditor rather than the maintenance debtor, in clear contrast to the Old Act. Moreover, the New Act enables the maintenance creditor to receive maintenance by way of a so called corrective connection whereby if the creditor is unable to obtain maintenance from the debtor by virtue of the law of his habitual residence, the creditor has an option to resort to the law of their common nationality (Article 46, proviso of Paragraph 1).

I. Expansion of Party Autonomy

The Old Act permited party autonomy only in the context of international contracts. However, the New Act has introduced party autonomy in the context of international family law and inheritance law such as matrimonial property regime (Article 38) and inheritance (Article 49). In addition, even in the case of management of affairs without mandate, unjust enrichment and tort, parties are also allowed to agree upon a governing law after occurrence of the event (Article 33). On the contrary, in the case of consumer contracts and individual employment contracts the New Act restricts party autonomy to a certain extent in order to protect the socio-economically weaker parties (Articles 27 and 28).

J. Consideration of International Conventions

In the field of international contracts, the New Act seeks international decisional harmony by incorporating key provisions of the "Convention on the Law Applicable to Contractual Obligations of the European Community" of 1980 (the "Rome Convention") and the "Inter-American Convention on the Law Applicable to International Contracts" of 1994 (Articles 17, 25 *et seq.*). In addition, the New Act also incorporated substantial parts of the "Convention on the Law Applicable to Maintenance Obligations" of 1973 and the "Convention on the Conflicts of Laws

Relating to the Form of Testamentary Dispositions" of 1961, both adopted by the Hague Conference on Private International Law (Article 46 and Article 50, Paragraph 3).

With respect to international jurisdiction to adjudicate, the New Act has considered the relevant provisions of the "Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of the European Community" of 1968, as amended by the Council Regulation, the Lugano Convention and the Preliminary Draft of the "Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters," which is currently under negotiation on a worldwide basis (Article 27, Paragraphs 4 to 6 and Article 28, Paragraphs 3 to 5).

III. Conclusion

The New Act is a product of the efforts to eliminate the existing problems of the Old Act and to adapt the Korean private international law regime to international conventions and national laws of advanced countries by modernizing the rather outdated Old Act. Unlike the Old Act which was heavily dependent upon the Japanese Private International Law (*Horei*), the New Act has been prepared by taking into full account the Rome Convention, the Swiss Private International Law, the German Private International Law and various conventions adopted by the Hague Conference on Private International Law. Therefore, the New Act has substantially reduced dependence upon the Japanese Private International Law. It is hoped, and I am personally confident, that the New Act will be able to achieve its intended objectives in the 21st century as the basic law for the ever-increasing legal relationships with foreign element.

[Translation] [1)]

Law Number 6465

The Act amending the Conflict of Laws Act

The Conflict of Laws Act shall be amended as follows:

Conflict of Laws Act (*Gukjesabeop*)

CHAPTER I GENERAL PROVISIONS

Article 1 (Purpose)

The purpose of this Act is to set forth the principles of the international jurisdiction to adjudicate, and to determine the governing law, with regard to the legal relationship which has a foreign element.

Article 2 (International Jurisdiction to Adjudicate)

(1) The courts shall have international jurisdiction to adjudicate if the parties or the case in dispute has substantial connection with The Republic of Korea. In determining whether or not there is such substantial connection, the courts shall follow the reasonable principles which are in conformity with the ideals of the allocation of international jurisdiction to adjudicate.

(2) The courts shall determine whether or not they have international jurisdiction to adjudicate by reference to the provisions on jurisdiction of domestic laws; provided, however, that they shall fully take into consideration the special nature of international jurisdiction to adjudicate in light of the provisions of paragraph (1).

Article 3 (*Lex Patriae*)

(1) If, in cases where the *lex patriae* of a party concerned shall govern, the party concerned has two or more nationalities, the *lex patriae* shall be the law of the country with which he has the closest connection; provided, however, that if one of such nationalities is that of The Republic of Korea, the law of The Republic of Korea shall be his *lex patriae.*

(2) In cases where a person has no nationality or it is impossible to ascertain his

1) Translated by the author (Kwang Hyun SUK).

nationality, the law of the country where he has his habitual residence (hereinafter referred to as the "Law of Habitual Residence") shall govern and if it is impossible to ascertain his habitual residence, the law of the country where he has his residence shall govern.

(3) With regard to a national of a country that has various local laws, the law designated by the relevant choice of law rules of that country and, if there are no such rules, the law of the local district with which he has the closest connection shall govern.

Article 4 (Law of Habitual Residence)

If, in cases where the Law of Habitual Residence of a party concerned shall govern, it is impossible to ascertain his habitual residence, the law of his residence shall govern.

Article 5 (Application of Foreign Law)

The courts shall examine and apply *ex officio* the content of the foreign law which has been designated by this Act and for this purpose may request the parties' cooperation therefor.

Article 6 (Scope of Governing Law)

The application of provisions of the foreign law, which is designated as governing law by this Act shall not be excluded for the sole reason that it has the nature of public law.

Article 7 (Mandatory Application of Korean Law)

Provisions of mandatory law of The Republic of Korea which in view of their legislative purpose must be applied irrespective of the governing law, shall be applicable even if a foreign law is designated as governing law by this Act.

Article 8 (Exception to the Designation of Governing Law)

(1) If the governing law designated by this Act has only a slight connection with the related legal relationship, and it is evident that there is a law of another country which has the closest connection with the legal relationship, the law of that other country shall apply.

(2) Provisions of paragraph (1) shall not be applicable where the parties have chosen a governing law by their agreement.

Article 9 (*Renvoi* in the case of Designation of Governing Law)

(1) If, in cases where a foreign law is designated as governing law by this Act, the law of such country provides that the law of The Republic of Korea shall govern, then the law of The Republic of Korea (other than that on determination of governing law) shall govern.

(2) Provisions of paragraph (1) shall not apply in any of the following cases:

1. where the governing law is chosen by the parties' agreement;
2. where the governing law of a contract is designated by this Act;
3. where the governing law of maintenance obligations is designated by the provisions of Article 46;
4. where the governing law of the form of will is designated by the provisions of Article 50, Paragraph (3);
5. where the law of the country of registration of a ship is designated by the provisions of Article 60; or
6. where the application of the provisions of paragraph (1) is against the purpose of the designation under this Act.

Article 10 (Provisions of Foreign Law Contrary to Public Order)

The application of provisions of a foreign law is excluded if such application is manifestly incompatible with the good morals and other public order of The Republic of Korea.

CHAPTER II PERSON

Article 11 (Capacity to Have Rights)

The capacity to have rights of a person shall be governed by his *lex patriae.*

Article 12 (Declaration of Disappearance)

If it is not clear whether a foreigner is alive or dead, the court may issue a declaration of disappearance under the laws of The Republic of Korea only when he has any property in The Republic of Korea, there is any legal relationship that is to be

governed by the laws of The Republic of Korea or there is any legitimate reason therefor.

Article 13 (Capacity to Act)

(1) The capacity to act of a person shall be governed by his *lex patriae.* The same shall apply where the capacity to act is expanded by marriage.

(2) The capacity to act which has been already acquired shall not be deprived or restricted by change of nationality.

Article 14 (Declaration of Quasi-Incompetency and Incompetency)

The court may issue a declaration of quasi-incompetency or incompetency under the laws of The Republic of Korea against a foreigner having his habitual residence or residence in The Republic of Korea.

Article 15 (Protection of Transactions)

(1) If a person who effects a juridical act and the opposite party are in the same country, a person who would have capacity under the law of that country cannot invoke his incapacity resulting from his *lex patriae* unless the other party was, or could have been, aware of his incapacity at the time of the juridical act.

(2) The provisions of paragraph (1) shall not apply to the juridical acts under the provisions of the family law or the inheritance law and the juridical acts relating to any real estate located in a country other than the place of juridical act.

Article 16 (Legal Persons and Associations)

Legal persons or associations shall be governed by the law of the country under the laws of which the persons or associations were incorporated or formed. However, the law of The Republic of Korea applies if the head office of the person or association is located in The Republic of Korea or the principal activities of the person or association are engaged in The Republic of Korea.

CHAPTER III JURIDICAL ACT

Article 17 (Form of Juridical Act)

(1) Form of a juridical act shall be subject to the governing law of the act.

(2) A juridical act is formally valid if it satisfies the formal requirements of the law where the act was effected.
(3) If the parties are in different countries at the time of conclusion of a contract, the contract is formally valid if it satisfies the formal requirements of a juridical act of the law of one of those countries.
(4) Where a juridical act is effected by an agent, the country in which the agent acts is the relevant country for the purposes of paragraph (2).
(5) Provisions of paragraphs (2) to (4) shall not apply to the form of a juridical act the subject matter of which is the creation or disposal of a real right or any other right which is subject to registration.

Article 18 (Agency)
(1) The relationship between principal and agent shall be subject to the governing law of the legal relationship between the parties.
(2) Whether or not the principal is bound to a third party by an act of an agent shall be governed by the law of the country in which the agent has his place of business or, if there is none, or if it is not discernable by the third party, by the law of the country in which the agent has actually acted in the particular case.
(3) If the agent is in an employment relationship with the principal and if he has no place of business of his own, the principal place of business of the principal shall be deemed to be the place of business of the agent.
(4) Notwithstanding the provisions of paragraphs (2) and (3), the principal may choose a governing law of agency; provided, however, that in order for the choice of governing law to be effective it must be expressly stated in the document proving the authority of the agent or must be notified in writing to the third party by either the principal or the agent.
(5) Provisions of paragraph (2) shall apply *mutatis mutandis* to the relationship between an agent without authority and a third party.

CHAPTER IV REAL RIGHTS (RIGHTS *IN REM*)

Article 19 (Governing Law of Real Rights)
(1) Real rights concerning immovables and movables and other rights that are subject to registration shall be governed by the law of the site (*lex situs*) of the

subject matter.

(2) Acquisition, loss or change of the rights prescribed in paragraph (1) shall be governed by the law of the site (*lex situs*) of the subject matter at the time of the completion of the causal action or event.

Article 20 (Means of Transportation)

Real rights of aircraft shall be subject to the law of its nationality and real rights of rolling stock shall be subject to the laws of the country approving its traffic service.

Article 21 (Bearer Bond)

Acquisition, loss and change of rights of a bearer bond shall be governed by the law of the site (lex situs) of such bond at the time of the completion of the causal action or event.

Article 22 (*Res in transitu*)

Acquisition, loss and change of real rights of goods in transit (*res in transitu*) shall be governed by the law of the country of destination.

Article 23 (Contractual Security Interest in Claims, etc.)

Contractual security interest in claims (*chaekwon*),[2] shares and other rights, and the securities which embody such claims, shares and other rights shall be governed by the law governing the subject right of such security interest. However, contractual security interest in bearer bonds shall be subject to the provisions of Article 21.

Article 24 (Protection of Intellectual Property Rights)

The protection of intellectual property rights shall be subject to the law where the right has been infringed.

2) "*Chaekwon*" is a Korean counterpart for "*une creance*" in French and "die *Forderung*" in German. [Translator's Note]

CHAPTER V CLAIM (*CHAEKWON*)

Article 25 (Party Autonomy)

(1) A contract shall be governed by the law expressly or impliedly chosen by the parties; provided, however, that existence of an implied choice may be acknowledged only when it is resonable to do so in light of the terms of the contract or the circumstances of the case.

(2) The parties can choose the law applicable to the whole or a part only of a contract.

(3) The parties may at any time agree to change the governing law of a contract, which has been so designated as a result of this Article or Article 26. Any change by the parties of the governing law made after the conclusion of the contract shall not prejudice its formal validity or prejudice the rights of third parties.

(4) Where all the elements relevant to a situation are connected with only one country, the parties' choice of a foreign law shall not exclude the application of mandatory rules of the law of that country.

(5) Provisions of Article 29 shall apply *mutatis mutandis* to the formation and validity of the parties' agreement to choose the governing law.

Article 26 (Objective Connection of Governing Law)

(1) If the governing law of a contract has not been chosen by the parties, the contract shall be governed by the law of the country which has the closest connection with the contract.

(2) It shall be presumed that the contract has the closest connection with the country where the party who is to effect one of the following performances has, at the time of conclusion of the contract, his habitual residence (in the case of a legal person or association, with the country where the party has its principal place of business); provided, however, that if the contract is entered into in the course of a party's profession or business activity, that country shall be the country in which the place of business of that party is situated:

1. in contracts to transfer, the performance of the transferor;
2. in contracts to grant the use of a thing or a right, the performance of the party that grants the use; or
3. in mandate contracts, contracts for completion of work and other similar

contracts for services, the performance of the party providing services.

(3) If the subject matter of the contract is a right in immovables, the law of the country where the immovable is situated is presumed to have the closest connection with the contract.

Article 27 (Consumer Contracts)

(1) If a contract which a consumer enters into for a purpose which can be regarded as being outside his profession or business activity falls into any one of the following cases, a choice of law made by the parties cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

1. where in that country the conclusion of the contract was preceded by professional or business activities including soliciting business through publicity that the other party has engaged in or directed to that country, and the consumer had taken in that country steps necessary for the conclusion of the contract;
2. where the other party received the consumer's order in that country; or
3. where the other party arranged for the consumer's journey to a foreign country for the purpose of inducing the consumer to order.

(2) Notwithstanding the provisions of Article 26, a contract to which paragraph (1) of this Article is applicable shall, be governed by the law of the country in which the consumer has his habitual residence.

(3) Notwithstanding the provisions of Article 17, paragraphs (1) to (3), a contract to which paragraph (1) of this Article is applicable shall, be governed by the law of the country in which the consumer has his habitual residence.

(4) In the case of a contract to which paragraph (1) of this Article is applicable, a consumer may also bring an action in the country in which he has his habitual residence.

(5) In the case of a contract to which paragraph (1) of this Article is applicable, an action against the consumer may only be brought by the other party in the country in which the consumer has his habitual residence.

(6) The parties to a contract to which paragraph (1) of this Article is applicable may, by a written agreement, enter into an agreement on international jurisdiction to adjudicate; provided, however, that such agreement is effective

only when it falls under any one of the following:

1. where such agreement is entered into after the dispute has arisen; or
2. where it allows the consumer to bring an action in another court in addition to the courts which have jurisdiction under this Article.

Article 28 (Employment Contract)

(1) In the case of an employment contract a choice of law made by the parties cannot deprive the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under the provisions of paragraph (2).

(2) Notwithstanding the provisions of Article 26, an employment contract shall, in the absence of choice of governing law by the parties, be governed by the law of the country in which the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated.

(3) In the case of an employment contract, an employee may also bring an action against the employer in the country in which the employee habitually carries out his work or in the last country in which he did so, or, if the employee does not or did not habitually carry out his work in any one country, in the country in which the place of business through which the employee was engaged is or was situated.

(4) In the case of an employment contract, an action against an employee may be brought by the employer only in the country where the employee has his habitual residence, or in the country in which the employee habitually carries out his work.

(5) The parties to an employment contract may, by a written agreement, enter into an agreement on international jurisdiction to adjudicate; provided, however, that such agreement is effective only when it falls under any one of the following:

1. where such agreement is entered into after the dispute has arisen; or
2. where it allows the employee to bring an action in another court in addition to the courts which have jurisdiction under this Article.

Article 29 (Formation and Validity of Contract)

(1) The formation and validity of a contract shall be determined by the law which

would govern it under this Act if the contract were valid.

(2) Nevertheless a party may recourse to the law of the country in which he has his habitual residence to establish that he did not consent to the contract if it is evident from the circumstances that it would be clearly unreasonable to determine the effect of his conduct in accordance with the law set forth in paragraph (1).

Article 30 (Management of Affairs without Mandate)

(1) Management of affairs without mandate shall be governed by the law of the country in which the management took place. However, if management of affairs without mandate has been effected based upon a legal relationship between the parties, it shall be subject to the governing law of the legal relationship.

(2) Claims resulting from payment of other person's obligations shall be subject to the governing law of the obligations.

Article 31 (Unjust Enrichment)

Unjust enrichment shall be governed by the law of the country in which the enrichment took place. However, if unjust enrichment has resulted from a performance effected based upon a legal relationship between the parties, it shall be subject to the governing law of the legal relationship.

Article 32 (Tort)

(1) Tort shall be governed by the law of the place where the event has occurred.

(2) Notwithstanding the provisions of paragraph (1), if the tort feasor and the victim had, at the time of tort, their habitual residences in the same country, tort shall be governed by the law of that country.

(3) Notwithstanding the provisions of paragraphs (1) and (2), if an existing legal relationship between the tort feasor and the victim is violated by the tort, the tort shall be governed by the law which is applicable to the legal relationship.

(4) In cases where a tort is governed by foreign law by provisions of paragraphs (1) to (3), damages based upon a tort shall not be awarded if the nature of the damages is clearly not for appropriate compensation for damage to the victim, or to the extent the damages is substantially in excess of appropriate

compensation for damage to the victim.

Article 33 (Subsequent Agreement on Governing Law)

Notwithstanding the provisions of Articles 30 to 32, the parties may agree, after an event constituting the management of affairs without mandate, unjust enrichment or tort has taken place, that such event shall be subject to the law of The Republic of Korea; provided, however, that rights of third parties shall not be prejudiced by such agreement.

Article 34 (Contractual Assignment of Claim (*Chaekwon*) and Assumption of Obligations)

(1) The legal relationship between assignor and assignee of a contractual assignment of a claim(*chaekwon*) shall be governed by the law which governs the contract between the assignor and assignee. However, the law governing the claim (*chaekwon*) to be assigned shall determine its assignability and the effect of assignment as against the debtor and third parties.

(2) Provisions of paragraph (1) shall apply *mutatis mutandis* to assumption of obligations.

Article 35 (Transfer of Claim (*Chaekwon*) by Operation of Law)

(1) The transfer of a claim (*chaekwon*) by operation of law shall be subject to the law which governs the underlying legal relationship between the old and the new creditors based upon which the transfer takes place. However, if there is any provision in the law governing the claim to be assigned which protects the debtor, such provision shall apply.

(2) If there is no such legal relationship referred to in paragraph (1), the transfer of a claim (*chaekwon*) by operation of law shall be subject to the law which governs the claim (*chaekwon*).

CHAPTER VI KINSHIP

Article 36 (Formation of Marriage)

(1) The requirements for the formation of a marriage shall be governed by the *lex patriae* of each of the parties.

(2) The form of a marriage ceremony shall be governed by the law of the place where the marriage ceremony takes place or the *lex patriae* of any one of the parties. However, if, in cases where the marriage ceremony takes place in The Republic of Korea, one of the parties is a national of The Republic of Korea, the form of a marriage ceremony shall be governed by the law of The Republic of Korea.

Article 37 (General Effect of Marriage)

The general effect of a marriage shall be governed by the law in the following order:

1. the same *lex patriae* of the spouses;
2. the law of the same habitual residence of the spouses; and
3. the law of the place with which the spouses have the closest connection.

Article 38 (Matrimonial Property Regime)

(1) Provisions of Article 37 shall apply *mutatis mutandis* to matrimonial property regime.

(2) Notwithstanding the provisions of paragraph (1), if the spouses choose, by their agreement, any one of the following laws, the matrimonial property regime shall be governed by the law chosen by the spouses; provided, however, that the agreement must be executed in writing and be affixed with the date and name and seal or signature of the spouses:
   1. the law of nationality of one of the spouses;
   2. the law of habitual residence of one of the spouses; or
   3. as regards matrimonial property regime concerning immovables, the law of site of the immovable.

(3) The matrimonial property regime under foreign law may not be enforceable against *bona fide* third parties with respect to juridical act effected in The Republic of Korea or the property located in The Republic of Korea. In this case, to the extent the matrimonial property regime under foreign law cannot be applied, the matrimonial property regime as against third parties shall be governed by the law of The Republic of Korea.

(4) Notwithstanding the provisions of paragraph (3), the matrimonial property contract entered into under foreign law may be enforceable against *bona fide*

third parties if it is registered in The Republic of Korea.

Article 39 (Divorce)

Provisions of Article 37 shall apply *mutatis mutandis* to divorce. However, if one of the spouses is a national of The Republic of Korea having a habitual residence in The Republic of Korea, divorce shall be governed by the law of The Republic of Korea.

Article 40 (Relationship between Parent and Legitimate Child)

(1) The formation of a relationship between a parent and a legitimate child shall be governed by *lex patriae* of one of the parents at the time of the birth of the child.

(2) If the husband has died before the birth of the child, the *lex patriae* of the husband at the time of his death shall be deemed as his *lex patriae* for the purpose of paragraph (1).

Article 41 (Relationship between Parent and Illegitimate Child)

(1) The formation of a relationship between a parent and an illegitimate child shall be governed by the law of the mother at the time of the birth of the child. However, the formation of parent and child relationship between the father and the child may also be governed by the law of the *lex patriae* of the father at the time of the birth of the child or the law of the current habitual residence of the child.

(2) The recognition may also be governed by the *lex patriae* of the person recognizing the child in addition to the laws set forth in paragraph (1).

(3) In the case of paragraph (1), if the father has died before the birth of the child, the *lex patriae* of the father at the time of his death shall be deemed as his *lex patriae*, and in the case of paragraph (2), if the person recognizing the child has died before the recognition, the *lex patriae* of the person at the time of his death shall be deemed as his *lex patriae.*

Article 42 (Legitimation of Illegitimate Child)

(1) The matters relating to whether an illegitimate child is changed to a legitimate child shall be governed by the *lex patriae* of the father or mother, or the law of the habitual residence of the child at the time of the completion of the event

which causes the legitimation.

(2) In the case of paragraph (1), if the father or mother has died before the completion of the event which causes the legitimation, the *lex patriae* of the father or mother at the time of his or her death shall be deemed as his or her *lex patriae.*

Article 43 (Adoption and Its Dissolution)

Adoption and its dissolution shall be governed by the *lex patriae* of the adoptive parent at the time of the adoption.

Article 44 (Consent)

If the law of the *lex patriae* of the child requires a consent or approval of the child or a third party with respect to the formation of the parent and child relationship under the provisions of Articles 41 to 43, such requirement must also be satisfied.

Article 45 (Legal Relationship between Parent and Child)

The legal relationship between a parent and a child shall be governed by the law of the *lex patriae* of the child if it is also the *lex patriae* of both the father and mother, and in other cases it shall be governed by the law of the habitual residence of the child.

Article 46 (Maintenance)

(1) Maintenance obligations shall be governed by the law of the habitual residence of the maintenance creditor. However, if the maintenance creditor is unable to obtain maintenance from the debtor by virtue of such law, the law of their common nationality shall apply.

(2) Notwithstanding the provisions of paragraph (1), the law applied to a divorce shall, if such divorce has been effected, or has been recognized, in The Republic of Korea, govern the maintenance obligations between the divorced spouses.

(3) In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the law of the debtor's habitual residence.

(4) If the creditor and the debtor are both nationals of The Republic of Korea and if

the debtor has his habitual residence in The Republic of Korea, the law of The Republic of Korea shall apply to the maintenance obligations.

Article 47 (Other Kinship)

Formation of, and the rights and obligations arising from, the kinship shall be governed by the *lex patriae* of each party concerned, unless otherwise set forth in this Act.

Article 48 (Guardianship)

(1) Guardianship shall be governed by the *lex patriae* of the ward.

(2) The guardianship for a foreigner who has his habitual residence or residence in The Republic of Korea shall be governed by the law of The Republic of Korea only in any of the following cases:

1. where there is no person to perform the duties of guardianship even if the causes for commencement of guardianship exist under the *lex patriae* of the ward or the person to perform the duties of guardianship cannot actually perform his duties;
2. where a declaration of quasi-incompetency or incompetency has been issued in The Republic of Korea; or
3. where there is an otherwise urgent need to protect the ward.

CHAPTER VII INHERITANCE

Article 49 (Inheritance)

(1) Inheritance shall be governed by the *lex patriae* of the deceased at the time of his death.

(2) Notwithstanding the provisions of paragraph (1), if the deceased has selected, by any form which is applicable to a will, one of the following laws as the governing law, inheritance shall be governed by such law:

1. the law of a country in which the deceased had his habitual residence at the time of designation. Such designation shall be effective only when the deceased has maintained until his death his habitual residence in that country; or
2. as regards inheritance of immovables, law of the place where they are situated.

Article 50 (Will)

(1) A will shall be governed by the *lex patriae* of the testator at the time when he made the will.

(2) The amendment or withdrawal of a will shall be governed by the *lex patriae* of the testator at the time of the amendment or withdrawal of the will.

(3) The form of a will shall be governed by any one of the following:

1. law of a nationality possessed by the testator, either at the time when he made the will, or at the time of his death;
2. law of the place in which the testator had his habitual residence, either at the time when he made the will, or at the time of his death;
3. law of the place where the testator made the will; or
4. as regards a will relating to immovables, law of the place where they are situated.

CHAPTER Ⅷ BILL OF EXCHANGE · PROMISSORY NOTE · CHECK

Article 51 (Capacity to Act)

(1) The capacity of a person who assumes obligations by a bill of exchange, promissory note, or check shall be governed by the *lex patriae* of such person. If the *lex patriae* provides that such capacity shall be governed by the law of another country, the law of that other country shall apply.

(2) If a person who, under the provisions of paragraph (1), lacks capacity has signed within the territory of another country where he is considered legally capable, he shall be held capable of assuming such obligations.

Article 52 (Qualification for Payer of Check)

(1) The qualification for a person who may become the payer of a check shall be governed by the law of the place of payment.

(2) If a check is invalid because the payer is a person who may not become a payer according to the law of the place of payment, the obligations arising from the signature that was affixed in another country where there are no such provisions shall not be affected.

Article 53 (Form)

(1) The form of act on a bill of exchange, promissory note or check[3] shall be governed by the law of the place of the signature; provided, however, that the form of act on a check may be governed by the law of the place of payment.

(2) If an act is invalid under the provisions of paragraph (1), but such act is legal under the law of the place where a subsequent act is effected, the validity of any subsequent act shall not be affected by the ineffectiveness of the previous act.

(3) If an act on a bill of exchange, promissory note or check that has been effected by a national of The Republic of Korea in a foreign country is invalid under the law of the place where such act was effected, but such act is legal under the law of The Republic of Korea, such act shall be effective as against other nationals of The Republic of Korea.

Article 54 (Effect)

(1) The obligations of the acceptor of a bill of exchange and of the issuer of a promissory note shall be governed by the law of the place of payment, the obligations arising from a check shall be governed by the law of the place of signature.

(2) The obligations under a bills of exchange, promissory note and check of the persons other than those set forth in paragraph (1), shall be governed by the law of the place of signature.

(3) The period allowed for the exercise of a right of recourse on a bill of exchange, promissory note or check shall be governed by the law of the place of issuance of such instrument with regard to all the signatories.

Article 55 (Acquisition of Underlying Claim)

Whether or not the holder of a bill of exchange or promissory note acquires the claim which caused the issuance of such instrument shall be governed by the law of the place of issuance of such instrument.

3) Act on a bill of exchange, promissory note or check is a generic term referring to various acts which encompasses issuance, endorsement, acceptance and aval, etc. effected in relation to a bill of exchange, promissory note or check. [Translator's Note]

Article 56 (Partial Acceptance and Partial Payment)

(1) Whether or not the acceptance of a bill of exchange may be restricted to a part of the sum payable, and whether or not the holder is obligated to accept the partial payment shall be governed by the law of the place of payment.

(2) The provisions of paragraph (1) shall apply *mutatis mutandis* to the payment under a promissory note.

Article 57 (Form of Act for Exercise and Preservation of Rights)

The form of, and the limits of time for, protest, as well as the form of other measures necessary for the exercise or preservation of the rights concerning a bill of exchange, promissory note, or check shall be governed by the law of the place in which the protest must be drawn up or the measures in question are to be taken.

Article 58 (Loss or Theft)

The measures to be taken in case of loss or theft of a bill of exchange, promissory note or check shall be governed by the law of the place of payment.

Article 59 (Law of Place of Payment)

The matters regarding a check as under any of the following shall be governed by the law of the place of payment of the check:

1. whether a check must necessarily be payable at sight, or it can be drawn payable at a fixed period after sight, and also what the effects are of the post-dating of a check;
2. the limit of time for presentment of a check;
3. whether a check can be accepted, guaranteed, confirmed or visaed, and what the effects are of such acceptance, guarantee, confirmation or visa;
4. whether the holder of a check may demand, and whether he shall be bound to accept, partial payment;
5. whether a check can be crossed and what the effects are of such crossing or of the words “payable in account” or any equivalent expression written on a check. In case where a check in respect of which payment in cash has been forbidden by the issuer or holder by writing on the instrument the expression “payable in account” or an equivalent expression has been drawn in a foreign country and is to be paid in The Republic of Korea, it shall have the effect of

a generally crossed check;

6. whether the holder of a check has special rights to the cover and what the nature is of these rights;
7. whether the issuer may revoke the mandate for payment of a check or take measures to stop its payment; and
8. whether a protest or any equivalent declaration is necessary in order to preserve the right of recourse against the endorsers, issuer or any other parties liable under the instrument.

CHAPTER IX MARITIME COMMERCE

Article 60 (Maritime Commerce)

The following matters relating to maritime commerce shall be governed by the law of the country of registration of ship:

1. the ownership, mortgage, maritime lien and other real rights (rights *in rem*) in a ship;
2. the priority order of the security interests in a ship;
3. the scope of a shipowner's liability for acts of the shipmaster and crew;
4. whether the shipowner, charterer, manager, operator or other users of the ship shall be entitled to invoke the limitation of liability and the scope of such limitation of liability;
5. general average; and
6. the power of agency of a shipmaster.

Article 61 (Collision of Ships)

(1) The liability resulting from a collision of ships at an open port, on a river or territorial sea shall be governed by the law of the place of collision.

(2) The liability resulting from a collision of ships on the high sea shall be governed by the law of the country of registration if each of the ships has the same country of registration; it shall be governed by the law of the country of registration of the ship that has injured if each of the ships has a different country of registration.

Article 62 (Salvage)

The right to claim remuneration arising from salvage shall be governed by the law of the place where the salvage takes place when the salvage was effected on a territorial sea; it shall be governed by the law of the country of registration of the ship that has effected the salvage when the salvage was effected on the high sea.

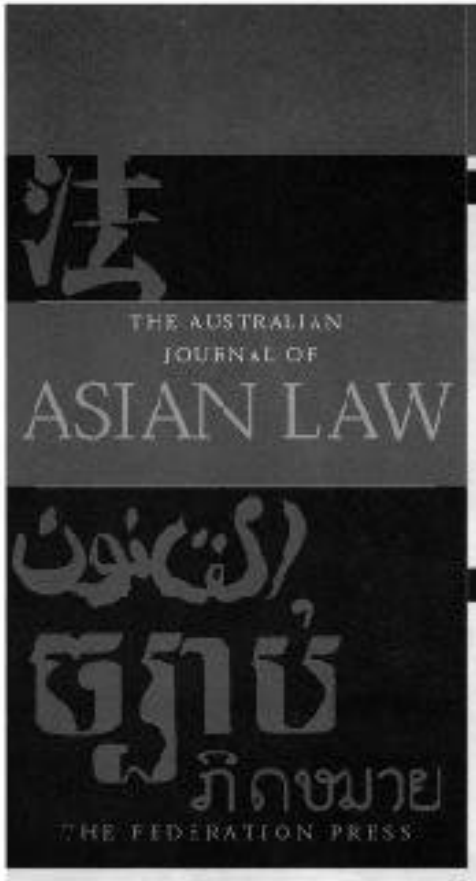
ADDENDA

(1) (Effective Date) This Act shall enter into force on July 1, 2001.

(2) (Scope of Application of Governing Law in Terms of Timing) The matters which have occurred before the entry into force of this Act shall be governed by the old Act (*Seoboesabeop*). However, the legal relationship which was formed before the entry into force of this Act but continues even after the entry into force of this Act shall be governed by this Act but only with respect to the part of the legal relationship which is in effect from the entry into force of this Act onwards.

(3) (Transitional Measures on the International Jurisdiction to Adjudicate) Provisions on the international jurisdiction to adjudicate under this Act shall not apply to cases which are pending before courts on the date as of which this Act takes effect.

(4) (Amendment of other Act) The Arbitration Act shall be amended as follows: "*Seoboesabeop*" in Article 29, Paragraph 1 shall be amended to "*Gukjesabeop*."



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PUBLICATION DETAILS

One volume is published each year in two parts of approximately 128 pages each. Volume 1 (1999) is published. Volume 2 (2000) Part 1 will be published August 2000. Volume 2 Part 2 will be published in November 2000.

Asian Law's ISSN is 1442-0728.

Abstracts of published and forthcoming articles are published on the federation Press Web site:
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