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# The Major Influences of the U.S. Constitutional Law Doctrines on the Interpretation and Application of the Constitution of the Republic of Korea : Critical Analysis on the Current Constitutional Court's Decisions and Thoughts of the Necessity of Amendment of the Current Constitution of the Republic of Korea

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**THE MAJOR INFLUENCES OF THE U.S. CONSTITUTIONAL LAW**  
**DOCTRINES ON THE INTERPRETATION AND APPLICATION OF**  
**THE CONSTITUTION OF THE REPUBLIC OF KOREA: Critical**  
**Analysis on the Current Constitutional Court's**  
**Decisions and Thoughts of the Necessity of**  
**Amendment of the Current Constitution of**  
**the Republic of Korea**

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THE MAJOR INFLUENCES OF THE U.S. CONSTITUTIONAL LAW  
DOCTRINES ON THE INTERPRETATION AND APPLICATION OF THE  
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I. INTRODUCTION

*The life of the law has not been logic, it has been experience..*

*The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as though it contained only the axioms and corollaries of a book of mathematics.*

*In order to know what it is, we must know what it has been, and what it tends to become.*

OLIVER WENDELL HOLMES, *THE COMMON LAW*, 1881

Motivation and the Purposes of the Study

The year of 1997 might be the most dramatic turning point of modern Korean history. Thanks to the result of the Election for the Fifteenth President of the Republic of Korea, the ruling party whose power originated from the military regime during the last five decades finally replaced by the long time opposition party, which has been recognized as more democratic or liberal party, for the first time in modern Korean history. The new President, Kim Dae-Jung, who has been known as the symbol of Korean pro-democracy movement, declared that "[W]e inaugurated the "Government of the People" through a peaceful transition of power from the ruling to an opposition party for the first

time in the history of the Republic of Korea" in his address for commemorating the 50<sup>th</sup> Anniversary of the Republic of Korea.<sup>1</sup> Kim Dae-Jung has devoted his life for Korean democracy and human rights protection. Many Korean people, therefore, expect him to generate the human rights situation and also, more importantly, to reform our nation politically and economically.

Needless to say, he has stressed the necessity of nation's reform. Unlike the former presidents, who had urged more importance of economical development rather than political development, he emphasizes the importance of harmonious development of both political democracy and economical success in parallel.<sup>2</sup> In addition to this transition of political environment, one of his sensational campaign promises was the amendment of Constitution that is to replace the current Presidential government to the Parliamentary government.<sup>3</sup>

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<sup>1</sup> Kim Dae-Jung, Commemorating the 50<sup>th</sup> Anniversary of the Republic of Korea, *Chongwadae*, Aug. 15, 1998 <<http://www.chongwadae.com>>.

<sup>2</sup> D.J. Kim, *supra* note 1, He urged that "[T]he governing philosophy of the current government is to develop democracy and a free market economy in parallel."

<sup>3</sup> He has agreed earlier with Kim Jong-pil of the United Liberal Democrats (ULD) that they will pursue the Cabinet system of government if he wins. See the Korean Politics Web-Site at <<http://www.koreanpolitics.com/1997/election/front.html>>.

Since the end of World War II, the United States has affected constitutionalism in many countries of Asia. The United States occupied the Philippines (1898-1946, except 1943-1945), Japan (1945-1952), and South Korea (1945-1948) and encouraged democratic revolution there, with different policies and results.<sup>4</sup> The U.S.A. Military Government in Korea ("USAMGIK") directly governed southern part of Korean Peninsula from its liberation in 1945 until the establishment of the Constitution of the Republic of Korea with declaration of beginning of independence in 1948. Although Americans did not participate in drafting the Constitution, USAMGIK gave its essential backing to the autonomy of Korea's constitution-making process with making series of ordinance. Moreover, with relatively short constitutional history, the Constitution has been amended nine times during last five decades. In the course of this transition, the influence of American constitutional law doctrines has been enormous.

With all the above respects, the primary purpose of this research is to find how the United States' constitutionalism has influenced on the interpretation and application of the Constitution of the Republic of Korea.

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<sup>4</sup> Lawrence W. Beer, *Introduction: Constitutionalism in Asia and the United States*, in *Constitutional Systems in Late Twentieth Century Asia*,

Through attaining this purpose, one might be able to find the development of human rights situation as well as the new judicial environment in South Korea, which is the secondary purpose of this research.

### **Methodology of the Study**

Primary legal methodology in the civil law countries has been the statutory analysis whose ideas are based on legal philosophy. While the student in Common law tradition has been *trained* by case law, namely judge-made-law case study, the student in Civil law tradition has been *taught* by scholar-made-law study. Even though, therefore, the primary method of this study has been employed by comparative approach, which is mainly concerned about more empirical way, I could not escape from theoretical analysis.

In modern society, laws are the products of the conflict between different social classes where the people have counter-interests. Any law could not exist by itself but it premises the existence of a nation and a society. There is no doubt why recently the study of society of law has had a great attention from legal scholars. Furthermore, the

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35 (Lawrence W. Beer ed. 1992).

Constitution of a nation is recognized as more influential and also instrumental law to the society and people's political life than any other legal discipline.

Since the primary goal of this study has been to find how the United States Constitutional doctrine has influenced on Korean Constitution, it appears that historical and diplomatic events between two countries have given a great deal of profound sources for this research.

Hence, although the primary method for my study will be the comparative law analysis which might be <sup>a</sup> more empirical and practical way, I will also employ the theoretical analysis in order to examine the decisions of Constitutional Court in Korea and also to introduce the basic constitutional doctrines in Korea. Moreover, this study will be applied the functional analysis as the secondary methodology. The public law system involves all three branches of government as well as a number of other agencies. There must be underlying extra-legal factors in practice of public law system such as political, social, cultural, economic and personal influences, interacting together.

## Organization of the Dissertation

In order to attain the purposes described so far, I will start this study from the introduction to the early diplomatic events between two countries and the early Korean-U.S. relations with historical perspective. In Chapter II, I present brief diplomatic history of two countries from the moment of the opening Hermit Kingdom by the West in the late 19<sup>th</sup> century to the end of Japanese Annexation and the beginning of the U.S. Military Government in Korea (USAMGIK) in 1948 with chronological approach. In doing so, I examine the early influences of the American Constitutionalism including the Declaration of Independence on the Constitution of Kingdom of Korea and the Constitution of the de facto Korean Government in Shanghai, China during the Japanese Annexation.

After three years of administration of USAMGIK in South Korea, the Republic of Korea was inaugurated with the establishment of its first Constitution in 1948. During the last five decades, the Constitution of South Korea has been amended nine times. In the course of transformation, the influence of the U.S. Constitution on the Korean Constitution has been enormous. Such constitutional

transitions with an analysis of the impact of U.S. Constitutionalism will be discussed in Chapter III.

The current constitution was adopted in 1987 after a nation-wide protest against Chun Doo-Hwan's regime when Korean people went out on the street and called for constitutional reform. One of the most significant changes in the Constitution of 1987 is the initiation of the Constitutional Court. Although the basic system and organization of the Constitutional Court followed the German system of judicial review; however, in practice, it appears that Korean Constitutional Court has been willing to follow the model of the U.S. Federal Supreme Court. In Chapter IV, therefore, I will compare the judicial review systems in both countries. In doing so, I will examine several important decisions of the Constitutional Court with as illustration of how the Court is to interpret and apply the U.S. Supreme Court's decisions to such cases.

South Korea has ratified two major International Human Rights Covenants and the role of these Covenants on the human rights situation in South Korea has increased since ratification. Even though this particular issue may be

peripheral of the main subject of this study, that issue might be conveniently discussed so far as there have been the human rights issues as well as the Justices' concern regarding the Covenants. In Chapter V, I will present the history of ratification of the Covenants: the current view of the Constitutional Court toward the Covenants: and the development of human rights situation in South Korea.

In Chapter VI, I will examine the presidential system of Korea, which has been the hottest as well as never-ending issue of Korean Constitution since its establishment, particularly after last year Presidential Election.

*"The United States of America and the Kingdom of Korea,  
being sincerely desirous of establishing permanent relations  
of amity and friendship ..."*

- In the *Treaty of Peace, Amity, Commerce, and Navigation  
Between the United States and the Kingdom of Korea*  
May 22, 1882

## II. THE IMPACT OF THE AMERICAN IMPERILISM ON THE KINGDOM OF KOREA ("CHOSUN") IN THE LATE NINETEENTH CENTURY

### A. INTRODUCTION

It was the late 19<sup>th</sup> century that the Kingdom of Korea entered into the turmoil of the world competition of the modern imperialism as a victim where the Western imperialist countries including Japan and Russia sought their colonies. After the Hermit Kingdom, Choson (literally means "the country of morning glory"), and Japan finally concluded the Kangwha Treaty, which opened ports in Korea, the real competition for seizing *the Kingdom* as their colony just began. It was the United States of America that had great but somewhat unorthodox efforts, for establishing diplomatic relations with *the Kingdom*.

What happened to the Kingdom in this so called "Opening Period" has been recognized the most important period in modern Korean history as well as Korean legal tradition because the Kingdom finally met the more modernized legal institution than traditional Chinese legal institution which the Kingdom had adopted and used for entire history until this period. Furthermore, the field of legal study was finally recognized as new academic area instead of Ethics or Confucian moral philosophy. Therefore, the Korean legal tradition finally formed the new and modernized institution in terms of the meanings and contents. <sup>5</sup>

In this Chapter, as I mentioned earlier, I present a brief history about what happened to the 19<sup>th</sup> century Korea, from the beginning of the Westerners' encroachment to the inauguration of the Republic of Korea in 1948. In doing so, more importantly, I will examine the early influences of the American constitutionalism on that of Kingdom of Korea and the Constitution of the First Republic in 1948.

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<sup>5</sup> Jong-go Choi, *History of Legal Thoughts in Korea*, 179 (1993)

## B. THE OPENING OF THE KINGDOM OF KOREA

In 1864, the boy Yi Myoung-bok duly ascended the throne (posthumous title Kojong) and his father Yi Ha-hung was made regent and given the title Tgaewongun (Prince of the Great Court). The Taewongun turned out to be one of the most powerful personalities in the history of Kingdom of Korea. He represented all the virtues of the Confucian traditions.<sup>6</sup> He was uncompromising, honest, and dedicated to the creation of a society upon the lines prescribed by the great sage.<sup>7</sup> However, unfortunately, he also represented the defects of Confucian thought—the rigidity of mind, resistance to change, refusal to face realities which conflicted with his beliefs.<sup>8</sup>

From early in the nineteenth century, Korean peninsula appeared to have become a potential economic colony for Western powers, such as Germany, France, the Great Britain, Russia, and the United States, and they persistently demanded *the Hermit Kingdom* to open trading ports. As was the case in all Western encroachments on East Asian Nations, it started with peaceful and religious overture, but it

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<sup>6</sup> Woo-kyun Han, *The History of Korea*, 362, (1978).

<sup>7</sup> *Id*

<sup>8</sup> More about Taewongun, see Ching Young Choe, *The Rule of the Taewongun, 1864-1873: Restoration in Yi Korea* (1972).

ended in bloody battles. In 1832 an English merchant ship appeared off the coast of a western port in Korea seeking to trade, and in 1845 an English warship spent more than a month in Korean waters, surveying the island stubbed sea around the west coast of Korea. In 1846 three French warships dropped anchor off the west coast, left a letter for forwarding to the court and departed, while in 1854 two Russian vessels sailed along the East coast, causing some deaths and injuries among the Korean they encountered.

In 1866, the German adventurer Oppert twice asked permission to trade, and after his request was denied it was he who came ashore two years later to rifle the tomb of the Prince of Namyon, the Taewongun's father, in Toksan county of Chungcheon province. In 1866 a French squadron of seven warships and 600 men invaded the Korean island of Kanghwa not too far from Seoul and demanded satisfaction for the execution of several French missionaries who had earlier entered the forbidden land in disguise. The expedition failed to accomplish any of its objectives and withdrew. In 1871 a similar expedition of five American warships whose intention was to protest the destruction of an American trading ship in an inland river of Korea was equally

unsuccessful, despite more elaborate diplomatic and military preliminaries.<sup>9</sup>

### **1. The Laws and Cultural Background of the Kingdom of Korea**

The law of a society or a nation can be understood from the perspective of its history and its broadest cultural context.<sup>10</sup> If we assume that law and legal institutions derive ultimately from a variety of political and social institutions, it would be pertinent to find what political or extra-legal underpinnings there are for law and the growth of a legal system.<sup>11</sup> Due to these aspects, the cultural or historical approach to Korean legal tradition including constitutionalism, democracy, and human-rights issues has been discussed by many legal scholars (*i.e.*, Hahm Pyong-Choon's enormously influential book, *The Korean Political Tradition and Law* (1967), Norma Jacob's *The Korean Road to Modernization and Development* (1987), Dae-Kwon Choi's *Development of Law and Legal Institutions in Korea*,

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<sup>9</sup> C.I. Eugene Kim & Han-kyu Kim, *Korea and the Politics of Imperialism 1876-1910*, 13, (1967).

<sup>10</sup> Youn Dae-Kyu, *Law and Political Authority in South Korea*, 5, (1990).

<sup>11</sup> Daniel S Lev, *Islamic Court in Indonesia*, 2-3, (1972).

Dae-Kyu Youn's *Law and Political Authority in South Korea* (1991), and William Shaw's *Human Rights in Korea* (1991)).

According to Professor William Shaw, in order to understand the legal tradition during the Nineteenth Century Chosun, one must be aware a couple of historical facts: first, "the decline of Confucianism as living philosophy (despite residual strength in interpersonal relations) that began in the 1880s and sharply accelerated after the loss of Korean independence in 1910"; secondly, "the growing strength, during the same period, of alternative philosophical, religious, or political traditions and forms of organization, including Catholic and Protestant Christianity, the Chondogyo or "Heavenly Way" Movement, Western liberalism, and Marxism."<sup>12</sup>

The Neo-Confucianism, established by Chu-Hi, the Chinese Confucian scholar, was adopted as the Kingdom's ideology, and it had a great influence on politics, culture, and society. It was the Kingdom of Korea who had taken Chu Hi's teaching more seriously than any other Asian countries. As Professor Dae-kwon Choi indicated, "Confucianism is to

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<sup>12</sup> William Shaw, Introduction, in *Human Rights in Korea: Historical and Policy Perspectives*, 4 (William Shaw ed., 1991).

traditional law what natural law, individual freedom, equality, the market system, liberalism, democratic revolution, and market economy, all combined, are to modern Western law." <sup>13</sup> The classic expression of Confucius' thought on law is the belief that desirable behavior and social harmony can be obtained, not by strict regulation or severe punishment, but by the rule of good men, whose virtuous examples are the most effective form of persuasion,<sup>14</sup> as Confucius philosophized that:

"If the people are guided by the written law [*bup* 法 in Korean and *fa* 法 in Chinese], and order among them is enforced by means of punishment, they will try to evade punishment, but have not sense of shame, but if they are guided by virtue, and order among them is enforced by rule of propriety [*ye* 禮 in Korean and *li* 禮 in Chinese], they will have a sense of shame and also be reformed."<sup>15</sup>

The term *ye*, therefore, came to be used as a word interchangeable with morality. *Ye* were perceived as preventing moral transgressions, and *bup* as punishing the offenders should they commit such violations. <sup>16</sup> In

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<sup>13</sup> Dai-Kwon Choi, *Development of Law and Legal Institutions in Korea*, in *Traditional Korean Legal Attitudes*, 59 (Bong Duck Chun & William Shaw, et la eds., ).

<sup>14</sup> Ralph H. Folsom & John H. Minan, *Law in the People's Republic of China: Commentary, Readings and Materials*, 3 (1989).

<sup>15</sup> *Id.*

<sup>16</sup> Vipran Chandra, *Korean Human-Rights Consciousness in an Era of Transition: A Survey of Late-Nineteenth-Century Developments*, in Shaw ed., *supra* note 21 at 30-31.

homogeneous societies like Korea, social norms become more effective means of social control and integration than law.<sup>17</sup> Confucian morality always favored the man of virtue over law and institutions - an essential characteristic of the idea of "rule-by-men" rather than "rule-by-law."<sup>18</sup> Due to these reasons, that the persistence of Confucianism in Korean society led the disappointing record of Korean constitutionalism has been discussed as the main cause of the underdevelopment of the democracy and constitutionalism in Korea.

Although this kind of "cultural determinism" was a popular way to explain the underdevelopment of Korean society, however, this cultural approach neglects the importance both of history and historical change. Therefore, taking a broader perspective on society, such as social, political, economic factors, or the role of humans in changing society must be a better approach to explain the constitutionalism and democracy in Korea.<sup>19</sup> Thus, as mentioned in Chapter I Introduction, these historical and

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<sup>17</sup> Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 *Pac.Rim L. & Pol'y J.* 395, 397 (May, 1995).

<sup>18</sup> Yoon, *supra* note 19 at 20.

<sup>19</sup> Yoon, *supra* note 26 at 399.

socio-political approaches have been taken the primary methodology for this study.

One of the Taewongun's cultural achievements was his compilation of legal and ritual works. The Ninth King of the Kingdom, Song-jong, established a legal compilation, the *Kyoungkuk Taejon* (Great Code of State Governance), which had used as its basic legal guide to administration. The code was divided into six sub-codes in accordance with the departmental divisions of the government: *I* (吏:personnel), *Ho* (戶:revenue), *Ye* (禮:Rites), *Pyoung* (兵:military), *Hyoung* (刑:criminal law), and *Kong* (工:public works).<sup>20</sup> Since there had been no amendment after 1785, the Taewongun believed that those old laws were obsolete for his reformation policy. Due to this reason, the Taewongun personally directed the compilation of a series of important codes. Completed in 1866, the *Taejon hwoetong* (the New Comprehensive Code of Administration) was an ambitious attempt to incorporate into

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<sup>20</sup> Chin Kim, *Korean Law Study Guide*, 2-3 (2<sup>nd</sup> ed., 1995). The code had been supplemented by three major compilations: the *Taejeon songnok* (Early Supplement to the Great Code) in 1492, the *Taejeon husongnok* (Late Supplement to the Great Code) in 1543, and the *Suk taejeon* (Supplementary Great Code) in 1744. In 1785 another code called *Taejeon tongpyoun* (Comprehensive Code of Administration) was enacted.

a single work all new laws issued after 1744 and all previously enacted laws.<sup>21</sup>

Although the Kingdom appeared to have a highly satisfied system of Confucian society and government to be accepted both by the rulers and the ruled, it had been from time to time shaken by peasant unrest and riots internally and the Westerners intrusions externally as mentioned. One of the most intimidating threats to the Kingdom was, for example, the impact between the traditional Confucianism and the Western thoughts that had flowed into the *yangban* intellectuals, one of main ruling class in the Kingdom society. A number of *yanban* intellectuals began to question the values of the existing sociopolitical system, and their ideas eventually sparked a minor intellectual movement known as *Sirhak* (Practical Learning).<sup>22</sup> These savants not only learned a great deal about Catholicism and Western science and technology but also something of Western law, politics, and society. In the early 1860s, another challenges to the Kingdom's Confucian system arose in the form of new religion,

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<sup>21</sup> Id. Other compilations were the *Yanjonpyongo* (Manual for the departments of appointment and war) in 1866, the *Yukchonchorye* (Regulations of the six departments) in 1867, the *Smabanyesik* (Rules of etiquette for the three classes) in 1866, and the *Orye pyongo* (Manual of the five rites) in 1868 (?).

<sup>22</sup> Chandra, *supra* note 25 at 39.

which formed itself *Tonghak* (Eastern learning), as distinguished from *Suhak* (Western Learning or Catholicism). This new thought drew elements from Confucianism, Taoism, Buddhism, and even Catholicism, and proclaimed itself in favor of class equality as well as sexual equality.<sup>23</sup>

## 2. The Seclusion Policy

Before 1880, the seclusion policy [*Shae-Kook* Policy] was accepted as the fundamental diplomatic policy of the Kingdom of Korea. In the early years of the Kingdom, Korea considered herself the center of a little universe of Confucian civilization and wealth. This little universe, as opposed to the greater universe with Ming China at its center, comprised many lands and peoples. The traditional Korean thought pattern identified the West with evil, and the ruling circles of Korea staunchly upheld the idea of rejecting evil, *Chuksaron*.<sup>24</sup> Another important factor in Korea's isolation, due to her geographical position, was her lack of direct contact with Western thought and

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<sup>23</sup> Chandra, *supra* note 25, at 40.

<sup>24</sup> Dae-Sook Suh, *The Centennial: A Brief History, in Korea and The United States: A Century of Cooperation*, 4 (Youngnok Koo & Dae-Sook Suh ed., 1984).

institutions.<sup>25</sup> There was another reason for the Kingdom's rejection of Western demands for trade relations: that is, the fear of the spread of Catholicism. Catholicism was regarded as the Western Evil by the Taewongun and Confucian scholars because its idea was opposed to traditional Confucian teachings. Therefore, it is not difficult to understand how the seclusion policy had become part of the national philosophy, character, and life.

### **3. The Initial Contact with America**

Before the Kingdom of Korea and the United States entered into the diplomatic relations in 1882, there had been very unusual and also cruel incidents that made the Kingdom unfavorable to America. There were a number of American ships around Korean Peninsula at that time because of the growing American trade with China, Japan, and Russia. In August 1866, an American schooner, *The General Sherman*, sailed up the Taedong River toward the city of Pyongyang where she hoped to exchange her goods for Korean paper, rice, gold, ginseng, and leopard skins. When *The General Sherman*

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<sup>25</sup> Choe, *supra* note 8, at 91.

refused to heed the advice to leave the port and to release the kidnapped local official of the authorities in Pyongyang, the Koreans retaliated by burning the ship and massacring the officers and men of the *General Sherman*. Needless to say, the *General Sherman* incident became a hot diplomatic issue, and finally the cause of an American expedition. In 1871 the U.S. government decided to use the incident as a pretext to force Korea to open its ports to trade. The U.S. Minister at Peking, Frederick F. Row, and the Commander of the U.S. Asiatic Squadron, Rear Admiral John Rodgers, were ordered to proceed into Korean waters with a detachment of five warships. By this time, however, in the aftermath of the French reprisal expedition, the "Foreign Disturbance of 1866 [Shin-mi Yang-yo]," the Taewongun had repaired the fortifications, built new gun emplacements and cast more cannon. The Row-Rodgers expedition of six ships stormed the Korean forts in Kanghwa, burned the buildings and houses, and killed the Korean soldiers who tried to repel the unprovoked American attack. It was one of the bloodiest battles that Koreans have fought to defend their country.

Exultant at his victories over the attacking American warships, the Taewongun now further hardened his exclusion

policy. To demonstrate his resolve to reject all contact with the Western nations, he had monument stones set up on the Chongno main thoroughfare in Seoul and at points throughout the country, incised with this admonition: "Western barbarians invade our land. If we do not fight we must then appease them. To urge appeasement is to betray the nation."<sup>26</sup>

As mentioned earlier, the efforts to open the Kingdom with armed forces were not successful and even worse it made the Kingdom become more secure and be hostile to the West. However, we cannot say that it was entirely failed but even had some influenced to Koreans as well as Americans due to the following reasons:

- 1) Koreans finally acknowledged the Westerners who seemed more powerful and more advanced than China and Japan;
- 2) Some Koreans became more interested in the Western ideas such as class equality as well as gender equality; and
- 3) Finally, the Westerners tried some other approaches to open the Kingdom which seemed more moderate ways<sup>27</sup>

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<sup>26</sup> Ki-baik Lee, *A New History of Korea*, 266 (1984).

<sup>27</sup> Most Western countries during this period regarded the Kingdom as very underdeveloped one. However, after their encounters, they finally acknowledged that the Kingdom was not the barbarian nation that they thought. Therefore, the West finally employed more moderated and diplomatic approaches to the Kingdom after those military encounters.

Therefore, needless to say, it was very clear that the time for opening the Kingdom had been come and it was the most crucial turning point of Korean history.

#### **4. The Treaty Period: 1882-1905**

The Treaty of Peace, Amity, Commerce, and Navigation between the United States and the Kingdom of Korea was concluded on 22 May 1882 at Inchon. It was signed by Commodore Shufeldt and Sin Hon, President of the Royal Cabinet, representing two independent and sovereign nations.

The interest of the United States in opening the Kingdom was primarily commercial, but the Kingdom's interest in concluding a treaty was more political than commercial. The Kingdom's officials seem to have placed heavy emphasis on the interpretation of the treaty's first article concerning good offices and mutual assistance.<sup>28</sup> The Treaty, however, did not obligate the United States to protect the political independence of Korea.

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<sup>28</sup> Article I of the Treaty provided that "There shall be perpetual peace and friendship between the President of the United States and the King of Korea and the citizens and subjects of their respective Governments. *If other Powers deal unjustly or oppressively with either Government, the other will exert their good offices, on being informed of the case, to bring about an amicable arrangement, thus showing their friendly*

The U. S. State Department had been irreconcilable with American envoys' enthusiasm for the Korean Kingdom and concerned over the performance of their assigned duties in their attempt to save the Kingdom.<sup>29</sup> For instance, when Dr. Horace N. Allen who was the American envoy and the personal physician to the king at the same time took it upon himself to protect the king and his court officials from political intrigues and he agonized in frustration over the Japanese and Russian struggle over Korea, he was reminded that intervention in Korean political affairs was not one of his assigned duties by the State Department.<sup>30</sup>

Secretary of State Hay repeated American policy by stating that United States interests in Korea were "rather commercial than political." The United States acquiesced in Japanese domination of Korea in the Taft-Katsura memorandum on 29 July 1905. By this agreement, the United States gave its approval to Japan's suzerainty over Korea in return for Japanese disavowal of any aggressive intention toward the Philippines. The desperate King Kojong called upon the United States to honor its repeated assurances of concern

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feelings." *Treaty of Peace, Amity, Commerce and Navigation*, May 22, 1882, U.S.-Korea, 23 Stat. 720.

<sup>29</sup> Suh, *supra* note 10, at 7.

<sup>30</sup> *Id.*

for Korean independence, but both President Roosevelt and his Secretary of State refused to see the King's emissary, Homer B. Hulbert.<sup>31</sup> The treaty of 1882 was terminated and Secretary of State Elihu Root ordered Edwin Morgan, the last American minister to Korea, to close up the legation in Seoul in November 1905.<sup>32</sup>

#### **5. Introducing the Western Ideas: Catholicism and Protestantism**

Since the introduction of Catholicism in 1784, followed by the arrival of Protestant missionaries in 1884, Christianity has proceeded to become--after Buddhism--the largest religion in the country. Today about one third of South Korea's 45 million people are Christian--11 million Protestants and 3 million Roman Catholics. Since the early 1960s, when South Korea's Christians scarcely topped the one million mark, the number of Christians, particularly Protestants, has increased faster than in any other country, doubling every decade. By 1994, moreover, there were over 35,000 churches and 50,000 pastors, making the South Korean church one of the most vital and dynamic in the world.

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<sup>31</sup> Suh, *supra* note 10. at 7

<sup>32</sup> *Id.*

Needless to say, many of the Western ideas imported to the Kingdom through the missionary works. It happened two different ways; 1) direct import from American missionaries and indirect import from Koreans who had opportunities to study in the United States during this opening period. When those Korean students went back to the Kingdom after their study in the United States, they organized new political group such as "Independent Group"; published papers; taught young Koreans; and tried to reform the Kingdom to the modernized nation. Some groups even tried political uprising such as Kapshin Chongbyon (Coup d'Etat of 1884)<sup>33</sup>

I will examine how this new religion, Christianity, influenced to the Kingdom during this opening period.

#### **a. Catholicism**

During Chosun Dynasty, particularly beginning of 16<sup>th</sup> Century, Koreans began to expose themselves to the West while they visited China for business purpose as well as diplomatic reasons. Led by their own curiosity, Korean

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<sup>33</sup> Suh, *supra* note 10. at 7

visitors to the capital city of China were often drawn to the strange men from the West. It was not until the latter part of the eighteenth century that a small number of Koreans were first introduced to Catholicism. Around 1770, a Korean envoy to China, Chong Tu-won, brought back to Korea Matteo Ricci's Tianzhu [The True Doctrine of the Lord of Heaven]. They were fascinated not only by the Western scientific instruments found among the strangers' possessions, but by the personalities of the men themselves.<sup>34</sup>

Choson sent tributary emissaries to China, the Middle Kingdom annually. According to the *Cheng-chiao-feng-pao*,<sup>35</sup> as early as in 1644 a Jesuit missionary, Johannes Adam Schall von Bell of Germany, approached for the purposes of evangelism the Chosun Prince Sohyeon who had been detained in China at that time.

In the first year of Shun-chin, a Korean prince, the son of the King Hyojong, was detained in the capital city. He heard of Tang -jo-wang (Johannes Adam Schall von Bell). So the prince paid him a visit when possible at the church where the priest resided. The prince questioned him about astronomy and other Western science. Jo-wang also came to repay the prince his

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<sup>34</sup> David Chung, *Syncretism: The Religious Context of Christian Beginnings in Korea*, 5(2001).

<sup>35</sup> Peter Hwang, *Chen-chiao-feng-pao*, 1904.

visit on several occasions at the Hall of the prince. They had long talks and they understood each other deeply. As Jo-wang often explained the truth of Catholicism, the prince was glad to hear of it and asked detailed questions. When the prince went back home to his country (as a free man), Jo-wang gave him many kinds of books in translation on astronomy, mathematics and the Truth of Catholicism. A globe and a portrait of God (Jesus) were included among the gifts. The prince complimented him with a letter written by himself.<sup>36</sup>

However, the prince died soon after his return without achieving anything Jo-wang had hoped for.

The introduction of Christianity to Korea was nothing short of a miracle. Koreans had organized a church in their capital city by the 1770s before any missions had even begun to direct their organized efforts toward this "Hermit Kingdom."<sup>37</sup> It was a spontaneous birth, marked by the special character of human wisdom guided by divine wisdom. The earliest converts were ones who had made themselves Christians. They were united in an organism, a cell-a living cell- that could respond, suffer, and grow. It was this underground cell that met regularly at Kim Pomu's

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<sup>36</sup> Yi Nyonghwa, *Choson Kidokkyo Kop Waekyo Sa (History of Korean Church and Diplomacy)*, 51 (1928).

<sup>37</sup> *Id* at 3.

Myongryedong panggol Street, Seoul in 1770s.<sup>38</sup> A representative of this group, Yi Seunghun was sent over the forbidden border to China and was baptized by the bishop who resided there and thereby lined the isolated member to the main body.

Alexandre de Gouvea, the bishop of Beijing at the time, who was chiefly responsible for the cultivation of this newborn church, expressed in his letter, which was published later under the title: *De Status christianismi in Regnum Coreae Mirabiliter Ingressi* (On the Status of Christianity Miraculously Entered into the Kingdom of Korea), that "within a short period of time, the believers in Christianity had increased... Within five years, the number of Christians had grown to about four thousand."<sup>39</sup>

However, before the official foundation of Korean Catholic Church, specially during the Regent Taewongun's rule, no less than ten thousand Christians paid the supreme price. The new Christians had no pastor to lead them for ten long years after they were accepted into the world of Catholic fellowship. Even before the first decade was over,

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<sup>38</sup> Yi, supra Note 26, at 51.

<sup>39</sup> Reprinted in Id. at 4. This document was translated into Portuguese and French from the Latin text and published respectively in Lisbon and in Paris.

they had paid heavy prices for their new faith. Thomas Kim, Paul Yun, and his cousin Jacques Kwon became Korea's first martyrs for the church.<sup>40</sup>

As a result of the repeated request, the bishop in Beijing finally sent a Chinese priest Chou Wen-mo (Jacques Tsiou) to the forbidden land secretly in 1794. Priest Chou Wen-mo became the first ecclesiastical official in Chosun and was beheaded as a martyr in 1801 after some six years of secret ministry.

In short, Catholic evangelism was a success from the very beginning. It began "miraculously" and accidentally, and was carried on heroically by the native converts under their own initiative.

#### **b. Protestantism**

In 1900, only sixteen years after the opening of missionary work in the Kingdom, the factors of the success were already discussed and heatedly debated at the Ecumenical Council, which met in New York that year with representatives of no fewer than forty-eight countries.<sup>41</sup>

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<sup>40</sup> Chung, *Supra* note at 6.

<sup>41</sup> *Id* at 13.

The first evangelistic agencies to begin missionary work in Korea were the Board of Foreign Missions of the Presbyterian Church and the Foreign Missionary Society of the Methodist Episcopal Church in the United States. These two organizations started their work simultaneously in Korea, operating their missions side by side and cooperating to some degree. In 1884, the Presbyterian Church appointed Dr. Horace N. Allen as the first missionary to Korea, while the Methodist Church appointed Dr. and Mrs. W.B. Scranton, his mother Mrs. Mary Scranton and the Rev. and Mrs. Henry Appenzeller as the first missionaries to Korea in the same year.<sup>42</sup>

In September of 1884, Dr. Allen arrived in Seoul, thereby becoming the first Western missionary to enter Korea. Soon after Dr. Allen arrived in Korea, a significant event took place which would have a profound impact on the missionary work in Korea. The Kapshin Chongbyon (Coup d'Etat of 1884) left Prince Min near death when he was set upon and brutally slashed. Dr. Allen was called in when Min was near death and his meticulous care over three months saved the prince's life.

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<sup>42</sup> Chung, *Supra* note at 6. at 13.

This incident gave the royal court great confidence in Western medicine and trust in an American alliance, prompting the court's greater hospitality towards the missionaries. As a consequence, Dr. Allen's petition for the establishment of a hospital using Western medicine was readily granted by the Korean government. The first general hospital was opened on April 10, 1885, bearing the name Kwanghyewon.<sup>43</sup>

Over the next decade, missionaries from several mission bodies arrived in Korea --Presbyterian (Northern branch) in 1884, Methodist Episcopal (North) in 1885, Canadian Baptists in 1889, Church of England in 1890, Presbyterian (Southern branch) in 1892, Canadian Presbyterian in 1893, and Methodist Episcopal (South) in 1896--adding to both the physical and spiritual presence of Christianity.<sup>44</sup>

Because of such lingering restrictions against the teaching of the "evil learning," therefore, direct evangelization of the populace was not possible; hence, institutional work--i.e. medical and educational work--preceded evangelism. The missionaries provided many vital

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<sup>43</sup> Chung, *Supra* note at 6 at 13

<sup>44</sup> Id.

medical services which would not have been available otherwise, particularly for the poor and women.

The missionaries were also quick to get involved in education. Knowing the Koreans' zeal for education and their openness to Western ideas, and hoping to enable illiterate Koreans to read the scriptures and religious tracts, the missionaries, of whom Mr. Appenzeller was the first and most prominent, set about the establishment of schools. The fact that even the King endorsed their plan made them all the more eager. The demand for education was so overwhelming that schools had to be established all over Korea. By 1910, in fact, missionaries had founded about 800 schools of various grades, accommodating over 41,000 students, which was about twice the total enrollment in all Korean government schools.<sup>45</sup> It is not an exaggeration to claim that the church was in charge of the only complete educational system in Korea at the time--only the church provided education from primary to college level. Complementing the importance of the missionaries' involvement in education was the latter's intimate link with

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<sup>45</sup> Chung, *Supra* note at 6 at 13.

Korean nationalism, particularly in light of the impending Japanese domination.<sup>46</sup>

The Korean churches entered a new era when the Japanese annexed the nation in 1910. Although the Japanese administrative policy toward the churches was seemingly friendly at first--precipitated, at least in part, by the government's recognition of the importance of Christian support to the success of Japanese rule--it gradually developed into an open policy of oppression and hostility.<sup>47</sup>

A more compelling reason for the change in its policy, however, was the prominence of Christians in the independence movement and Christianity's association with the rise of Korean nationalism. Two events that forged the link between Christianity and Korean nationalism were the Conspiracy Trial of 1911 and the Independence Movement of 1919 or Samil Undong.

The Conspiracy Trial involved the outlandish claim by the new government that it had uncovered a plot to assassinate the Japanese Governor-General in Korea at the time. In early 1911, Koreans were arrested--all of whom were

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<sup>46</sup> Andrew E. Kim, History of Christianity in Korea: From Its Troubled Beginning to Its Contemporary Success, Korea Overseas Information Service, See Web-site at <<http://www.kimsoft.com/1997/xhist.htm>>

suspected of involvement in the independence movement and were brought to trial. Although most of them were acquitted, the fact that ninety-eight of the men were Christians left a strong impression in the minds of the Korean people, establishing the Korean churches and Christian leaders as defenders of Koreans' national aspiration.<sup>48</sup>

The Independence Movement of 1919 was also noted for the prominent role of Christians, especially Protestants, as its organizers and leaders: nearly half of those who signed the Declaration of Independence--15 of 33 signers--were Christians.<sup>49</sup> The salience of Christians in the movement was further noted in the figure of those imprisoned for participating in the demonstration: over 22 per cent of the total or 2,087 out of 9,458 were Christians.

This was all the more astonishing given the fact that Christians comprised only about 200,000 or 1.3 per cent of the total population of 16 million at the time. As a leading organization of the demonstration, churches became special targets of Japanese military reprisals. Forty-seven churches were burned down, and hundreds of Christians perished in the demonstration, while thousands, including women, were subjected to imprisonment and torture. The brutal

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<sup>47</sup> Kim, *Supra* note 46.

suppression of this demonstration and the prominence of Christians among those persecuted thus produced a strong link between Christianity and Korean nationalism.

### **6. American Educated Elite in Korean Society**

Many Koreans have come to the United States for study during the past hundred years. During this opening period, many Korean elite who had a vision for new world were eager to visit the United States.

Since their study in the United States seems to have caused changes in their value systems, behavioral orientations, or level of knowledge, it is necessary to inquire into the characteristics of the American culture which they absorbed. The characteristics frequently quoted by Koreans on American cultures can be itemized as follows:

- 1) Democracy (emphasis on individualism, freedom and equality, decentralization of power, responsibility, respect for law, cooperation and education)
- 2) Capitalism
- 3) Pragmatism
- 4) Puritanism
- 5) Respect for experience and science.<sup>50</sup>

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<sup>48</sup> Kim, *Supra* note 46.

<sup>49</sup> Id.

<sup>50</sup> Dong Suh Bark, *The American-Educated Elite in Korean Society, 265 in Korea and the United States: A Century of Cooperation*, edited by Youngnok Koo & Dae-Sook Suh.

Korean leaders who studied in the United States during the opening period include Jae Phil So, Chi Ho Yun, Syngman Rhee and Kil Jun Yu.

Kil Jun Yu was the first Korean to study in America. He traveled extensively to Japan and European countries and was active as a leader of the enlightenment movement upon returning to Korea.<sup>51</sup> Even though the enlightened thoughts had already been imported from China and Japan long before Koreans began to go to the United States, Yu contributed to a systematization of enlightened thought. Enlightened thought was characterized as "Western skills based on Eastern values."<sup>52</sup> Although Yu did not stay in the United States long enough to obtain a university degree, his role and achievement on the enlightenment movement must be recognized as one of the prominent elite during this period.

Upon returning home in 1895, Jae Phil So began to publish a newspaper, the *Tongnip sinmun* (Independent Newspaper), which was instrumental in promoting Korea's national interest while under Japanese oppression. Published entirely in *hangul* (Korean), the newspaper inspired Koreans with the spirit of national independence,

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<sup>51</sup> Bark, *Supra* note 50 at 265.

nationalism, and democracy. While promoting enlightenment through the newspaper, they organized the Independence club (composed private citizens and officials) in order to achieve their national goals, built the Independence Gate, and insisted on founding a national assembly.<sup>53</sup>

The Koreans who studied in the United States toward the end of the Choson period belonged to the school of enlightenment. They were friendly to the United States and absorbed the American cultural influence. Upon returning home from the United States, their activities were centered on political problems, since Korea's national sovereignty was then being unstable.<sup>54</sup>

The number of people who studied in America at that time was extremely small. But their contribution to the development of Korea was remarkable. If they had compromised with the conservative group that opposed their activities, Korean history would have turned in another direction.<sup>55</sup>

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<sup>52</sup> Kwang-nin Lee, *Hankuk Kaehwasa Yungu* [Study of the history of Korean Enlightenment] 37, 38 & 54 (1974).

<sup>53</sup> *Id.*, *Supra* note 51 at 266.

<sup>54</sup> *Id.* at 277

<sup>55</sup> *Id.*

## 7. First Appearance of American Constitutionalism in the Nineteenth Century Korea: The Era of Enlightenment Movement

The outcome of all those developments was an impetus to the further import of liberal ideas and values from the West, and that seemed to settle into the Enlightenment Movement [Kaehwa]. The first stirrings of the Enlightenment Movement occurred very early in the 1880s. The leaders of the Enlightenment Movement had similar background; all had been exposed to some knowledge about the West through their common study of a few elementary books imported into the Kingdom during the 1870s: all had also had some experience to the scholarly works of the *Sirhak* School.<sup>56</sup>

More importantly, however, through learning over the Western liberal ideas and *Sirhak*, they eventually recognized the necessities of the nation's reform to a modern nation-state, which could protect the Kingdom from the imperialists' intrusion and, more importantly, eliminate the Confucian class system. To achieve these goals, Kim Ok-kyun, who was one of the leading figures of the Movement and had heavily influenced by Japanese "Civilization and Enlightenment (*bummei kaika*) Movement" and Meiji Revolution,

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<sup>56</sup> Chandra, *supra* note 25 at 47-49.

led a coup and seized control of the palace and the government on 4 December 1884. Although the new government lasted barely three days, this newly set up "reform" government undertook to work for the elimination of all class distinctions and the establishment of equal rights for all, for the firm abolition of the tributary system, raising Korea's status to that of the truly sovereign state.<sup>57</sup>

The failure of this attempt at radical reform did not mean that all progressive forces and figures were destroyed in Korea. After the suppression against 1894 coup, the survivals escaped to exile in Japan and America and those included Pak Young-hyo and Suh Jae-pil, who eventually exposed to American ideas of democracy during residing in America.

During this last period of the Kingdom of Korea, there had not been any direct constitutional influences by the United States: however, sporadic references to American constitutionalism are found in late nineteenth century publications.<sup>58</sup> The first reference that was found at that

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<sup>57</sup> Chandra, *supra* note 25 at 47-49.

<sup>58</sup> Kyoung Whan Ahn, *The Influence of American Constitutionanism on South Korea*, 22 S. Ill. L.J., 71 (Fall, 1997).

period of the Kingdom among American constitutionalism was the *Declaration of Independence*.<sup>59</sup>

In 1883, with the encouragement of Pak Young-hyo and with assistance of Yu Kil-chun and Yun Chi-ho, other young, progressive government officials, had started the publication of *Hangsung sunbo*, a newspaper. This newspaper had played a significant role to spread progressive ideas among the Korean people until its demise, due to financial reasons, in 1888. In 11 February of 1885 edition, the Declaration of Independence appeared under the title, "About America."<sup>60</sup> That article introduced the first paragraph and the first part of the second paragraph of the Declaration of Independence: for instance, it was written that "... all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."<sup>61</sup> The author of this article emphasized the inalterability of those rights,

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<sup>59</sup> Tscholsu Kim, *Mikuk Hunbopee Hankuk Hunbope Michin Younghyang Susul* [The Introduction to the Influence of the Constitution of the United States on the Constitution of the Republic of Korea], in *Hankukesu Mikuk Hunbopei Younghyangkea Kyohun* [Influence and Lessons of the U. S. Constitution in Korea], 9,10 (Hankuk Kongbup Hakhoi [Korean Public Law Association] ed.,1987).

<sup>60</sup> For details, see Bonduk Chun, *Hankuk Gundaebup Sasangsa* [History of Modern Korean Legal Thoughts], 82

<sup>61</sup> Kim, *supra* note 34 at 10, 11. The quotation for the Declaration of Independence from, Kermit L. Hall et al, *American Legal History: Cases and Materials*, 66 (2<sup>nd</sup> ed., 1996).

expressing that "no one can restrict those inherent liberties and even the Ghost can not steal those inherent rights."<sup>62</sup> Although most articles wrote anonymously, it had been believed that the articles might be written by the leading members of the Enlightenment Movement. They argued that the state's main role was to protect such "Heaven-bestowed" rights: "A state that does not fulfill this role is not a state, and a government that betrays this responsibility is not a government." According to Professor Chandra, the articles in this newspaper showed the American Declaration of Independence through the vision of the book "Conditions in the West", by Fukuzawa Yukichi, a leader of Japanese "Civil and Enlightenment" Movement.<sup>63</sup> Thus, due to this reason, Professor Chulsu Kim asserted that the direct influence of American constitutionalism did not find in those references.

After failure of 1884 coup, Pak Young-hyo did not accept his exile in Japan but rather honed his progressive ideas further by visiting the United States. In 1888, he put his ideas together and sent them in the form of a long

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<sup>62</sup> Kim, *supra* note 34 at 11.

<sup>63</sup> Chandra, *supra* note 25 at 52.

memorial to the Korean King. Professor Chandra indicated two basic ideas of the memorial, so called "Ku ui sangso":

First, Pak wrote of all human beings as equal in the eyes of the Creator; hence all have the same rights to life, liberty, and the pursuit of prosperity. These are inalienable endowments of all. Second, he said that it was the people who initially created all governments. Their aim was to seek ways in which to protect their rights. Government is nothing, but a trust and, if the government fails to live up to its duty as a trust, the people have a right to compel it to do so or alter it or replace it.<sup>64</sup>

Pak also wrote of the need for "a joint rule of government, shared by the monarch and the subjects," and suggested the setting up of a system of elected Assembly and elected officials at the local and regional levels as a concrete measure for popular participation in government.<sup>65</sup> He also called for the encouragement of newspapers and political parties as forum for the expression of public opinion.<sup>66</sup> In addition to these, he also argued the concept of equality of classes and between the genders, and proposed the banning of concubinage, freedom of choice in marriage, and the remarriage of widows.<sup>67</sup> More importantly and more related to this study, he mentioned about the role of law in

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<sup>64</sup> Chandra, *supra* note 25 at 50: more details about Pak's memorial, see Chon Bong-duk, *Pak Young-hyo wa ku ui sangso susul* [An Introduction to Pak Young-hyo and his memorial] (1978) and also, Young-ick Lew, *The Reform Efforts and Ideas of Pak Young-hyo, 1894-1885*, in *Korean Studies*, Vol. 1 (Honolulu, Center For Korean Studies, University of Hawaii, 1977).

<sup>65</sup> *Id.*, at 51.

a limited monarchy. According to Pak, the purpose of law was to "regulate the interrelationship of human beings with a view to creating a just society and preventing evil."<sup>68</sup> He also called for open, fair and speedy trials; and for the right of all accused to have access to attorneys and to all evidence helpful to their case.<sup>69</sup> Although he did not go into detail, he also asserted equal rights and equal education for women.

Meanwhile, during 1883-1884, Yu Kil-jun, was in the United States, studying, traveling, and developing his insights about the world. Upon his return to Korea, he decided to write a book on the uses of an enlightened spirit. His book titled "*Seoyu kyunmun* [Observations from a Journey to the West] contains much about political systems, international law, commerce, technology, education, and so on, advocating that Korea strive for modernization on the model of Western civilization."<sup>70</sup>

In Chapter IV People's Rights of *Seoyu kyunmun*, he asserted that "individual's freedom and rights were

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<sup>66</sup> Chandra, *supra* note 25 at 50.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

unalienable; all men should be allowed to enjoy such freedom and rights equally; and such freedoms were unalterable, undeniable, and unrestricted."<sup>71</sup> He listed the content of the inherent rights, such as right to enjoyment of life and liberty, property rights, right to assembly and religion, right to freedom of speech, and right to reputation.<sup>72</sup> Furthermore, he mentioned about the presidential system of which he was not in favor, insisting that "the real purpose of the establishment of a government must be in favor of the people's will; therefore, that government must exist for the people, on itself of the people and by the people."<sup>73</sup>

Upon returning home in 1895 after majoring in medicine and obtaining American citizenship, Jae-pil Suh (Philip Jasion) began to publish a newspaper, the TongNip Shinmun [the Independence Newspaper], which was instrumental in promoting Korea's national interest while under Japanese oppression.<sup>74</sup> The Tongnip Shinmun inspired Korean with the spirit of national independence, nationalism, and democracy.<sup>75</sup> With writing series of articles in that paper,

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<sup>70</sup> Lee, *supra* note 11 at 297,298.

<sup>71</sup> Kim, *supra* note 34, at 12.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Suh, *supra* note 9, at 266.

<sup>75</sup> *Id.*

Jae-pil Suh insisted upon the adoption of the Western style of democracy: for instance, general election, local autonomy, national parliament, separation of powers, and right to due process of law.<sup>76</sup> In 1896, Jae-pil Suh founded the Independence Club, which was the first and most active organization to secure the nation's independence and the rights of the people. The leading figures of the Independence Club included Kil-jun Yu and Chi-ho Yun, and with Jae-pil Suh these three leaders seem to have developed a friendly attitude toward American culture because they studied in America and received support from Americans. One of the main goals of the Club was to initiate a popular rights movement as a means of bringing about wider participation in the political process.<sup>77</sup> For this, the Club called for the right of the individual to the security of his person and property, the rights of free speech and assembly, the full equality of all people, and doctrine of the sovereignty of the people. Furthermore, the Club proposed the King to convert the Privy Council [ChungChu Won] into a parliamentary assembly.<sup>78</sup> In these respects, the Independence Club in effect had started a movement for political democracy for the first time in Korea.

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<sup>76</sup> Kim, *supra* note 34, at 12, 13.

<sup>77</sup> Lee, *supra* note 11, at 304.

There had been also some Americans who had traveled to Korea and devoted themselves to work for the development of the Korean legal culture during this period. These advisors include Judge Owen N. Denny, Charles W. LeGendre, and General Clarence W. Greathouse.<sup>79</sup>

### 8. Summary

During the forty-four years of King Kojong's reign including the period of the Taewongun's regent, the Kingdom drifted from an isolated "Hermit Kingdom" into a modern state by establishing treaty relations with Japan and the Western powers. The United States was the first Western country that established diplomatic relations with the Kingdom. As mentioned earlier, the primary purpose of the United States in the Treaty 1882 was commercial rather than political which was more important to the Kingdom, because the King and his followers believed that they needed the political ally who could protect the independence of the

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<sup>78</sup> Lee, *supra* note 11, at 304.

<sup>79</sup> Kim, *supra* note 34, at 14; Ahn, *supra* note 33 at 71. For details about these advisors' activities, see Yur-Bok Lee, *Korean-American Diplomatic Relations, 1882-1905*, in *One Hundred Years of Korean-American Relations, 1882-1982*, 31-34 (Yur-Bok Lee & Wayne Patterson ed., 1986) ; Chong-Ko Choi, *On the Reception of Western Law in Korea*, Korean J. Comp. L. 122 (1981); Young I. Lew, *American Advisor in Korea: 1885-1894*; Young I. Lew, *The United States And Korean-American Relations, 1866-1876*

Kingdom from the Western or Eastern imperialists, particularly from Japan's intrusion.

In addition to this sovereignty issue, many young progressive intellectuals, like Kim Ok-kyun, Pak Young-hyo, Yu Kil-jun and Suh Jae-pil, who learned the western values of democracy that eventually they admired so much for the nation's reform, had great efforts to plant those ideas into the very resistant soil, the *Hermit Kingdom*. After they learned the Western ideas of democracy from Japanese references which Japanese intellectuals had translated into Japanese, some of them had actually been to America and exposed them to new and pioneering ideas that the Kingdom might import as quickly as she could.

Even though their efforts seem to have less influenced than they expected, it might be considered as the first endeavor to adopt the western version of democracy, particularly that of American's, and, more importantly, their efforts had played very valuable roles to link the ancient Confucian Monarchy to the modernizing democratic nation in spite of the Japanese interruption.

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(1979); Robert Ray Swartout, *Madarins, Gunboats And Power Politics: Owen Nickerson Denny And The International Rivalries in Korea* (1980).

### C. THE DARK ERA: Under Japanese annexation (1910-1945)

In 1910, when Japan finally annexed Korea, the influence of America on Korea started to decrease, and because of its ties with Japanese Empire, the United States did little to give political support for the people of Korea's independence movement. However, the Korean movement for independence often combined nationalist preoccupations with American notions of constitutionalism and Christianity.<sup>80</sup> Although official government envoys retreated from Korea, American missionaries, educators, and philanthropists remained, and their works were very successful. During this period, even though Korea did not look to American law, Korea's legal system had developed for Japan's exploitative purposes, two important instances of influences of American constitutionalism are found: that is, Korean Declaration of Independence of March 1, 1919 and the Constitutional Charter of the Provisional Government. In this part, therefore, the above two constitutional documents will be discussed.

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<sup>80</sup> Lawrence W. Beer, *The Influence of American Constitutionalism in Asia, in American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History*, 127 (George Athan Billias ed., 1990).

## **1. The March First Movement and the Korean Declaration of Independence**

In August 22, 1910, Prime Minister Yi Wan-yong and Japanese Resident-General Terauchi Masatake formulated the terms of the annexation treaty and secured the Prime Minister's signature on it.<sup>81</sup> Finally, on August 29, 1910, Sunjong, the son of the King Kojong, was forced to issue a proclamation giving up both his throne and his country. Thus, the Korean nation, against the will of its entire people, was handed over to the harsh colonial rule of Japan.

### **a. The March First Independence Movement**

After Japanese annexation of Korea, patriotic Korean launched an independence movement against Japanese colonial rule. Their organized activities were strengthened in 1919 with the outburst of the March First Independence Movement against Japanese colonial rule, which led to the birth of the Korean Provisional Government in Shanghai, China. Koreans in the United States gathered at Independence Hall in Philadelphia to declare Korean independence. The ideological underpinning of the March First Movement was the principle of "self-determination of peoples" proclaimed by

American President Woodrow Wilson.<sup>82</sup> On 11 February of 1918 Wilson clarified his thoughts of "self-determination of peoples" in his notes to the German and Austrian Foreign Ministries, in which he said: "National aspirations must be respected; peoples may now be dominated and governed only by their consent."<sup>83</sup> Unfortunately, however, it just intended to liberate the people who had been victimized by the Germans; thus, it was a fatal flaw in the otherwise reasonable expectation of Korean patriots that their country's independence was to be restored.<sup>84</sup>

The March First Movement began with the promulgation of Independence, which also called "Kimi Toklip Suneun [The Korean Declaration of Independence 1919]," signed by the thirty-three representatives of the Korean people. Of the thirty-three leaders of the March First Movement, sixteen were Christians, fifteen were followers of Chundoism, and two were Buddhists. Thus the majority of the leaders were Christians, who apparently were influenced by American

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<sup>81</sup> Lee, *supra* note 11 at 313.

<sup>82</sup> Suh, *supra* note 9 at 9; The Korean independence movements were "strongly influenced by World War I and the Russian Revolution. Inspiration was provided by the calls for "self-determination of peoples" by Woodrow Wilson and by Lenin and Trotsky, in a new era that presumably was to be marked by brotherhood, justice, and peace." Robert T. Oliver, *A History of the Korean People in Modern Times, 1800 to the Present*, 126 (1993).

<sup>83</sup> *Id.*

missionaries.<sup>85</sup> The opening lines of the Korean Declaration of Independence read as follows, in a translation made shortly after the event:

We herewith proclaim the independence of Korea and the liberty of the Korean people. We tell it to the world in witness of the equality of all nations and we pass it on to our posterity as their inherent right. We make this proclamation, having back of us five thousand year of history and twenty millions of a united loyal people. We take this step to insure to our children, for all time to come, personal liberty in accord with the awakening consciousness of this new era. This is the clear leading of God, the moving principle of the present age, the whole human race's just claim. It is something that cannot be stamped out, or stifled, or gagged, or suppressed by any means.<sup>86</sup>

The Korean Declaration of Independence declared the principles of the right of a people to its own national existence and of the equality of all mankind. The Korean Declaration of Independence called for "freedom and equality in words echoing the American Declaration of Independence."<sup>87</sup> The March First Movement with the Korean Declaration of Independence became a national ideology, namely *Sam-Il Minjok Jungsin* [National Spirit of March

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<sup>84</sup> Suh, *supra* note 9 at 9.

<sup>85</sup> Dong Shu Bark, *The American Educate Elite in Korean Society*, in Suh, *supra* note 9 at 268. For more details about American missionary's activities in Korea during Japanese colonial rule, see Wi Jo Kang, *Relations between the Japanese Colonial Government and the American Missionary Community in Korea, 1905-1945*, in *One Hundred Years of Korean-American Relations, 1882-1982*, 68 (Yur-Bok Lee & Wayne Patterson ed., 1986).

<sup>86</sup> Lee, *supra* note 11 at 342.

First]. Not only did this Movement intend to achieve the independency of Korea, but also it aspired the nation to transform from the ancient status into the modernizing state. Thus, this movement must be also recognized as the national movement for the creation of a modern state,<sup>88</sup> because the Declaration did not call for restoring the old Monarchy but for establishing the modernizing system of a democratic republic. Through the organizational framework of the Independence Movement, the former leadership classes were more or less excluded, and this was a development of genuine promise for the founding of a pluralistic society.<sup>89</sup> The movement was a new channel to the leadership. It had the advantages of the fluid society: new men, new ideas, and new forms moving up in a period of modernization.<sup>90</sup>

The ideas of the March First Movement were those of Korean independence, nationalism, and democracy, but these ideals can be traced to the ideas which Kil-jun Suh and the Independence Club had brought from America in the later Chosun period.<sup>91</sup> Dr. Gregory Henderson noted: "The Movement marked the first national response to a Western idea and, ...

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<sup>87</sup> Beer, *supra* note 55 at 127.

<sup>88</sup> Young-Soo Kim, *Daehanminkuk Yimsijoungboo Hunbopron* [A study for the Constitution of the Korean De-facto Government] 183, 184 (1980).

<sup>89</sup> Gregory Henderson, *Korea The Politics of the Vortex*, 84 (1968).

<sup>90</sup> *Id.*

<sup>91</sup> Bark, *supra* note 62 at 268, 269.

to Koreans, it is the cornerstone of their national politics one of the few events of their history in which pride is shared and closely felt. For the first time they were united behind an idea, not fragmented by competition for the same power."<sup>92</sup> He also indicated that "because of the role of Christianity in education and in the Movement, girl students and women played their parts in the organization, taking their places popularly for the first time on the national political stage."<sup>93</sup>

Although suppression and complete failure to achieve independence led to a sense of disappointment, the movement remained in many ways a success. Most importantly, the spirit of the March First Movement with the Declaration of Independence symbolized the Korean democracy and had great influence on the creation of the Republic of Korea and its Constitution. The primary ideas of the Declaration of Independence, such as the theory of inherent rights, equality, and ideology of democratic republic, which were apparently the influences of the Western democratic ideas - mostly from the American constitutionalism -, still remained

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<sup>92</sup> Henderson, *supra* note 64 at 82.

<sup>93</sup> *Id.*

the current Constitution of the Republic of Korea as fundamental Korean constitutionalism.<sup>94</sup>

**b. The Creation of the Exile Provisional Government  
of the Republic of Korea**

Since it is recognized, particularly by those leaders of the March First Movement, that it was urgent for Korean people to establish a unifying organization for the independency, several different provisional governments were established both inside and outside Korea in the immediate wake of the March First Movement: those are, *Daehan Kukmin Hoei* [the Assembly for Korean People] in Russia, *Chosun Minkuk Imsi Chungbu* [De-facto Government of Korea] in China, *SangHae Imsi Chungbu* [Shanghai De-facto Government] in Shanghai, China, *Shinhan Minkuk Chungbu* [New Korean Government] in China, and *Hansung Chungbu* [Government in Seoul] in Seoul. *Daehan Kukmin Hoei* was joined into *Shanghai De-facto Government* with amending the Constitutional Charter of the Shanghai De-facto Government, and then, in April 1919, the latter and *Hansung Government*

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<sup>94</sup> The Preamble of the Constitution states that "[W]e the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea

united into the *Taehan Minkuk Imsi Chungbu* [the Provisional Government of the Republic of Korea, hereinafter "the Provisional Government"] in Shanghai, China. Thus, since then the year of 1919 was called "the first year of the era of the Republic of Korea," and the Provisional Government had represented the Korean people until 1945 when Korea restored its independency. The Provisional Government consisted of a deliberative organ and an administrative organ, and, importantly, it was formed in accordance with the principles of democracy for the first time in Korean history.

As mentioned in the preceding Part, the Provisional Government of the Republic of Korea was established with the amendment to the Constitutional Charter of Shanghai De-facto Government in April 1919, and that Constitution became the First Constitution of the Provisional Government. The Constitution of the Provisional Government was amended four times, until Korea restored its independency and established the First Constitution of Republic of Korea in 1948.

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Government born of the March First Independence Movement of 1919 and ...." Gisbert H. Flanz ed, *Constitutions of The Countries of the World*, Vol. X,



### III. OVERVIEW OF CONSTITUTION OF REPUBLIC OF KOREA WITH INFLUENCE OF AMERICAN CONSTITUTION

#### A. BRIEF REVIEW OF THE AMERICAN CONSTITUTIONAL PRINCIPLES

In order to understand the influence of United States constitutionalism to Korea, one might first find out what the United States' constitutional doctrines have been recognized and further how these doctrines have spread many countries. Each country has a distinctive constitutional history and culture, but the United States is the contributor to constitutionalism in many countries specially those who liberated from colonial rules after World War II. As mentioned earlier, the Declaration of Independence, the Constitution of the United States, other documents such as Federalist Paper, and judicial decisions have been affected modern statecraft and legalism.<sup>95</sup>

What are American constitutional doctrines or characteristics? And what specific doctrines have been planted in Korea? According to Professor Lawrence W. Beer, American constitutional doctrines include the following: (1) a single (written) document national constitution, usually

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<sup>95</sup> Beer, Supra Note 55 at 113

with a preamble of guiding principles, as a means of fusing ideas with law and governmental institutions; (2) a listing of constitutional rights defended by independent courts; (3) the idea of a constitution as "the supreme law of the land"; (4) a constituent or constitutional assembly with authority to develop a basis law which legitimizes independent statehood, a revolution, or some other form of major sociopolitical change; and (5) the concept of the separation of powers.<sup>96</sup>

In addition to the above five elements, the followings also recognize American constitutional influences to Korea; (6) presidential government system which always adopted as government system during the changes of Korean constitution except for only the Second Republic Constitution; (7) a rigorous amendment process; and (8) presidential election process, popular and competitive election. However, the above eight elements have not been always adopted for nine Korean Constitutions.

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<sup>96</sup> Beer, *Supra* Note 55 at 114. And also see, Ahn, *Supra* Note 34 at 73, Professor Ahn adds more elements to this list including follows: a rigorous amendment process; and free, popular and competitive elections, decided through secret balloting by all citizens.

In this chapter, therefore, I present the changes of Korean constitutional law from the establishment of the Republic of Korea that also established the first Constitution to the current constitution which amended in 1987 with the aspect of political changes as well as social changes.

**B. THE UNITED STATES MILITARY GOVERNMENT IN KOREA  
(USAMGIK) AND THE ESTABLISHMENT OF CONSTITUTION OF  
REPUBLIC OF KOREA**

After World War II, when Japan surrendered to the Allies and many colonial Asian countries liberated, the United States has affected constitutionalism in these Asian countries and South Korea was one of them. The United States occupied South Korea and encouraged democratic change by their consultation of America's constitutional experience. However, in fact this America's efforts and encouragement were not carrying out according to what American expected because of the heavy influence of Japanese legal institutions on Korea during 35 years of occupation period, the resistance against USAMGIK's policies from left-wing and struggle between the left and right-wing. Furthermore,

since America only occupied South Korea not North Korea, the desire of Korean's unification was also the key factor of this unsatisfied American's effort.

The main reason of Korean division after liberation from Japan was due to the several decisions of the Allies' meeting, and particularly due to President Roosevelt's two aims as the leader of the Allied coalition which were to win World War II and to establish postwar conditions that would lead to lasting peace.<sup>97</sup> Moreover, after Pearl Harbor attack, President Roosevelt sought a plan that would bring the Soviet Russia into the Pacific War and for that he felt it was necessary to accept Russia's entrance into both Eastern Europe and Korea.

A result of the meeting in Cairo, in late November 1943, President Roosevelt, the British Prime Minister Churchill, and Prime Minister of China Chiang Kaishek proposed that they issue a promise that "Korea shall be free and independent."<sup>98</sup> In February 1945, when the three leaders met at Yalta, President Roosevelt offered a policy guide

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<sup>97</sup> Robert T. Oliver, *Transition and Continuity in American-Korean Relations in the Postwar Period in Korea and The United States: A Century of Cooperation*, edited by Youngnok Koo & Dae-Sook Suh, 91 (1984)

<sup>98</sup> *Id.*

which include the startling proposition: "The position of the Soviet Union in the Far East is such that it would seem advisable to have Soviet representation on an interim international administration of Korea regardless of whether or not the Soviet Union enters the war in the Pacific."<sup>99</sup> Later, at the Potsdam Conference, in July 1945, President Harry Truman agreed that northern Korea might be occupied by Russian troops and that a four-power trusteeship should be established over the peninsula.<sup>100</sup> Two months later, when the Allied leaders met in a conference in Moscow, the discussion concerning Korea erupted in bitter disagreement. Nevertheless, the trusteeship plan was announced, on December 27. Korean nationalists regarded the trusteeship announcement as "a shocking fact that stems from an erroneous perception of Korean realities and ignores the people's will."<sup>101</sup> It was so obvious that this trusteeship plan was not acceptable for Korea because it regarded as another colonial rule and historically this trusteeship plan turned out to be fatally flawed.<sup>102</sup> Through sturdy resistance its patriot leaders defeated the trusteeship plan,

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<sup>99</sup> Oliver, *Supra* note 97 at 91

<sup>100</sup> *Id*

<sup>101</sup> *Id*

<sup>102</sup> *Id*

but they were not able to end the division of Korean peninsula.

On September 7, 1945, General Douglas MacArthur proclaimed that the areas below 38 degrees North and the people residing there were under the military administration of the United States. On the very next day, the United States Army landed on the Korean peninsula below the 38<sup>th</sup> parallel to disarm the Japanese armed forces while the Soviets already entered northern Korea for the same purpose. From that moment, even if Korea did attain liberation from Japan, another colonial period started under the direction and control of the United States of America.

### **1. The Period of the United States Military Government in Korea (1945-1948)**

From 1945 to 1948, United States Military Government in South Korea (hereinafter "USAMGIK") ruled the southern part of Korean peninsula directly through ordinances, while the Soviet Union controlled the northern part of Korea through Kim Il-Sung. Dr. Robert T. Oliver, who was a counselor for the First President of Korea and personally involved in

Korean affairs during the USAMGIK period, noted about USAMGIK's activities as follows;

The American Military Government in South Korea was marked by goodwill and good intentions but also by futility and ineffectiveness. Very evident was the determination of the United States to end the USAMGIK as soon as possible and to withdraw from the peninsula, and from involvement in Korean affairs,... The feelings and attitudes of its personnel were strangely mixed, ranging from "We like you and want to help you" to "We dislike being here and we want to leave you as soon as we can." The result was confusion and uncertainty.<sup>103</sup>

As Dr. Oliver's notes, Koreans reactions toward USAMGIK's attitudes were also strangely mixed, ranging from "We like you and want you to help us" to "We dislike you being here and we want you to leave as soon as possible." This confusion was mostly due to the struggles and tensions between left-wing and right-wing, Communists and Anti-communists.

During the period of the USAMGIK, essential values of American democracy were introduced to Korea. The USAMGIK sought to "nurture a political democracy in South Korea modeled after the United States." The American Occupation led by Lt. General John R. Hodge had four goals: to remove the Japanese, to prepare the Koreans for self-government, to

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<sup>103</sup> Oliver, *supra* note 57 at 169.

rebuild the economy, and to establish an effective democratic government.<sup>104</sup>

Once USAMGIK was set up on September 7, 1945, it started issuing the ordinances which had same legitimate authority as the legislation. One hundred forty one ordinances had been issued before the South Korean Interim Government was established and the Korean Interim Legislative Assembly (hereinafter "KILA") given the legislative function. However, even though KILA passed only 12 pieces of legislation, USAMGIK still continued to issue the ordinances and it totaled 211 by the end of Military Government.<sup>105</sup>

On October 9, 1945, the USAMGIK promulgated Ordinance No. 11, providing that "As of today all the laws and decrees with legal authority shall be rescinded if their judicial and administrative applications result in discriminations because of race, nationality, creeds, or political

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<sup>104</sup> Beer, *supra* note 55, at 128: The State Department declared at August 1946 that "The fundamental objectives of occupation policy ... aim, simply, toward ... the eventual reconstruction of political life ... on a peaceful and democratic basis." Reprinted in E. Grant Meade, *American Military Government in Korea* 7 (1951).

<sup>105</sup> Id.

beliefs."<sup>106</sup> To achieve this, USAMGIK tried to de-Japanize Korean law by replacing Japanese influences with American law. As a start, USAMGIK administration repealed many notorious colonial laws, such as the Sedition Law, the Political Crimes Law, the Preventive Arrest Law, and the Publication Act, promulgated by the Japanese regime.<sup>107</sup>

The USAMGIK contributed to the introduction of basic ideas of American democracy and constitutionalism. As mentioned earlier, although American constitutionalism such as the theory of inherent rights and equality already had been brought into the late nineteenth century Korea by Koreans educated in America, American missionaries, and teachers, most Koreans learned the meaning of constitutional democracy and the doctrine of separation of powers for the first time in history during the Occupation.<sup>108</sup> However, the American influence over Korea's constitutional fate had been limited. As Lawrence W. Beer indicated, there had been two inhibited factors over occupation efforts at democratic reform from the beginning of the occupation. First, "[T]he assumption that, unlike Japan, Korea was a liberated ally

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<sup>106</sup> Ordinance No. 11 § II.

<sup>107</sup> Tscholsu Kim & Sang Don Lee, *The Influence of U.S. Constitutional Law Doctrines in Korea*, in *Constitutional Systems in Late Twentieth Century*, 303, 304 (Lawrence B ed., 1991).

and therefore had to bear the onus for creating a new democracy, however impossible that task might be under the circumstances; and secondly, the lack of planning, personnel, knowledge, and political stability, and the absence of a unified and complaining populace and a preexisting indigenous government."<sup>109</sup> For instance, regarding the second factor, "a severe shortage of legal professionals further exacerbated the difficulties of developing a coherent tradition of rights protection and constitutional government under law."<sup>110</sup> Furthermore, not one Korean law specialist who might be able to serve for the USAMGIK existed in the U.S.

In spite of those obstacles, the USAMGIK did attempt to establish *habeas corpus* and other fundamental rights, promulgating series of ordinance which had a strong flavor of American constitutionalism.<sup>111</sup> For example, on March 20, 1948, the USAMGIK amended the Criminal Procedure Act, providing that no one could be arrested without a warrant issued by a judge, and that the accused persons were

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<sup>109</sup> Kim & Lee, *supra* note 73 at 304.

<sup>109</sup> Beer, *supra* note 55 at 128.

<sup>110</sup> *Id.* "In 1945, only eight out of 120 prosecutors, 46 out of 235 judges and an estimated 195 qualified lawyers in the South were Koreans." See, Henderson, *supra* note 64 at 17.

<sup>111</sup> For details about those ordinances, see Kim, *supra* note 34 at 22-28, in Korean; see, Kyu Ho Youm, *Press Law in South Korea*, 37-44 (1996) in English; Henderson, *supra* note 64 at 151-162.

guaranteed the right to legal counsel.<sup>112</sup> Moreover, the USAMGIK promoted gender equality in political and family affairs, which led to give women right to vote before the national election held on May 10, 1948.<sup>113</sup> Ordinance No.126 provided that "[A]ll public officials and Members of National Assembly shall be elected by universal and equal ballot by the citizens regardless gender."<sup>114</sup>

However, the most important proposition taken by USAMGIK for Korean democracy and civil rights was the "Ordinance on the Rights of the Korean People" on April 4, 1948, near the end of its three-year rule. Professor Tscholsu Kim, a leading constitutional law scholar, wrote:

Probably the most significant measure taken by the U.S. Military Administration for Korean civil rights was "The Ordinance on the Rights of the Korean People" issued by General Hodge on April 7, 1948. The Ordinance consisted of twelve Articles guaranteeing the freedom of religion (Article 10), assembly and association, expression and publication (Article 8), and the rights to legal counsel, to speedy and fair trial (Article 6 & 7), and to equal protection under the law (Article 1). It also prohibited torture and deprivation of freedom or property without due process of law (Article 3 & 4). These precious principles were obviously derived from the basic doctrines of the Constitution of United States. The principles enumerated in this Ordinance had a consequential impact upon the political leaders of Korea who were preparing

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<sup>112</sup> Kim & Lee, *supra* note 73 at 304.

<sup>113</sup> *Id.*; Ordinance No. 126,

<sup>114</sup> Ordinance No. 126. *Reprinted and translated in Kim, supra* note 34 at 26.

the nation for independence.<sup>115</sup> [the number of Article added.]

It included major liberties found in the American Bill of Rights, but the exercise of those rights was limited by the Article 12, providing that "those rights may be restricted temporary only when necessary for national emergency or for public welfare."<sup>116</sup> However, "it was meant to be an American gift to the Koreans legal system."<sup>117</sup>

## **2. The Establishment of the Constitution of Republic of Korea**

On June 30, 1947, a special committee for drafting the laws for preparing the inauguration the Republic of Korea was organized and then in the autumn of that year a subcommittee started his job to draft a constitution for the new republic. Since the Constitution Drafting Committee lacked much expertise, it relied heavily on Dr. Chin-o Yu's Draft.<sup>118</sup> Dr. Yu preferred European to American law and

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<sup>115</sup> Kim & Lee, *supra* note 73 at 305.

<sup>116</sup> Reprinted in Kim, *supra* note 34 at 28.

<sup>117</sup> Ahn, *supra* note 33 at 73.

<sup>118</sup> It is also known that Colonel Emery J. Woodall, the legal officer of the AMG, prepared his own version of a draft Constitution for Korea and gave it to Dr. Yu; however, there is no evidence that the so-called "Woodall Draft" had any significant influence in the making of the Constitution of Korea. Kim & Lee, *supra* note 73 at 305.

constitution for guidance, but it seems that "The Ordinance on the Rights of the Korea People" was very helpful for him to draft the provisions for individual rights.<sup>119</sup> In Dr. Yu's original version of the Draft, a bicameral parliamentary system with cabinet responsibility was considered as the governmental system for new republic, but during the deliberation of the new Constitution, Syngman Rhee, who was at that time virtually the only candidate for President, force the cabinet-centered system to be changed to a presidential system and unicameral legislature.<sup>120</sup>

Therefore, the draft Constitution of the subcommittee featured a unique mixture of the presidential and parliamentary systems of government. It provided for a bicameral legislature, and for a president elected by the legislature. As the prime minister under the parliamentary system, the president was given the power to dissolve the legislature, and on the other hand, the legislature could cast a vote of no-confidence in the Cabinet headed by the Premier.<sup>121</sup> Also, the Supreme Court had the power to declare unconstitutional and void laws found to be in conflict with the Constitution.<sup>122</sup> But as it turned out, bicameralism and

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<sup>119</sup> *Id.*

<sup>120</sup> Youn, *supra* note 19 at 96, 97.

<sup>121</sup> Kim & Lee, *supra* note 73 at 305.

<sup>122</sup> *Id.*

judicial were not adopted by the National Assembly, and a strong presidency became the basis of the government's structure at the insistence of Syngman Rhee.

Professor Dae-Kyu Youn indicated two problems of this unique deliberation ; "first, the shift from parliamentary system to presidential system was based not on any consideration of principles or any long-term effect, but on short-term interest of ensuring the presidency for one individual; second, the first Constitution failed to accommodate the views of political forces favoring a government whose purpose was to unify the North and South."<sup>123</sup>

On May 10, 1948, for the first time in Korea history, national elections for the unicameral National Assembly were held under the auspices of the United Nations. On July 12, 1948, the National Assembly finally passed the draft Constitution, and the Constitution of the Republic of Korea took effect on July 17, 1948. The National Assembly also elected Dr. Syngman Rhee as the first President of the Republic of Korea.

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<sup>123</sup> Yoon, *supra* note 19 at 97.

As the record of American Constitution represents the American history, the record of Korean Constitution portrays the unstableness and complexity of modern Korean history. Since the establishment of the first constitution in 1948, the Constitution of the Republic of Korea has been changed nine times, an average of almost once every five years. This frequent constitutional changes recognize as one of the most negative characters and have come about largely through abnormal extensions of the presidential term of office, often in conjunction with the exercise of martial law.<sup>124</sup> Those constitutional changes have usually accompanied with major political incident (*i.e.*, Coup or nation-wide protest). As Dr. Gregory Henderson indicated, despite of an accompaniment to her sensational economic and kaleidoscopic social revolutions, "the search for constitutional and political identity of Korea still lurches" on fifty years later.<sup>125</sup>

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<sup>124</sup> Yoon, *supra* note 26 at 400. Professor Yoon also summarizes other facts of constitutional changes in Korea: Executive Dominance over the Legislature; Passivity in Judicial Review; and Neglected Civil Rights.

<sup>125</sup> Gregory Henderson, *Constitutional Changes from the First to the Sixth Republics: 1948-1987*, in *Political Change in South Korea*, 23 (Ilpyoung J. Kim & Young Whan Kihl ed., 1988).

This Chapter analyzes the record of constitutional changes with several historical facts since the inauguration of the Republic of Korea, as follows:

- (1) the rapid economical development and underdevelopment of constitutionalism;
- (2) the tension between the authoritarian regime and peoples' pro-democracy movement;
- (3) the "Red Threat (anti-communism)," as the pretext of the neglected Civil Rights; and
- (4) the continuing influences of American democracy in theory, but America's silent approval of the military dictatorship in reality.

#### **a. Influence of the U.S. Constitution on Individual Liberties**

As mentioned earlier, "The Ordinance on the Rights of Korean People" issued by General Hodge had a very strong influence on the drafting of the individual rights provisions of the Constitution of 1948. Thanks to this very significant contribution of American concepts of individual rights to the drafting process, the constitutions of the Republic of Korea have conserved precious principles of individual liberties, such as the freedoms of religion, and the freedoms of speech and assembly, the right of *habeas corpus*, the right to a fair trial, and equal protection of all citizens under the law.

Rights were listed in Chapter II as equality before the law, freedom of domicile, freedom from trespass and unlawful search, freedom of private correspondence, the freedom of speech, press, assemble and association, the right of property, equal opportunity of education, the equality of men and women and so on.<sup>126</sup> Listed liberties were guaranteed "except in accordance with law," and "with the provisions of law." Article 28 provided that "laws imposing restrictions upon the liberties and rights of citizens shall be enacted only when necessary for the maintenance of public order or the welfare of the community." A problem of this restriction was that such "necessaries leave to strong executive opinion."<sup>127</sup> This restriction always adopted in Korean constitutional amendments in more severe ways or more relaxed ways. Hence, I will discuss this issue in later of this chapter.

#### **b. Presidential Government and Legislature**

The discussion about which governmental system might be appropriate to Republic of Korea has always been a controversial issue in politics as well as in the

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<sup>126</sup> Gregory Henderson, *Human Rights in South Korea 1945-1953*, in Shaw ed., *supra* note 21 at 148.

constitutional academia. It has been suspicious whether the adoption of the American style of the presidential system in the Constitution of 1948 caused only by Syngman Lee's obstinacy. However, it is not difficult to understand why Syngman Lee and USAMGIK preferred the presidential system. Professor Tscholsu Kim explained about Syngman Rhee's biased ideas toward the United States as follows;

"Syngman Rhee had been educated at Princeton University and had spent a long time in Hawaii; as a result, he became a staunch believer in American constitutionalism. He was, quite simply, more comfortable with a presidential government like that of America than with a parliamentary system. As he did not have many followers in Korea at that time, he surely might have thought he had no chance to be an effective leader within the framework of parliamentary government favored by most Korean politicians. Dr. Rhee was finally successful in getting the support of the U.S. Government in early 1948, and thus he could pressure the National Assembly to adopt a Constitution for the presidential government."<sup>128</sup>

However, in order to compromise between Syngman Rhee and those politicians who preferred the parliamentary government, the actual Constitution of the First Republic had several features of cabinet-responsibility system: for instance, (1) the Prime Minister was appointed by the President upon approval of the National Assembly; (2) the National Assembly could request the Prime Minister and

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<sup>127</sup> *Id.*

<sup>128</sup> Kim & Lee, *supra* note 73 at 307.

Cabinet Ministers to be present at National Assembly sessions for questioning; and (3) the Executives could introduce bills in the National Assembly.

Although the President had relatively strong powers under the Constitution of 1948, the legislature was awarded considerable powers, including that of overriding a presidential veto by two-thirds of a quorum and instituting impeachment proceedings against the president and vice-president, Cabinet members, judges, and other officials designated by law when they violated constitutional provisions.<sup>129</sup>

### **c. Judiciary**

USAMGIK promulgated the "Judiciary Organization Law," providing that "Courts shall adjudicate civil actions, criminal actions, administrative litigation and all other legal actions." Hence it appeared that USAMGIK might want the new republic to follow the model of American judicial system rather than of France or Germany, where the separate special court have authority to review the administrative litigation. During constitutional drafting, USAMGIK seems

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<sup>129</sup> Henderson, *supra* note 93 at 148.

to have wanted the Constitution to establish judicial review like that in the United States. However, the Constitution of 1948 adopted French style of constitutional review which a special court, namely the Constitutional Committee, had the power to review the constitutionality of laws.

According to Professor Henderson, due to the consistent with "Sino-Korean-Japanese tradition, the Judiciary was considerably less powerful and independent than the legislature.<sup>130</sup> For instance, the chief Justice was appointed by the president with the consent of the National Assembly for unspecified terms, and other judges were appointed by the president for 10 years term. Hence, such an unstable situation of judges made them amenable to presidential direction.<sup>131</sup>

### 3. Summary

Although the influences of American values and ideas of democracy and constitutionalism on Korea started from the nineteenth century Korea with various ways, the more realistic and practical impact have been found during USAMGIK period. Promulgating series of laws and ordinances,

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<sup>130</sup> Henderson, *supra* note 93 at 148.

<sup>131</sup> *Id.*

the U.S. constitutionalism had constructive effect on drafting the Constitution of the Republic of Korea.

Due to the lack of official documents of that period in both Korea and the United States, it is considerably difficult to say whether USAMGIK played any important and active role in the process of drafting of the Constitution of 1948. Nonetheless, however, it is very obvious that the American constitutional principles have had a great influence on the constitutional development of Korea since 1948 although Korean constitutional democracy is "not yet mature as its American counterpart."<sup>132</sup>

In order to understand Korean constitutional democracy, one must be aware of noticeable factors of modern Korean history, as Professor William Shaw indicated as follows;

- (1) The decline of Confucianism as a living political philosophy (despite residual strength in interpersonal relations) that began in the 1880s and sharply accelerated after the loss of Korean independence in 1910.
- (2) The growing strength, during the same period, of alternative philosophical, religious, or political traditions and forms of organization, including Catholic and Protestant Christianity, the Chondogyo or "Heavenly Way" Movement, Western liberalism, and Marxism.
- (3) The strength in the postwar period of the model of militarized government and social control the Japanese exercised for thirty-five years to 1945.
- (4) The effects of national division, civil war, and the accompanying military tension on the Korean

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<sup>132</sup> Kim & Lee, *supra* note 75 at 309.

peninsula since 1945, necessitating large, often politically significant military establishments on both sides of the 38<sup>th</sup> parallel.<sup>133</sup>

In addition to the above historical facts, which I have reviewed in this Charter, now we must turn to look at the following historical facts in order to understand the underdevelopment of constitutional democracy in Korea;

- (1) Korean War and the roles of United Nations;
- (2) In spite of persistent pro-democracy movement by Korean people, how the Military regime in South Korea could last for the last five decades;
- (3) The threat of the North Korea's intrusion and anti-communism as the primary national policy of South Korea;
- (4) Continuing influences of American democracy in theory, but its ignorance by military dictatorship's arbitrary rule in South Korea in reality;
- (5) Most recently, the inauguration of the first democratic government and economic crisis in South Korea; and
- (6) Most importantly, the United States' roles of the above modern Korean historical facts

In the following Charters, the above facts will be discussed in order to explain the development of Korean constitutionalism with analyzing the influences of American constitutionalism doctrines.

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<sup>133</sup> William Shaw, *Introduction*, in *Human Rights in Korea: Historical and Policy Perspectives*, 4 (William Shaw ed., 1991).

**C. The Constitution of the First Republic (1948-1960):  
Syngman Rhee's Regime**

**1. First Amendment (July 7, 1952)- "the Excerpt  
Amendment"**

Even though Syngman Rhee preferred American style of constitutionalism and democracy that considered much more modernized and even progressive idea, his own ideology and thought still seemed that remained the traditional Confucian ideology. He preferred the more centralized governmental system which he believed it was the presidential government with unicameral legislature. He might regard himself as a powerful leader of a nation like a King not as a political leader in a modernized democratic society. With these his belief and his strong personality led him to unfortunate and imprudent attempt to amend constitution for prolonging his time in office.

In addition to the above, one of the most crucial and tragic historical incident happed at June of 1950. It was the Korean War that mainly caused the anti-communism even though it already started after division of Korean peninsula. During next five decades until recent period - probably until two Koreas reunite-, this anti-communism has been a

dominating national ideology and unfortunately, it has used as the pretext of the delayed democracy in South Korea.

On January 28, 1950, the opposition party introduced a constitutional amendment which would have changed the presidential system to a clear-cut cabinet responsible system. Soon after the bill was barely defeated on March 13, 1950, President Rhee attempted to pass another amendment which would have allowed the President to be elected by direct popular vote. The first Constitution in article 53 provided that the President be elected by the National Assembly. However, since the majority in the Assembly at that time did not support President Rhee; for instance, the Assembly reacted not only by turning down one prime minister appointment but by twice passing resolutions for the resignation of the cabinet, this proved to be the high-water mark of constitutional and Assembly rebellion against executive excesses in South Korea.<sup>134</sup> This amendment bill also defeated. This unpleasant experience gave the President a lesson on how important it was to have the majority in the legislature. Rhee reacted by arresting sixteen Assemblymen (over 7 percent of the body) and on May

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<sup>134</sup> Shaw, *Supra* note 133, at 28

14, 1950, he convicted thirteen of them on trumped-up charges of communist conspiracy after an outrageously unfair trial.<sup>135</sup> Thus the captive judiciary was used to emasculate opposition politics and the powers of the legislature. Popular reaction to Rhee, however, came two weeks later in the elections of May 30, 1950, when many Rhee opponents won seats, only to be tragically removed into North Korean captivity soon afterwards.<sup>136</sup>

Rhee reluctantly decided to form the Liberal Party in December 1951. On April 17, 1952, the opposition party submitted an amendment bill introducing a parliamentary system; the bill already carried 123 signatures, exceeding by one the required two-thirds majority. In a countermove President Rhee reintroduced its defeated bill, with some slight revisions - mandating an "easily manipulable popular election of the president" combined with a bicameral legislature.<sup>137</sup> Since Rhee expected that the opposition would have rejected, the government urged the people to recall their representatives, thugs (usually called the "Political Mob") were sent to dissenting Assemblymen, some of whom were placed under police custody on false charges,

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<sup>135</sup> Shaw, *Supra* note 133, at 28

<sup>136</sup> *Id.*

and martial law was declared and enforced to repress all political activity.<sup>138</sup> Finally, at July 4, 1952, Rhee submitted an excerpt amendment bill that selected from previous Rhee's bill and the opposition's new bill. In this sense, the first amendment was called the "Excerpt Amendment" as a nickname. The vote was taken in the middle of night, in all 166 members standing, under presence of military. The amendment was passed without a dissenting vote - all this at the height of Korean War and in a temporary capital where the government had taken refuge in Busan.<sup>139</sup> Syngman Lee was reelected the following year.

The new constitution included several important changes as follows; (1) the president elected by the direct popular vote not by the Congress; (2) bicameral legislature; and (3) the prime minister as a leader of the cabinet appointed by the president (but Rhee never appointed one). Since the main purpose of this amendment solely was to prolong President Rhee's tenure in office, the government barely concerned regarding any other provisions in the constitution.

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<sup>137</sup> Shaw, *Supra* note 133 at 28.

<sup>138</sup> Yoon, *supra* note 19 at 98.

<sup>139</sup> *Id.*

The process of First Amendment involved a number of illegalities and irregularities and, more importantly, it must be recognized as unconstitutional procedure itself. First, the opposite Assemblymen were forced to vote under the presence of military in and outside of the Congress without any debate. Second, the mandatory 30 day public announcement of a constitutional amendment before it was introduced under the Constitution (article 98) was not held. It was just a starting-point which the government abused the Constitution and democracy for its own stake.

**2. Second Amendment (November 29, 1954)- So called, the amendment of "Sleight-of-hand rounding off"**

In order to run for a third term, Syngman Rhee needed a constitutional amendment one more time. In 1954, looking ahead to 1956 when his second term was to end, Rhee again proposed a constitutional amendment removing the barrier against more than two presidential terms. Its defeat by two-thirds of a vote was announced on November 27, 1954, but reversed the next day by eliminating the fraction through a

sleight-of-hand rounding off.<sup>140</sup> The unlimited term for the presidency in this amendment was to apply only to the first president, Syngman Rhee. Thus, this contradicts the principle of democracy, which is the equal rights before the law. In constitutional and democratic viewpoint, the amendment process was unconstitutional because first, it violated the principle of not deliberating the same measure twice during the same session of the Assembly and secondly, the ruling party applied a mathematical formula that was not supposed to use for legal process or constitutional amendment process in order to pass the bill when they failed to meet the quorum.<sup>141</sup> It literally violated a simple democratic rule and Rhee's regime arbitrarily used such a rule for prolong their ruling period.

The Second amendment adopted more American style of the presidential system. In the previous constitution, the President elected through the direct popular vote appoints a prime minister instead of the vice president. However, in

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<sup>140</sup> Henderson, *supra* note 102 at 28. The day after the defeat the government party made a surprising announcement: "It turns out that Vice-speaker Choi's announcement that the amendment bill failed to pass, was erroneous. An error was made in counting the votes. The exact figure for a two-thirds majority for 203, the total member, is 135.33... Since a human cannot be a decimal, the required figure should be 135, an integer closest to 135.3... with the fraction rounded off. The amendment is accordingly considered to have passed. See Yoon, *supra* note 19 at 99.

the second amendment, both the president and the vice president are elected through the popular vote. Therefore, all articles of the prime minister were deleted. The articles of economical system that were prescribed as the more planned and closed market system changed to the free market system. In addition to the extension of term for the presidency, the Second Amendment also abolished the local autonomy reluctantly implemented from 1952-1958. Since then, official down through township chiefs had been appointed rather than elected by the local people until 1993 when the elections for local autonomy - i.e., elections for the governors and the representatives for the local legislature - were held in almost 30 years.

As a result, after commencing in 1948 with considerable democratic ideals which had already inspired previous Koreans drafts from 1919 to 1947, the Korean constitution soon was "laid under siege by amendments, evasions and repressive legislation which continued, solidified, extended, or centralized the increasingly autocratic power of the executive position."<sup>142</sup> Since the primary purpose of those two amendments was to prolong the term of the presidency, it

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<sup>141</sup> Tscholsu Kim, *Hunbophakgaeron* (The Introduction of Constitution), 52 (1988).

was generally understood that there had not been any significant changes in the other provisions of the Constitution except for the presidency. As we saw the proceeding Chapter, the adoption of American style of the presidential government was due to the Syngman Rhee's own political covetousness. Therefore, instead of following the presidential election process of the U.S., he and his followers forced the Constitution Drafting Committee of the National Assembly to establish the indirect presidential election by the National Assembly. However, when Syngman Rhee and his followers found the Assembly was not in favor of Rhee, they started abusing the Constitution and democracy. Therefore, the main purpose of the First and Second Amendment were solely to extend President Rhee's term of the presidency and to become more centralized government and gradually dictatorial government.

Since these two acquisitive amendments by the authoritarian regime, the following amendments also aimed to prolong the rule of the authoritarian regime except for the latest amendment which the process and the primary purpose of the amendment was relatively more democratic.

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<sup>142</sup> Henderson, *supra* note 102 at 28.

In diplomatic perspective, the relationship between Rhee's regime and the United States government gradually changed while Rhee had become authoritarian regime. Since Korean liberation from Japanese occupation in 1945, the United States did not hesitate to use its enormous influence over South Korea for many purposes.<sup>143</sup> The U.S. Administration, both Republic and Democratic administrations, intervened on a number of occasions to press the autocratic Syngman Rhee's regime. In March 1950, Secretary of State Dean G. Acheson reminded the Rhee regime that "U.S. aid, both military and economic, to the Republic of Korea has been predicated upon the existence and growth of democratic institutions within the Republic."<sup>144</sup>

However, such pressures could not change the nature of Rhee's regime because Rhee might have strong belief in his followers and more importantly he could not recognize how badly Korean people, particularly students, wanted to enjoy freedom and democracy and to remove his regime. Furthermore, the U.S. administration did not attempt to act against Rhee's regime in order to give them more bona fide pressure.

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<sup>143</sup> Cohen & Baker, 173

<sup>144</sup> Id.

As I discussed above, the opposition and many Koreans called for amending the Constitution with European style of parliamentary system because they strongly believed the reason that Rhee became a dictator was due to the presidential system. A number of constitutional scholars have been skeptical about the success of American style of presidential government in Korea, as Professor Tae Yeon Han wrote:

"The American system of presidential government has no virtue at all except for the stability and authority of the Executive... Especially in the less-developed countries, it surely develops into severe corruption as has already been shown in the experience of Latin American states."<sup>145</sup>

As mentioned earlier, the effort of the presidential system of government in Korea had been totally failed: however, the constitutional provisions for political and civil rights were reinforced and American constitutional doctrines on court decisions were frequently mentioned in discourse on the Constitution.<sup>146</sup> American constitutional law theories also exerted influence in the making of the Constitution of the Second Republic.

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<sup>145</sup> Tae Yeon Han, *Tendency of the Constitution of the Second Republic*, in *Sasangkye* [The World of Philosophy], 165-173 (June 1960).

## D. The Constitution of the Second Republic: The Turn to Democracy

### 1. Third Amendment (June 15, 1960)

Between the Second and the Third Amendment, there had been significant changes in Korean society. First of all, the war was over. The society started a process of urbanization and centralization which has proceeded relentlessly ever since.<sup>147</sup> Seoul, which had 1,446,000 in 1949, had 2,445,400 in 1960. Urban population, which had been 11.4 percent in 1940, became 33.2 percent by 1960. Internal and external communication sort boomed with urbanization. The number of college enrollment increased almost quadrupling from 1948 to 1960, and an overall literacy rapidly was boosted. Seoul became - and remains today - one of the largest and most violent educational centers in the world. These new and rapid social changes raised grievances, while sharpening ambition and desire for social and political change.<sup>148</sup>

The presidential election under the Second Amendment were so systematically rigged that popular protest flared in

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<sup>146</sup> Kim & Lee, *supra* note 73 at 311.

<sup>147</sup> Henderson, *supra* note 102 at 29.

April, 1960 (the April Student Revolution), which eventually led to the resignation of the President Rhee. His party and Government were also dismantled, it was the end of the First Republic of Korea. As a result of the experience with the Rhee presidency, it was generally recognized that the presidential system of government had been a complete failure in Korea. Like Dr Chin-O Yu, who wrote the original draft of Constitution in 1948, recalled, "it is the common feeling among the people that we should escape from the hell of a presidential system and adopt a democratic parliamentary system of government."<sup>149</sup>

Therefore, the introduction of a parliamentary system became the most significant issue during the process of the Third Amendment. After several months of interim government, the Constitution was amended and the general election was held under new constitution on July 29, 1960.

The Constitution of 1960, the "Constitution of Second Republic," adopted a typical cabinet system of government. A full cabinet system of government was erected in clauses making the President simply "head of State," elected to a five-year term by a two-thirds vote of a now newly-created

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<sup>148</sup> Hendersonk, *supra* note 102 at 29.

<sup>149</sup> Kim & Lee, *supra* note 73 at 310.

Senate meeting in joint session with a far more powerful and numerous House of Representatives. Executive power was vested in a state council headed by a Prime Minister, responsible as a body to the House of Representatives. The Prime Minister was to be nominated by the President but approved by majority vote of the House, which could elect him or her in case of a deadlock with the President. The stated council had either to resign en bloc if a non-confidence resolution was passed or it had to dissolve the House and call for new elections. All presidential acts required prime ministerial countersignature. A majority of cabinet members had to be selected from the National Assembly. The power to decide on the constitutionality of statutes was given to a newly established Constitutional Court, a special tribunal modeled after the Federal Constitutional Court of West Germany.

In reaction against the long and extensive violation of basic civil rights during Rhee's rule, the 1960 constitution's rights were made unconditional, all "except as provided by law" escape clauses being removed. It must be recognized as one of the biggest constitutional developments in Korean history, because that provision,

namely the "general restriction of fundamental rights," had a great potential to be abused by the authoritarian regime for its own political greed. New constitution also prescribed the provision for the impartiality of officials and police.

Although the Government of the United States welcomed the revival of constitutional democracy in South Korea, an American-style governmental structure - the Presidential system of government - was denounced as the origin of authoritarianism. However, the constitutional provisions for political and civil rights were reinforced and American constitutional theories and court decisions were frequently mentioned in discourse on the Constitution. The United States' constitutional law doctrines also exerted influence in the making of the Constitution of the Second Republic.

## **2. Fourth Amendment (November 29, 1960)**

In a much more liberal atmosphere, Korean people demanded more freedom and called for a punitive law against "national traitors" (i.e., high ranking officials in the

Rhee's regime who had responsible for the fraudulent election and the brutal repression against the "April Student Revolution). Under the pressure of popular demand, the new government undertook a constitutional amendment allowing legislation for retroactive punishment of those guilty of election irregularities, corruption and appropriation of public property - under the inclusive designation of "anti-democratic" acts. Lawyers and legal scholars took exception to the proposed amendment on the principle prohibiting *ex post facto* penalty. But the people's demand was overwhelming. The Fourth Amendment had some virtue in consolidating the results of the "April Student Revolution" by tracking down crimes committed under the auspices of political power in the past.<sup>150</sup>

**E. The Constitution of the Third Republic (1962-1972):  
System based on U.S. Constitutional Principles**

**1. Post-war U.S.-Korean Relations To 1972**

Americans not only played the key role in liberating Korea from Japanese colonial oppression at the end of World

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<sup>150</sup> Yoon, *supra* note 19, at 100.

War II but also agreed to the Soviet occupation of the northern part of the peninsula while U.S. forces occupied the southern part. While the Soviet and its Korean sympathizers converted the north into a totalitarian Communist system, the American occupiers taught people in the south as much about authoritarian practices as about democratic principles in the process of bringing order out of chaos and creating a government that would be responsive to both American interests and ideology.<sup>151</sup> When postwar attempts to establish a united government for the entire peninsula failed, it was the United States took the initiative in establishing the Republic of Korea under U.N. auspice in the south while the Communists established the Democratic People's Republic of Korea (D.P.R.K.) in the north, thus perpetuating the novel and tragic division of the Korean people.<sup>152</sup>

When, following the 1948 withdrawal of U.S. forces from the R.O.K., its Communist rival sought to unify the peninsula by force in 1950, the United States led the foreign coalition that under the UN banner went to the

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<sup>151</sup> Jerome Alan Cohen & Edward J. Baker, *U.S. Foreign Policy and Human Rights in South Korea*, in *Human Rights in Korea* 172 (William Shaw ed., 1991).

<sup>152</sup> *Id.*

defense of the R.O.K. At the end of that bloody battle, the United States concluded the Mutual Security Treaty of 1954 with the R.O.K., obligating the United States to come to the defense of South Korea "in accordance with its constitutional process."<sup>153</sup> The United States thereafter continued provided military and economic aid to South Korea. Moreover, because South Korea was alienated from all its neighbors - the Communist regimes that controlled China, the Soviet Union and North Korea, and the detested former colonial ruler, Japan - and largely isolated from the rest of world, the overall American impact upon South Korea was immense.<sup>154</sup> Americans not only became the defenders of South Koreans but, in trade, investment, politics, cultural life, and education, also became their mentors and big brothers.

From 1948 to 1965, the United States did not hesitate to use its enormous influence over South Korea for many purposes. Although government under the AMG, 1945-1948, had offered only a flawed and ambiguous model of democratic rule, after the Republic of Korea established, Washington, under both Democratic and Republican administrations, intervened on a number of occasions to press the autocratic Syngman

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<sup>153</sup> Cohen & Baker, *supra* note 152 at 172.

<sup>154</sup> *Id.*

Rhee to curb some of the worst excesses of his often-arbitrary presidency.<sup>155</sup> However, such pressures could not alter the nature of Rhee's government, but they at least made clear to the Korean people that the United States did not endorse his authoritarianism: hence, the U.S. position was surely not an irrelevant factor in the calculations of those who overthrew Rhee and gave Korean the only year of unrestricted political freedom they had ever known.<sup>156</sup>

With the above respects, it has been very essential for the political leaders in South Korea to get a positive support from Washington. Neither General Park Chung Hee's overthrow of Korea's short-lived democratic government in 1961, nor the two-stage coup of General Chun Doo Hwan in the 1981 case, had the legitimately elected President Yun Po Sun asked his American ally to suppress the usurpers, the United States would probably have done so. Yet, in both instances, once the new leaders seized power, the American attitude toward them gradually changed from suspicion and hostility to unenthusiastic acquiescence to strong support, despite their increasingly repressive rule.<sup>157</sup> Unfortunately, this relationship between two countries has had negative effects

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<sup>155</sup> Cohen & Baker, *supra* note 117 at 173.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

on South Korea because American support has been indispensable to the survival of any government.

## 2. Fifth Amendment (December 26, 1962): The Turn to Military Authoritarianism

The Second Republic lasted less than a year, as the Government led by Prime Minister Myon Chang was fragile. Governmental and political processes under the new constitution - particularly under the parliamentary system - were democratic, but they were barely capable to maintain social stability. Although the previous opposite party won the majority, the party divided the two almost equal 'Old' and 'New' Democratic factions against each other. The latter's leader, Dr. Chang Myon, barely emerged prime minister with three votes over the majority. The two factions finally then split two parties with 86 'old' (New Democratic Party) and 95 'new' (Democratic Party) assemblymen.<sup>158</sup> This factional split caused instability, delays in decision-making and public disenchantment. People went out street again and called for prosecuting the former

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<sup>158</sup> Henderson, *supra* note 102 at 31-2.

government officials who involved in corruption. Robbery and gang terrorism increased citizen apprehension. College student attempts in the spring of 1961 to debate North Korean students at Panmunjom provoked a conservative military group to be ready to pounce on new government.

The reaction came with a vengeance in the May 16, 1961, coup by Major General Park Chung-hee, his nephew, Colonel Kim Jong-pil, and some 250 officers and 3,500 men from the 600,000 man armed forces.<sup>159</sup> The Government intimidated and overthrown without resistance - was replaced by a military junta of 30 colonel and brigadier generals under Major-General Park.<sup>160</sup> A junta, the Supreme Council for National Reconstruction, was set up under martial law to take the place of the National Assembly which was immediately dissolved. The Law for Emergency Measures for National Reconstruction was formulated to be the highest guidelines for the revolutionary regime to manage affairs of state.<sup>161</sup> The Constitution was allowed to stay in force so far as it did not conflict with the emergency law. The entire state authority came under the command of the Supreme Council.

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<sup>159</sup> Henderson, *supra* note 102 at 31-2.

<sup>160</sup> *Id.*

On August 12, 1961, General Park, then the Chairman of the Council, released a statement to the effect that the Army would return to the barracks after establishing civilian government in the spring of 1963, and that the new Constitution would provide for a presidential government with unicameral National Assembly. On July 11, 1962, a special Constitution Drafting Committee [consisting of nine members and twenty-one advisors] was organized under the Supreme Council. The final draft of the Constitution was prepared in October 1962, and was submitted to the Council. The draft was approved of the voters in a special referendum on December 17, 1962. Professor Tscholsu Kim indicated several unique points about the process of making the Constitution of 1962 as follows;

"First, professors of constitutional law, administrative law and political science played a dominant role. Second, as is well known, the Kennedy Administration of the U.S. was not very happy with the military regime in Korea and wanted a swift transfer of political power to a new civilian government. Third, the U.S. government was very interested in the nature of the new Constitution. Indeed, invitations extended to two American scholars, Professor Emerson of Yale University and Professor Frantz of New York University, to visit Korea were taken as a sign that the Korean military leaders were sincere in their expressed intention to build a democratic regime. It is also now known that the eminent diplomat, Philip Habib, then Political Attache of the U.S. Embassy at Seoul, was

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<sup>61</sup> Yoon, *supra* note 19 at 101.

deeply concerned about the nature of the soon-to-be-born Constitution."<sup>162</sup>

Two notable changes, which substantially adopted from American Constitutional principles, must be noticed: that is, first, the presidential system based on the American presidential system was retained, and secondly, a judicial review system on the United States model was adopted. These are among the most distinctive characteristics of American Constitution; hence, it would be fair to say that the Constitution of 1962 had more of an "American flavor" than its predecessors.<sup>163</sup>

Though the new Constitution aimed to have been followed after a democratic principle of the separation of powers, it conferred on the executive inordinate powers over the other branches.<sup>164</sup> Therefore, there was a risk that the president, as head of the ruling party at the same time, would be able to manipulate the legislature whenever the ruling party was in the majority.<sup>165</sup> However, despite all its problems,

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<sup>162</sup> Kim & Lee, *supra* note 73 at 313.

<sup>163</sup> *Id.*

<sup>164</sup> Yoon, *supra* note 19 at 102.

<sup>165</sup> *Id.*

according to Professor Youn Dae-kyu, on the whole the new Constitution was the best so far in the postwar years.<sup>166</sup>

#### a. The Presidential Government System

Most constitutional law scholar involved in the drafting of the new constitution preferred the presidential government. Although they clearly knew that an American style presidential government system was never successful in foreign soil, as shown in the Latin American countries, they believed South Korea had no other alternative, since the prerequisites of parliamentary, such as a tradition of party politics and bureaucracy, was not yet established.<sup>167</sup>

The new Constitution called for the election in 1963 of a President heading a strong presidential system with power to appoint and dismiss the Prime Minister and the cabinet without legislative consent. The Assembly was downgraded to a weak, unicameral body reduced from 233 to 175 members unempowered to revise the Supreme Council for National Reconstruction legislation that had been decided by military

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<sup>166</sup> *Id.* Ironically, Professor Youn presumed "because the military was more prudent and circumspect in the new political experiment than generally believed, ... and they may well have desired democratic development," it was possible to establish better constitution. However, there have not been any reliable evidence or witness for this

men arguing in secret. As a reaction against what the military regarded as 'chaotic' or 'corrupt' politics, candidacy for the Assembly as an independent was forbidden and "a person shall lose his membership ... when he leaves or changes his party or when his party is dissolved."<sup>168</sup> For these reasons, unlike Professor Youn's presumption, the Coup Constitution turned out to be a politically more restrictive form of the later Syngman Rhee Constitution.<sup>169</sup>

#### **b. Judicial Review**

The Third Republic (1962 - 1972) adopted the American style of judicial review. Article 102 of the Constitution of 1962 provided:

- (1) The Supreme Court shall have the power to make final review of the constitutionality of a legislation when its constitutionality is prerequisite to a trial.
- (2) The Supreme Court shall have power to make a final review of the constitutionality or legality of administrative decrees, regulations or dispositions, when their constitutionality is prerequisite to a trial."<sup>170</sup>

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presumption, and more importantly, General Park's' regime must be recognized undemocratic and authoritarian regime.

<sup>167</sup> Kim & Lee, *supra* note 73 at 312.

<sup>168</sup> Henderson, *supra* note 102 at 32.

<sup>169</sup> *Id.*

<sup>170</sup> Honbup [Constitution], amended in 1962, art. 109 (1), translated in *Laws of the Republic of Korea 1-7* (Korean Oversea Information Center 1969).

Under the new Constitution, the Supreme Court had the final authority to review the constitutionality of legislation as well as other government acts. As mentioned earlier, one of the most significant aspects of the Constitution of 1962 was the inclusion of constitutional review by the ordinary courts. However, it was not clear whether judicial review was also granted to lower courts. In 1966, the Supreme Court ruled that all the courts have the power to determine the unconstitutionality of a legislation regardless of the level of the court. Yet only the Supreme Court can make a final decision about the constitutionality.<sup>171</sup>

According to Professor Tscholsu Kim, it is not known how judicial review came to be incorporated into the Constitution of 1962.<sup>172</sup> Indeed, one of the most controversial issues during the drafting process was where to locate the power of constitutional review. Constitutional law scholars were generally inclined to establish a special tribunal like the Federal Constitutional Court of Germany. Judges and practicing lawyers maintained that constitutional adjudication is only an aspect of litigation and that declaring legislative acts

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<sup>171</sup> Yoon, *supra* note 19 at 159.

<sup>172</sup> Kim & Lee, *supra* note 73 at 313.

unconstitutional should be an ordinary part of the judicial function. Inside the Constitutional Drafting Committee, the constitutional law scholars clearly wanted to establish a Constitutional Court. Justice Young Sup Lee of the Supreme Court, the only member from the judiciary, showed careful interest in giving such power to the courts.<sup>173</sup> In the early 1960's, the United States was experiencing a high tide of judicial activism under the leadership of the late Chief Justice Earl Warren, so it was not strange for the judges of Korea at the time to devoutly wish for the power of judicial review.<sup>174</sup> The Constitution of 1962 was a calm victory for the judiciary in this sense.

In order to preserve judicial independence, and in view of earlier infringements on its independence from the outside, the procedure for appointing Justices was carefully concerned. The article 99 of the Constitution provided that "the Chief Justice shall be appointed by the President with the consent of the National Assembly upon the recommendation of the Justice Recommendation Council. ... Justices shall be appointed by the President upon recommendation of the Chief Justice with the consent of the Justice Recommendation Council. ... The Justice Recommendation Council shall be

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<sup>173</sup> The National Assembly Library, 1 Records of Constitutional Amendment, 197-217 (1967).

composed of four judges, two lawyers, one professor of law nominated by the President, the Minister of Justice and the Prosecutor General."<sup>175</sup> Among nine, three of the Justice Recommendation Council were appointed by the executive authorities. Judges other than Justices were appointed by the Chief Justice through the decision of the Supreme Court Justices Council.

The Supreme Court was composed of the Chief Justice and no more than fifteen Justices.<sup>176</sup> When a law was raised a question of its constitutionality, a quorum of two-thirds or more of Supreme Court Justices must deliberate the matter, and a final decision would be reached by a two-thirds vote of Justices present.<sup>177</sup> However, the Supreme Court rejected this provision of the Court Organization Act as unconstitutional on the grounds that the "majority vote" rule should be considered a basic principle of court decision at all times, unless the Constitution provided otherwise.<sup>178</sup>

The "case or controversy " proviso that the Court review a law only "when its constitutionality is

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<sup>174</sup> Kim & Lee, *supra* note 73 at 313.

<sup>175</sup> Const. (1962), art. 99(3).

<sup>176</sup> Const. Art 97(2) (1962).

<sup>177</sup> Court Organization Act, art. 59 (1), Law No.51, amended on Aug. 7, 1970, Law No. 2222.

prerequisite to a trial," was constructed to mean that the judicial review system on the American model included procedure as well as content.<sup>179</sup> The phrase "case or controversy" is interchangeable with "a matter appropriate for judicial decision" as distinguished from disputes which are hypothetical, academic, or moot.<sup>180</sup>

In *Choi Pyong-kil v. Central Election Management Committee*,<sup>181</sup> where the constitutionality of the Political Party Act and the Act for Election of National Assembly Members was challenged, the Supreme Court reasoned as follows:

The object which the plaintiff seeks in this suit is presumed to be, in essence, a judgement of whether certain provisions of the law cited about are constitutional. The plaintiff cites provisions from the Constitution, article 102. As long as the provisions concerned are not prerequisite to deciding the case pending to determine before this court, it should be clear that the Supreme Court is unable to determine the constitutionality of these provisions.

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<sup>178</sup> *Kim Hee-won et al. v. Korea*, Sup. Ct. Civ. Vol. 19(2), 110, 116-17 (June 22, 1971).

<sup>179</sup> Yoon, *supra* note 19 at 160.

<sup>180</sup> *Id.* The Supreme Court stated that "[T]hrough under article 102 of the Constitution the courts exercise power judicial review of the constitutionality or legality of governmental acts and the Supreme Court reviews it with finality, as the article provides, such judicial review power, shall be exercised only when the constitutionality or legality of a legislation, decree, regulation, or disposition is prerequisite to a trial. The Supreme Court cannot, as the Constitutional Court could under the old Constitution, review just any law on request; it is authorized to review only laws that are involved in cases pending before a court. See Sup. Ct. dec., Mar. 14, 1966 (65 Cho 6); Sup. Ct. dec., July 28, 1966 (66 Ka 11). Reprinted in Yoon, *supra* note at 160.

<sup>181</sup> *Choi Pyong-kil v. Central Election Management Committee*, 16 Sungu [Election Cases], 1, 3-4 (Sup. Ct.), reprinted in Tscholsu Kim, *Wihon Pomnyul Simsa Chedoron* [A Study of Judicial Review], 338-68 (1983).

Accordingly, this court dismisses the suit without deciding on the constitutionality for lack of standing.

As Professor Yoon indicated, the decisions of the Supreme Court seemed consistent with their United States counterparts in spite of the differences in language.<sup>182</sup> It was only natural because South Korea adopted the American style judicial review. In the United States, the requirement of a case or controversy is a constitutional limitation to basic judicial power of the federal courts. The technical requirement of "judicial litigation" is understood to be inherent in the concept of judicature itself.<sup>183</sup> Therefore, it was natural that as long as the Supreme Court had the power of judicial review, this requirement should be applied to the court's review of legislation. Nevertheless, the intent of article 102 of the Constitution that "when its constitutionality is prerequisite to a trial," there is to be a stress on similarities in procedure between the Korean judicial review system and the American system.<sup>184</sup>

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<sup>182</sup> Yoon, *supra* note 19 at 161.

<sup>183</sup> *Id.*, at 162.

<sup>184</sup> *Id.* Japan also adopted the American system under article 81 of Japan's constitution, where such an expression is not provided; hence, there has been a dispute about the requirement of case and controversy. The Japanese Supreme Court held that the courts have power to determine only a concrete legal dispute but not an abstract issue dealing with the constitutionality of law. See, *Suzuki v. Japan*, 6 Minshu 783 (Sup.Ct., Oct. 8, 1952). About Japanese judicial review, see D. Henderson,

Regarding the effect of the Supreme Court's decision, no specific provisions have been laid down, nor have the courts made their position clear. There are instances in which lower courts have used the expression "null and void on account of unconstitutionality."<sup>185</sup> In its single decision of this kind, the Supreme Court simply declared that the law in question was "unconstitutional" and that "it would be proper not to apply it."<sup>186</sup>

The prevailing view in Korea is that a law declared unconstitutional is not rendered null and void retroactively or prospectively; the effect of unconstitutionality is limited to denial of the application of the law in question to the party or parties concerned. The rationale for such restricted application is that, unlike the constitutional court or constitutional committee under a continental system, Korean courts are primarily concerned with deciding cases, and are not empowered to nullify laws enacted by the legislature. According to critics, this line of argument will lead to an unfair administration of justice,

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*Japanese Judicial Review of Legislation: The First Twenty Years*, 43 Washington Law Review, 1005-1030 (1968).

<sup>185</sup> Seoul District Civil Ct., dec., 67 Ka 12829 (May 30, 1968).

Reprinted in Yoon, *supra* note 19 at 162.

<sup>186</sup> Yoon, *supra* note 19 at 162.

disparities in application of laws, and will undermine their stability.<sup>187</sup>

Judicial review by the courts, encouraged by a successful history in the United States, was launched with the expectation that certain politicized issues would be subject to litigation. With the power of judicial review shifted to the ordinary courts, it was expected that this would lead to a consolidation of constitutionalism in a land relatively new to democratic experiments.<sup>188</sup> After the Constitution of 1962 took effect in 1963, a number of statutes were challenged as unconstitutionality in the courts. Several statutes were held unconstitutional by the trial and appellate courts in the late 1960s. However, the Supreme Court was reluctant to hold acts of the National Assembly unconstitutional. The only case on which the Supreme Court of Korea has declared statutory provision unconstitutional was the decision on June 22, 1971, concerning the provision of the Government Tort Liability Act (1967).<sup>189</sup> Since it was the first and last time that the Supreme Court of South Korea had held provisions of statutes

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<sup>187</sup> Kim, *supra* note 147 at 120-28.

<sup>188</sup> Yoon, *supra* note 19 at 164.

<sup>189</sup> Kukka Basabg Bub [The Government Tort Liability Act], Law No. 1899, (1967), amended 1973, 1980, and 1981.

promulgated by the legislature unconstitutional until 1989, when the Constitutional Court established under the Constitution of Sixth Republic, it deserves more detailed analysis.

Article 2(1) of the Government Tort Liability Act provided:

The National or local government is liable for damage occurring by willful or negligent act of its officials employees... However, if military servicemen or civilian employees of the armed forces should be killed or wounded while performing combat, drill or other duty, or while in barracks, ships, airplanes or other craft which are used for military purposes, and if they or their bereaved family are eligible for compensation by other acts such as pensions for the disabled or dependents, they cannot claim compensation under this law.

Therefore, if a serviceman were killed during drill by a culpable comrade, his bereaved family would only be allowed a military pension which paid less money than a money judgement by civil court in comparable situation. As a result, this provision was denounced as a violation of the constitutional guarantee of equal protection of the law and of the right to file a claim for tort liability of government.

In 1968, two tribunals of Seoul District Court held the provision unconstitutional, and their decisions were upheld

by the Seoul High Court. The Government brought this action to the Supreme Court. Park's administration and the ruling Democratic Republican Party took this proceeding very seriously. A holding by the Supreme Court that the provision was unconstitutional would be taken to mean a boost to judicial independence and a challenge against the regime. Moreover, in fact the major reason for the legal restriction on tort liability claims was to save the Government money. So Park's administration decided to save the provision. In July 1970, the Administration and the ruling party sponsored a bill to revise a provision of the Judiciary Organization Act of 1949. The bill finally passed the National Assembly and became effective from August of the same year. The sole purpose of the amendment of the Judiciary Organization Act was to add the following new provision: "For the Supreme Court to hold a statute unconstitutional, more than two-thirds of the Justices must be present and more than two-thirds of the Justices present must concur."

On June 22, 1971, the Supreme Court, by a vote of eleven-to five, held the provision of Article 59(1) of the Judiciary Organization Act unconstitutional, and by a nine-

to seven vote, it also held Article 2(1) of the Government Tort Liability Act unconstitutional. The majority of the Supreme Court held that because of the separation of powers principle enunciated in the Constitution, an exception to using the majority rule in deciding cases could be made only by the Constitution itself: thus Article 59(1) of the Judiciary Organization Act was unconstitutional.<sup>190</sup> In light of this view, the Court held it would decide the constitutionality of the Government Tort Liability Act by simple majority rule. In addition, the Court held that Article 2(1) of the Government Tort Liability Act violated the equal protection of law clause and also constituted an unjustifiable deprivation of basic right.<sup>191</sup>

Under the fear of authoritarian regime like Park's, the decision was quite notable. It was the first time that provisions of legislative regulation had been nullified by the Supreme Court. The legal community including the bar and legal academia praised the Court's decision and expected the judiciary to be more active role to protect fundamental human rights against abuses of the Government. But reactions from the Government and the ruling party were

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<sup>190</sup> Kim & Lee, *supra* note 73 at 315.

<sup>191</sup> *Id.*

quite different.<sup>192</sup> They denounced the judiciary as not understanding the situation of its own nation.

However, except for the Government Tort Liability Act case, in fear of politicizing the judiciary, the Supreme Court maintained the self-restraint principle, as was seen in frequent reversals of lower courts' holdings of unconstitutionality, and in its ready accommodation of the "political question" doctrine. If judicial review had been properly developed by the courts, and if decisions on constitutionality had been respected by the executive branch, judicial supremacy could have been established in South Korea. However, such a hope proved to be only a dream.

Professor Bong Keun Kal, one of the framers of the Constitution of 1972, once argued that judicial review in the Third Republic was a complete failure because of the following reasons: first, a lack of historical background for judicial supremacy; secondly, the judges' lack of credibility or authority among the people; and finally, a

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<sup>192</sup> By the Constitution of 1972, a Constitution Committee was given the power of constitutional review, and President Park the power to renominate all judges. The shocking result of the renominating procedure was exclusion of the nine Justices of the Supreme Court who had held the article 2(1) of the Government Tort Liability Act unconstitutional. See Kim & Lee, *supra* note 73 at 315-16.

legal culture different from that of the United States.<sup>193</sup> However, it is not difficult to reach a conclusion that Professor Kal's theory is wrong. It is true that the success of judicial review in the U.S. has heavily relied on the "general caliber of its federal judges"<sup>194</sup> and on the common law tradition. However, the primary reason the failure of judicial review in the Third Republic was due to the nature of the military dictatorship. Park's regime could not tolerate the independent judiciary. Although judicial review was adopted in the Third Republic of Korea, it did not develop as hoped: the Park's administration was not willing to respect the decisions of the courts, and judges were not independent. Furthermore, it should be recognized that judicial review in the Third Republic of Korea was ruined by the "Yushin" coup of 1972.<sup>195</sup> In these senses, the question of whether Korea's constitutional experience based on the U.S. constitutional principles was a success or failure might not be concluded at this point, and this controversial question has been still debating in the constitutional academia and politics as well.

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<sup>193</sup> Bong Keun Kal, *A Treaties on the Yushin Constitution* 393-94 (1976).

<sup>194</sup> Kim & Lee, *supra* note 73 at 316.

### c. Summary

The Constitution of 1962 adopted a governmental system based on the U.S. constitutional principles. However, in practice Park's regime was not willing to respect the constitutional principles and became authoritarian regime. This fact became one of the strongest arguments for so called the "cabinet system advocate," asserting that in American presidential system there has always been strong potential for a government to become authoritarian regime.

The experience of judicial review during the Third Republic was unsatisfactory. The courts have many opportunities to review the constitutionality of laws, and more importantly the lower courts occasionally made holdings of unconstitutionality. However, as mentioned earlier, the Supreme Court maintained the self-restraint principle, reversing the lower courts' decisions frequently, and in its ready accommodation of the "political question" doctrine.<sup>196</sup>

During the Third Republic, more constitutional review cases were brought before the courts. This demonstrates that the judiciary has the capacity for exercising restraint on government power, and it was true that several court decisions virtually heightened tension between the judiciary

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<sup>195</sup> Kim & Lee, *supra* note 73 at 316.

<sup>196</sup> Yoon, *supra* note 19, at 164.

and the executive toward the end of the Third Republic.<sup>197</sup> Therefore, as explained, the decision of the Supreme Court in 1971 had an enormous impact and brought big reaction from Park's regime.

Finally, it has been still in debate whether the adoption of the U.S. constitutional doctrines into Korea's constitution was a success or failure, even when considered without reference to the notorious "Yushin" coup. But, if the answer is "success," then a governmental system with a presidency and judicial review can be readopted in Korea.<sup>198</sup>

## **E. The Forth Republic (1972-1979): Yu-Shin Regime**

### **1. Political Background under Park's Regime: 1962 to 1972**

With some controls, massive government support, mounting government economic success, and a proportional representation system of 44 out of 175 seats, the Park's party succeeded in engineering narrow election victories in 1963, 1967, and 1971. It also controlled the National

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<sup>197</sup> Yoon, *supra* note 19, at 164.

<sup>198</sup> *Id.*

Assembly with a minority of total votes in 1963 (32 percent) and 1971 (47.7 percent), achieving just over a majority in 1967, after admitted illegalities. The proportional representation system not only cushioned government pluralities, it also gave military men without local political roots a chance to serve in the legislature.<sup>199</sup>

As indicated earlier, it has been essential for the political leaders in South Korea, particularly those who got their power through inappropriate or illegitimate way, to get a positive support from Washington. Not only was Washington maintaining a policy of equidistance between the Park's regime and the still active opposition forces, who were bolstered by renewed anti-government demonstrations by the students.<sup>200</sup> Therefore, Park sorely needed the U.S. seal of approval to consolidate his power. Furthermore, in view of the pervasiveness of the perception of a "threat from the north," military aid was especially crucial. If Park could not get it, South Korea would need someone who could: hence, as late as 1965, American leverage over South Korea seemed powerful, and it was coupled with a continuing will to use it, if only on occasion, to moderate some of the regime's

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<sup>199</sup> Henderson, *supra* note 102 at 32-33.

<sup>200</sup> Cohen & Baker, *supra* note 117 at 175-74.

worst abuses against human rights and efforts to suppress pluralistic elements in society.<sup>201</sup>

The American involvement in Vietnam markedly changed Korean-American relations. The United States badly needed Korean combat forces in Vietnam beginning in late 1965. The American request for South Korea troops made the war a veritable heaven-sent opportunity for Park. He seized this opportunity, as well as American insistence upon Seoul's normalization of relations with Tokyo, to wring out of the United States everything that he could have hoped for as support. The results were dramatic.<sup>202</sup>

Through a series of policies and public and private utterances and gestures the United States made clear to Korean and the world that its earlier doubts about Park had dissipated and that American ties with South Korea were closer than ever.

President Johnson visited Seoul in November of the 1966 and "reaffirmed the readiness and determination of the United States to render prompt and effective assistance to

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<sup>201</sup> Cohen & Baker, *supra* note 117 at 175-74.

<sup>202</sup> *Id.*

defeat an armed attack against the Republic of Korea,"<sup>203</sup> a new rhetorical flourish that Koreans hopefully depicted as indication a stronger American tie. And, as early as July 1965, the U.S. Commander in South Korea and Ambassador Winthrop Brown had jointly pledged that there would be no reduction in U.S. force levels on the peninsula.<sup>204</sup> The change of Washington's support for Park's administration put an end to the U.S. policy of maintaining equidistance between the party in power and its opposition.<sup>205</sup> Washington's new-found enthusiasm for Park was also manifested in the language best understood by South Koreans anxious about their security - military aid. It rose dramatically from the all-time low of 124 million dollars in 1964 to a whopping 480 million dollars in 1969 and 556 million dollars in 1971.<sup>206</sup> Whatever may have been the functional utility of such lavish spending by the United States, its symbolic significance was enormous.

This change in Korea-U.S. relations elicited a reaction from North Korea that further strengthened Park's hand. The

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<sup>203</sup> Dept. of State Bull., 21 November 1966, p. 1198.

<sup>204</sup> S.R. Larsen & J.L. Collins, Jr., *Allied Participation in Vietnam*, 125 (1975).

<sup>205</sup> Cohen & Baker, *supra* note 117 at 174-75.

<sup>206</sup> U.S. Agency for International Development, *Overseas Loans and Grants and Assistance from International Organizations*, 71(1960).

response of the North was to exacerbate the already tense situation on the Korean peninsula through a host of incidents that culminated in 1968 in the doomed commando attack upon the Blue House (President residency), the seizure of the U.S. intelligence ship *Pueblo*, and the shoot-down of a U.S. EC-121 reconnaissance plane.<sup>207</sup>

The advent of the Nixon and Ford Administrations only exacerbated the situation. When Washington ceased exercising the leverage over Seoul that it formerly employed to curb the worst abuses of South Korea's authoritarianism, it had done so on pragmatic grounds. The new Republican Administration, however, transformed this recent practice into a matter of high principle, invoking the shibboleth of "nonintervention in the internal affairs of another state" against Americans and Koreans who sought a return to the earlier U.S. practice of applying various pressures toward stimulating South Korea's rulers to grant their people certain minimal political and civil rights. This gave Park the clearest signal that he could move ahead in the early 1970s with measures far more repressive than those he adopted during the first decade of his rule. Thus, two of

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<sup>207</sup> Cohen & Baker, *supra* note 117 at 175.

the less well known casualties of the Vietnam War were democracy and human rights in Korea.<sup>208</sup>

As Dr. Gregory Henderson's description of Park's regime, the Park era saw "the rebirth of a kind of Japanese colonial style politics of firm, somewhat militarized control, decisive economic planning, widespread mobilization techniques, and political desiccation."<sup>209</sup> The National Assembly had chiefly censorial and limited consultative powers, but narrow legislative powers.<sup>210</sup>

## **2. Sixth Amendment: October 21, 1969.**

With a sufficient number of seats assured in the National Assembly, the ruling party undertook another constitutional amendment to authorize a third term for President Park Chung-Hee. Despite resistance from the opposition, the amendment bill was passed in the National Assembly and was approved by a referendum.<sup>211</sup> The pretext of

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<sup>208</sup> Cohen & Baker, *supra* note 117 at 175-74.

<sup>209</sup> Henderson, *supra* note 102 at 33.

<sup>210</sup> *Id.*

<sup>211</sup> Under the Constitution of 1961, in addition to the passage of National Assembly, referendum was made a requirement for a constitutional amendment. Const., art. 112(1), amended in 1961.

the amendment was that the country needed a strong and competent leader in the interest of national security and economic growth. The opposition argument was that the ruling party was seeking a consolidation of dictatorship and its perpetuation. Members of the opposition party seated in the main hall of the Assembly building and protested against the amendment.

Thereupon, the ruling party clandestinely called into session its members of the Assembly in another building across the street. It was at 2:28 AM on September 14, 1969, early Sunday morning. On hand were 122 legislators, more than the required two-thirds, with some independents among them. The vote was taken and the amendment was carried without a dissenting vote; a subsequent referendum approved it by a majority vote of 65 percent.<sup>212</sup> Thus, without the participation of the opposition, a third term was made lawful for President Park. While the opposition were protesting in the Assembly building, the ruling party held a separate session in another building under heavy security. It was too late when the opposition members caught on and stormed into the session. Therefore, new Constitution gave Park a chance to get one more term for his presidency by

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<sup>212</sup> Wu Song, *Hanguk Honbup Kaechongsa* [The History of Korean Constitutional Amendment], 282-283 (1980).

removing the third-term limitation. However, this still failed to sate Park's lust for unobstructed power even though he received a shock with Kim Dae-jung's great crowd-getting popularity in the 1971 elections in which urban areas voted 51.4 percent for Kim (though Park took 51.2 percent of the national vote).<sup>213</sup>

The process of Sixth amendment must be recognized as unconstitutional and inappropriate process because the ruling party changed the place for the vote without prior notice or agreement; the vote was taken on a Sunday, again without agreement to that effect: hence, it would have been null and void.<sup>214</sup>

### **3. Seventh Amendment (December 27, 1972): YuShin Regime**

#### **a. The Constitution of 1972**

On October 17, 1972, President Park declared a state of emergency and martial law, and took extraordinary measures, including dissolution of the National Assembly and suspension of the political and civil rights of the people.

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<sup>213</sup> Henderson, *supra* note 102 at 33.

<sup>214</sup> Yoon, *supra* note 19 at 103.

In a bloodless coup against his own constitution, he used the military forces against the National Assembly and other civilian centers, proscribed all politics once again, and lacerated the constitution with some seventy-two amendments - cutting away any remaining muscle the mangled legislature and judiciary still possessed.<sup>215</sup>

On October 27, a draft Constitution was promulgated by the Extraordinary Cabinet Meeting which was given legislature power. A draft constitution passed in a referendum on November 25, thus beginning the period of Fourth Republic. The Constitution of 1972 or the Fourth Republic is commonly referred to as "Yushin [Revitalization]" Constitution. This constitution ostensibly designed to accelerate reunification and to give constitutional backing to what was claimed to be a "Korean style democracy."<sup>216</sup> Dr. Gregory Henderson well described this constitution as follows:

"This constitution also proved to be innovative - instituting direct elections by an electoral college which Park headed and which then dutifully re-elected him on December 23, 1972, by a Pyongyang-style term. Government control of the further-weakened Assemble was assured by the presidential appointment, via the same dutiful electoral college, of one-third of its members. Draconian 'Emergency Measures' then supplemented even

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<sup>215</sup> Henderson, *supra* note 102, at 33.

<sup>216</sup> Yoon, *supra* note 19 at 103-4.

these taut controls, suppressing student movements, demonstrations or any criticism. From 1972 to 1975 repression reached its highest point since the worst wartime colonial days. Park euphemistically called this monstrosity the 'Yushin' ('Revitalizing') reforms, a phrase which, not insignificantly, he drew from Meiji Japan. The economy had boomed, but politics, like a starved and frightened waif, quaked at the edge of a totalitarian precipice."<sup>217</sup>

**b. Presidential Absolutism versus Nominal  
Judiciary and Legislature**

Therefore, the most unique characteristic of the Constitution of 1972 was concentration of powers in the President. The President was given powers to declare a state of emergency, to take extraordinary measures, and to dissolve the legislature.<sup>218</sup> However, one of the most bizarre characteristics of the Constitution was the presidential election process. The President was elected by the National Congress for Reunification, a specially organized group consisting of some 2,300 delegates, elected for a term of six years. The Delegates were elected by popular vote. They had to be at least 30 years old and had to be eligible to become members of the National Assembly.<sup>219</sup>

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<sup>217</sup> Henderson, *supra* note 102 at 33.

<sup>218</sup> Honbup [Constitution], art. 53, 59, amended in 1972.

<sup>219</sup> Honbup [Constitution], art. 35 - 42, amended in 1972.

president was also empowered to appoint one-third of the Members of National Assembly upon approval of the National Congress for the Reunification, to appoint the Chief Justice with the approval of the National Assembly, and to designate all other judges upon the recommendation of the Chief Justice.<sup>220</sup>

Under the Constitution of the Forth Republic, the Supreme Court no longer had the power to determine the constitutionality of legislation. The Constitution Committee, which was identical to that of the Constitution of 1960, was resurrected and accorded the power of judicial review.<sup>221</sup>

The article 109 (1) of the Constitution provided that:

The Constitution Committee shall judge the following matters:

1. The constitutionality of a legislation upon the request of the court
2. Impeachment
3. Dissolution of a political party

The new Constitution Committee was a standing organization with nine Justices to be appointed three each by the President, National Assembly and Chief Justice.<sup>222</sup> The Justices were not allowed to join any political party

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<sup>220</sup> Honbup [Constitution], art. 40, 103, amended in 1972.

<sup>221</sup> Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 *Stan. J. Int'l.*, 1, 6 (Winter 1994).

nor could they participate in any political activities.<sup>223</sup> When the constitutionality of a legislation was a prerequisite of a trial, the trial court would request a decision of the Committee through the Supreme Court, and would judge according to the Committee's decision.<sup>224</sup> The courts still had the power to review the constitutionality or legality of lower laws such as decrees, administrative order or dispositions, when their constitutionality or legality was a prerequisite to a trial.<sup>225</sup> In order to hold a law unconstitutional, the concurrence of two-thirds was required.<sup>226</sup>

During the 1972 to 1980, the Committee did not make a single decision on constitutionality. The Committee on its own initiative had no power to review a law for its constitutionality but had to await request from the Supreme Court for such review. During the about period, there were altogether 19 requests for constitutional review addressed to the Supreme Court but not a single case reached the

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<sup>222</sup> Honbup [Constitution], art. 109 (2), (3), amended in 1972.

<sup>223</sup> Honbup [Constitution], art. 110 (2), amended in 1972.

<sup>224</sup> Honbup [Constitution], art. 105 (1), 109 (1), amended in 1972.

<sup>225</sup> Honbup [Constitution], art. 105 (2), amended in 1972.

<sup>226</sup> Honbup [Constitution], art. 111 (1), amended in 1972.

Constitution Committee, because the Supreme Court held all the laws involved to be constitutional.<sup>227</sup>

### **c. Denial of Fundamental Human Rights**

An initial reading of the Yushin Constitution seemed to suggest support for many basic human rights. The Charter II of the Constitution titled "The Rights and Duties of Citizens" opened with a ringing declaration that "all citizens shall be assured dignity and value of human beings, and it shall be the duty of the State to guarantee such fundamental rights of the people to the utmost."<sup>228</sup> A number of specific guarantees were qualified on their face. Freedoms of speech, press, assembly, and association were promised "except as provided by laws," and "the right to association, collective bargaining, and collective action of workers shall be guaranteed within the scope defined by law."<sup>229</sup> Laws restriction all freedoms and rights might be enacted "when necessary for the maintenance of nation al security, order, or public welfare."<sup>230</sup> This provision, so called "provision of general restriction of fundamental

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<sup>227</sup> Yoon, *supra* note 19 at 166.

<sup>228</sup> Honbup [Constitution], art. 8, amended in 1972.

<sup>229</sup> Honbup [Constitution], art 8 & 29, amended in 1972.

<sup>230</sup> Honbup [Constitution], art 32 (2), amended in 1972.

rights," is designed to expand the constitutionally permissible limits of restricting basic rights through "laws."<sup>231</sup> It is noteworthy that the Yushin Constitution does not retain its predecessor's provision that even a law restricting liberties and rights in the public interest cannot be constitutionally valid if it infringes "the essential substances of liberties and rights (Article 32(2) of the pre-Yushin Constitution)." Moreover, whenever the president merely "anticipated" a threat to the national security or public safety and order, the Constitution authorized him to take 'emergency measures' to "temporarily suspend the freedom and rights of people prescribed in this Constitution" and disallowed any judicial review of presidential actions.<sup>232</sup> And, in similar circumstances, the Constitution also authorized the president to declare martial law and take special measures suspending basic rights.<sup>233</sup>

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<sup>231</sup> The terms "laws" herein denotes statutes passed by the legislature and meeting the requirements of generality and specificity.

<sup>232</sup> Honbup [Constitution], art. 32(2) & (4), amended in 1972.

<sup>233</sup> Honbup [Constitution], art. 54(1) & (3), amended in 1972.

#### d. The Yushin System

Drafters of the 'Yushin' Constitution tried to defend it by pointing out that it had certain similarities to the De Gaulle Constitution of France, arguing that the Constitution was in fact sufficiently democratic in principle. They also argued that both constitutions were designed to cope with crises such as a modern state might face and that to this end the government machinery, particularly the presidential power, were strengthened, and the parliamentary process was streamlined.<sup>234</sup> Although it was true that the Yushin constitution adopted the French style of presidential system, in practice under Park's regime, this constitution became the worst constitution of modern Korean history. The regime used this constitution as means for their political weapon in order to suppress its political opposition and pro-democracy movement.

Like the previous process of constitutional amendments (except for Third Amendment), this Constitution was not a product of legitimate process already provided by the existing Constitution. Instead, the existing Constitution was suspended by emergency decree (the Martial Law), and deliberations on amendments were done in secret. The

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<sup>234</sup> Bongkun Kal, *Yushin Honbopron* [Yushin Constitutional Law], 276-80 (1976).

Emergency State Council proposed and passed the draft. Without any public hearing or open debate the amendment was put to a referendum, while all political activity was suspended. Therefore, there was no wonder why the *Yushin* regime could be sustained only by a series of extraordinary measures prohibiting any political activities for or discussing the revision of the *Yushin* Constitution.<sup>235</sup>

The most distinctive constitutional doctrines originating from the United States Constitution, presidential government based on the separation of powers and the doctrine of judicial review, were thrown out of the constitutional system of Korea by the "*Yushin*" Reforms.<sup>236</sup> The primary purpose of the "*Yushin*" Reforms was to make possible President Park's stay permanent tenure in office. The *Yushin* was an "unfortunate and shameful episode" for most of Korean people.<sup>237</sup>

All in all, like American observers noted, the historical situation under the *Yushin* Regime might be characterized as: (1) state officials' arbitrary violation of the integrity of the person outside the judicial system;

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<sup>235</sup> Kim & Lee, *supra* note 73 at 318.

<sup>236</sup> *Id.*, at 319.

(2) arbitrary manipulation of the judicial system for purposes of political repression; and (3) restraints and denial upon freedoms and fundamental human rights.<sup>238</sup>

The *Yushin* Regime continued until the assassination of President Park in October 1979; the period between 1972 to 1979 can be viewed as the "Dark Age" of constitutionalism in the recent history of Korea.

## **G. The Constitution of the Fifth Republic (1980-1987)**

### **1. The Transition from Park to Chun**

October 26, 1979, President Park was shot and killed by Kim Chae-kyu, Director of the Korean Central Intelligence Agency (KCIA) at a dinner party, putting an end to Park's lifetime presidency. The nation was stunned but calm. Interestingly, after assassination the atmosphere in South Korea was relatively liberal.

According to a national survey by the Social Science Research Institute of Seoul National University - the first poll of its kind since 1972 - 72.8 percent of the

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<sup>237</sup> *Id.*

<sup>238</sup> Cohen & Baker, *supra* note 117 at 177.

respondents felt that "democratization" was more important than "economic development." That Korean people could sustain a democracy was the belief of 89.2 percent. "Expansion of human rights and freedom" was regarded as the most important aspect of political development by 23.3 percent, "strengthening national security" by 20 percent, "social justice through fair distribution" by 15.4 percent, and the independence of the legislature and judiciary by 12 percent.<sup>239</sup>

Even President Choi Kyu-ha, who was Prime Minister at the time of the assassination succeeded Park, agreed that the Constitution had to be amended and promised that he would promote freedom. On 7 December, he rescinded Emergency Decree No. 9, the 1975 presidential decree banning all criticism of the Yushin Constitution, and released 68 political prisoners held under it. In addition, on November 26, the National Assembly established the Special Committee for Constitutional Revision. However, this is not to say that all restrictions on public debate was removed.

That liberal atmosphere, unfortunately and unanticipatedly, had been gone when the Commander of the Defense Security Command, Major General Chun Doo-hwan staged

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<sup>239</sup> Dong-A Ilbo [Dong-A Newspaper], Jan. 1, 1980 1. Reprinted in *id.*, at 189.

a coup against his commanding officers on December 12, 1979, placing the Army Chief of Staff under arrest. On the night of 12 December 1979, General Chun took several thousand troops from the area between Seoul and the Demilitarized Zone and used them to stage an intra-military putsch, which resulted in several deaths and the arrest of between 30 and 40 senior generals, including the martial-law commander, Chung Sung-hwa, who was accused of complicity in the assassination of Park.<sup>240</sup> Indeed, the troops were under the operational control of the United States-Republic of Korea Combined Forces Command formally under the authority of General John Wickham, the highest ranking U.S. Officer in Korea.<sup>241</sup> However, he apparently had no foreknowledge and was reportedly furious about this violation of the chain of command. It was generally recognized that the 12 December action [so called "12.12 Satae"] was the first step in an attempt by Chun to move into the place of President Park.

During the early months of 1980, many groups made proposals for constitutional revision. Most drafts called for a parliamentary form of government and strengthened protection for fundamental human rights. On March 13, 1980,

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<sup>240</sup> Cohen & Baker, *supra* note 117 at 190.

<sup>241</sup> *Id.*

the Government established the Advisory Committee for Constitutional Revision in the President's office. Public debate was vigorous and was widely covered by the press, despite the fact that the nation had been placed under a limited form of martial law after the assassination. From late March, demonstrations and mass assemblies were held throughout the nation demanding political freedom and democracy.

During this period, three major political figures emerged in opposition. One was Kim Dae-jung, who had run against Park in the 1971 election and became well-known internationally in 1973 when he was kidnapped from Tokyo and nearly killed by the KCIA. Kim had spent most of time since 1973 in prison or under house arrest. His political and civil rights remained suspended until 29 February 1980. Another was Kim Young Sam, who as head of the New Democratic Party (NDP) played a major role in the events preceding Park's assassination. The third was Kim Jong Pil, who was the planner of the 1961 coup, the founder of both KCIA and the Democratic Republican Party (DRP), and a major figure of the Park years.<sup>242</sup>

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<sup>242</sup> These so called "Three Kims" has been the most influential political figure since 1970s. Kim Young Sam was elected the Fourteenth President. Kim Dae jung is the current President and Kim Jong Pil is the Prime Minister under Kim Dae Jung's administration. Interestingly enough, the

After "12.12 Incident," students and intellectuals feared that continued martial law and slowed down pace of constitutional revision might well write another chapter in the thick volume of obstructions and frustrations to Korean democracy.<sup>243</sup> Their fear mounted on April 14, 1980 when General Chun made himself National Security Planning Agency (old KCIA) Director while retaining, apparently illegal, the Defense Security Command. Beginning of May, campus demonstrations escalated. Students called for an end to martial law; the dismissal of Chun, President Choi, and Prime Minister Sin Hyun-hwak; the prompt drafting of a new constitution; and early elections. However, Chun and his followers responded with Martial Law Decree No. 10 on May 17, 1980.<sup>244</sup>

Under this decree, all political activity was prohibited, the National Assembly was dissolved, censorship was imposed on the press and media, all colleges and universities were closed, strikes were banded, and it was

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opposition candidate's election slogan was the "Liquidation of the period of Three Kims." However, the Three Kims's influence on Korean politics still has been powerful and enormous.

<sup>243</sup> Henderson, *supra* note 102 at 34.

<sup>244</sup> Ironically, two day before this declaration of expanded martial law, Prime Minister issued a special appeal to the students, asking for time and promising to take their demands into consideration, and the students responded by calling off demonstrations and on May 16 they were back in

forbidden to be absent from work without a good reason.<sup>245</sup> Kim Dae-jung and many of his followers were arrested; and Kim Young Sam was placed under house arrest. Public discussion of political issue, including a new constitution and election, ceased.

On May 18, 1980, massive demonstrations by students and other citizens erupted in Kwangju, a city of 800,000 in Kim Dae-jung's home province in southwestern Korea. This "Kwangju Riot," now officially named "Kwnagju Pro-Democratic Movement," were then repressed by special forces that Chun had trained for brutal warfare. During the ten days before the Army retook the city, the citizens broadcast appeals for the United States mediation, but the U.S. Department of State did not respond.<sup>246</sup> By official count, 191 people were killed, including 23 soldiers and 4 police officers; 122 persons were wounded and 730 were slightly injured.<sup>247</sup> Responsible private estimates, however, put the number of

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classes. More details about this story, see Cohen & Baker, *supra* note 117 at 188-96.

<sup>245</sup> For the full text of the Martial Law Decree in Korean, see Yonhap Tongsin [Korean Associated Press], 559 (1981). For summaries and partial translations in English, see Amnesty International, *Republic of Korea: Violations of Human Rights*, 7 (1981).

<sup>246</sup> Cohen & Baker, *supra* note 117 at 193.

<sup>247</sup> Minister of Defense, *Report on the Kwangju Incident to the National Assembly National Defense Committee* (June 7, 1985). Reprinted in Donald N. Clark, ed., *The Kwnagju Uprising: Shadows over the Regime in South*

civilian dead as high as 1,200 with many more injured missing. Almost two decades after the events, the circumstances of the transfer of the operational control of the troops used in retaking Kwangju remained under dispute, and many critics continued to assert that the U.S. government shared in the responsibility for the suppressing there.<sup>248</sup>

On May 31, a Special Committee for National Security Measures was established with a junta-like 31-member Military-Civilian Standing Committee behind it that, with subcommittees, made all key state decisions. On August 16, 1980 President Choi resigned from the presidency, and on August 27, General Chun Doo Hwan was selected under the *Yushin* Constitution until an election could be held under a revised constitution. In his inaugural address he announced that a new constitution would soon be drafted. A government-appointed committee, working behind the scenes, delivered the eighth revision of the constitution on September 29, 1980. It was approved in a national referendum - under martial law and without debate or an alternative - on October 22, 1980. Compared to the hopes of

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Korea, 91 (1988); also see Amnesty International, *Republic of Korea: Violations of Human Rights*, 8 (1981).

eleven months earlier, it represented only a decidedly lukewarm improvement on the unparalleled rigors of the *Yushin* Constitution.<sup>249</sup>

## 2. The Content of Chun's Fifth Constitution

In the Constitution of Fifth Republic a number of the worst features of the *Yushin Constitution* were removed, and it appeared to afford greater protection than the *Yushin Constitution* for some rights.<sup>250</sup> For instance, in Article 11 habeas corpus and the exclusion of coerced confessions from evidence were guaranteed as they had been before the *Yushin Constitution*.<sup>251</sup> Freedoms of residence, occupation, correspondence, speech, the press, assembly and association are now guaranteed without "except as provided law" clause, though the needs of security and public welfare still permit ill-defined exceptions.<sup>252</sup>

The governmental structure under Chun Constitution was a modified presidential system. The Constitution contains new presidential provisions for an expanded seven-year term.

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<sup>248</sup> Cohen & Baker, *supra* note 117 at 193.

<sup>249</sup> Henderson, *supra* note 102 at 35-6.

<sup>250</sup> *Id*; Cohen & Baker, *supra* note 117 at 197.

<sup>251</sup> Honbup [Constitution], art. 11(5), amended in 1980.

The president is allowed to serve only one such term and no amendment favoring the incumbent can be submitted.<sup>253</sup> Amendments removing these barriers to another term are possible, however, under the real pretext of a *force majeure*.<sup>254</sup> The president continues to be elected indirectly by a "Presidential Electoral College" of 5,278 members.<sup>255</sup> The president continues to have greater powers. Emergency powers are slightly reduced and require National Assembly concurrence but the martial law provisions remain the same as in the *Yushin Constitution*. Presidential appointive powers remain much the same as in former constitutions.

The legislature remains weak but it has recaptured the ability to override a presidential veto by a two-thirds majority and to inspect state affairs and demand documents and witness. The *Yushin Constitution's* weakening of the judiciary essentially continues. The Constitution of Third Republic power to review the constitutionality of laws was not restored to the courts. The Constitution Committee was established to review the constitutionality of laws upon submission by the courts.<sup>256</sup>

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<sup>252</sup> Honbup [Constitution], art. 13, 14, 15, 20 & 35, amended in 1980.

<sup>253</sup> Honbup [Constitution], art. 45 & 129(2), amended in 1980.

<sup>254</sup> Honbup [Constitution], art. 129(2), amended in 1980; also see Henderson, *supra* note 102 at 36.

<sup>255</sup> Honbup [Constitution], art. 40 & 41, amended in 1980.

<sup>256</sup> Honbup [Constitution], art. 112, amended in 1980.

## H. THE SIXTH REPUBLIC AND CURRENT CONSTITUTION

### 1. The End of the Fifth Republic and the Journey to the Democratic Society

After the National Assembly elections in February 1985, revision of the Constitution was the major political issue. One of the most recognized experts of Korean politics, the late Dr. Gregory Henderson recalled this momentous transition of Korean democracy as follows;

"An observer like myself, who has seen forty years of eight amended or recreated Korean constitutions, cannot help but remember the first one in 1948 with nostalgia. There lurked in it, for all its faults, a hopeful feeling that democracy would neither be too headlong-embraced, as in 1960, nor too curbed and waylaid, as always since, but that it might in some way be truly sought. Somehow, between the extremes of a hard-line military and students caught in passionate idealism, the thread of viable democracy, indeed, of political moderation itself, was lost for an entire generation."<sup>257</sup>

Dr. Henderson had seen the political changes after amendment of 1987 Constitution as follows;

"The political skies have been lightened by the June 29 announcement but clouds still hang in them. A highly political people packed into tinderbox urban concentrations have yet to achieve the political identity they sought with an enthusiasm so wholeheartedly in 1945; an identity which today should be a fit partner of their economic flair. ... A politically legitimate government has yet to be

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<sup>257</sup> Henderson, *supra* note 102 at 40-42.

established. Further emotional political discontent may yet be rekindled. Such a rekindling is not the best builder of democratic stability. What will emerge from the passion, the repression, the turmoil of these months is not fully predictable. A further coup or assassinations, though their likelihood has been reduced, are not inconceivable. Yet, on the whole, hopes have revived. ... When a system of greater pluralism is forged, a representative system with some spirit of compromise will grow to break the ancient vortex pattern which has so long defined Korea's political life; its advent will be as welcome as its delays in arrival have been prolonged."<sup>258</sup>

For the people of South Korea, 1987 was a year of momentous political changes. In June, millions of South Koreans participated in nationwide protests against the military dictatorship of Chun Doo Hwan. These massive protests erupted after President Chun announced to suspend debate over constitutional reforms concerning election of his successor as president.

In the second general election on February 12, 1985 during Chun's regime, the opposition parties won majority in the votes for the second time in modern Korean history (since 1948). However, due to the "proportional-representation system" in the General Election Law, the Chun's ruling party received 55 percent of control even though they received only 35.4 percent at the popular vote.

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<sup>258</sup> *Id.*

Under this "proportional-representation system." Most National Assembly members are popularly elected as representatives of local constituencies. The party winning the most local-constituency seats then receives a disproportionate "bonus" when a fixed pool of non-elective national constituency seats is distributed. The national-constituency (NC) seats have been used to dispense patronage and also auctioned off to raise campaign funds even though the original purpose of NC was to give the social minority (ie., woman, member of labor unions and peasants and so on) an opportunity to be able to join the National Assembly. In 1985, there were 92 NC seats and the ruling Democratic Justice Party (DJP) was allotted two-thirds or 61 based on its plurality of local constituency (LC) seats.<sup>259</sup> The remaining 31 were shared among the opposition parties according to their LC seats.

Opposition parties polled almost twice as many votes as the ruling DJP, despite formidable DJP advantages due to the Chun regime's command of local administration, the broadcast media, and vast financial resources.<sup>260</sup> The outcome reflected Chun's unpopularity and Korean people's desire to

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<sup>259</sup> International League of Human Rights and International Rights Law Group, *Democracy in South Korea: A promise Unfulfilled*, 87 (1985)

reform their nation. It might also consider as an indirect referendum that revealed the illegitimacy of the Chun government that had been questioned since the inception of his regime.

The leading opposition party that created in a very short time for the 1985 election by two long time dissents against military dictatorship, Kim Youngsam and Kim Daejung who both became the president, New Korean Democratic Party (NKDP) led to a gradual consolidation of an organized opposition and to growing popular support for constitutional revision. On 12 February 1986, the NKDP started out a nationwide campaign to collect 10 million signatures on a petition calling for a constitutional revision which would not only introduce direct presidential election but also ban military involvement in politics, restrict executive powers, enlarge legislative powers, abolish the proportional representation system, end censorship, and introduce stronger protections of political freedoms and other human rights.<sup>261</sup> However, Chun's regime responded by banning the campaign, arresting NKDP leaders, raiding the NKDP offices

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<sup>260</sup> West & Baker, at 226.

<sup>261</sup> "NKDP: Leading Democratic Reforms in Korea" (undated pamphlet setting forth the constitutional reform program, on file at the *Harvard Human Rights Yearbook*).

to search for lists of petition signers, and escalating threats against Kim Dae Jung who was still under house arrest and other proponents of reform.

Then NKDP with other opposition groups and human rights activities, which called non-governmental opposition organizations such as Mintongryun (the League of Democratization and Reunification) and Minhwahyup (the Committee of Democratization), organized a series of rallies for the end of military government and constitutional reform, in some cases attracting crowds of 50,000 or more. Major student demonstrations against Chun dictatorship occurred through the year of 1986. Finally, the National Assembly set up a committee for negotiating constitutional revision in June 1986. However, the ruling DJP repeatedly rejected NKDP proposals to submit the direct presidential election question to a popular referendum. Instead, the DJP proposed a parliamentary system similar to that of Japanese which was unacceptable alternative to the opposition.

On 12 January 1987, President Chun in his New Year Press conference warned the opposition that he would be compelled to make a "momentous decision" if an agreement

were not soon reached on the issue of constitutional revision.<sup>262</sup> Chun actually used this warning, "momentous decision," several occasions and it usually implied the declaration of the national emergency so that he could proclaim the martial law. However, at that time his threat did not much effect on Korean people who were eager to end the military dictatorship. Therefore, this announcement immediately provoked widespread public outrage and civil unrest.

In the morning of January 18, 1987, Koreans were thrilled by a shocking news that a 21-year-old college student at Seoul National University, Chong-chul Pak, was torture-murdered during the interrogation at a cell of the Anti-Communist Bureau of the National Police at January 14 (the news did not appear until January 18). Pak died while being subjected to "water torture" that was a simulation of drowning by repeatedly forcing the victim's head under water in an interrogation cell. Protests and memorial services were held throughout the nation, and the NKDP, religious leaders, and human rights activists proclaimed February 7 as a nationwide day of mourning for Pak.<sup>263</sup>

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<sup>262</sup> Korea Herald, 13 January 1987, p. 1

<sup>263</sup> West & Baker, 231.

On April 13, in response of growing peoples' criticism of his regime, Chun declared that he finally made his "momentous decision" that he mentioned at the press conference at January. At nationally televised press conference, Chun announced the so called "4.13 Hohunjochi" (the decree of prohibiting amendment process). He proclaimed that the "counterproductive debate" on constitutional revision would have to end and the next president would be elected under the 1980 Constitution<sup>264</sup> because continuing debate would jeopardize "the two major national tasks of a peaceful change of government and the Seoul Olympics."<sup>265</sup> In his instance that the first peaceful transition of power in forty years was the most important precondition for accomplishing genuine democratic development.

Despite rising protests, ex-general and DJP chairman Roh Tae Woo was officially nominated as the DJP's presidential candidate on 10 June. However, at the same date, the biggest nationwide protest, called "6.10 Peace

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<sup>264</sup> West & Baker, 230.

<sup>265</sup> The Secretary General of the International Commission of Jurists on 21 April requested the government to explain the legal basis of the ban on debate, but no response was received, ICJ Report, pp. 19-20.

March for New Constitution, against Chun's regime occurred. The crowds turning out around the country were no longer composed entirely of young student demonstrators--there were middle-aged and elderly citizens, laborers, taxi drivers, and white-collar workers (got a nickname as Necktie Force because they wore neckties and they hardly joined protest before). The government admitted using more than 350,000 tear-gas grenades and canisters against civilians in June 1987--more than were used in all of 1986.<sup>266</sup>

Gaston J. Sigur of the State Department of the United States government, came to Seoul and met with Chun and Roh and unlike past, he also met with the opposition leaders, Kim Young Sam and Kim Dae Jung, who at that time was under house arrest. When he returned to Washington, he called for a political compromise, release of political prisoners, an end to preemptive arrests, and government tolerance of peaceful demonstrations, pointedly stating: "Military steps offer no solutions."<sup>267</sup>

At last, on 29 June 1987, DJP's presidential candidate, Roh Tae Woo, responding to immense public pressure,

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<sup>266</sup> Physicians for Human Rights, "The Use of Tear Gas in the Republic of Korea: A Report by Health Professionals," (1987), reprinted in West & Baker.

<sup>267</sup> Korea Weekly Report 6. 13 (June 29, 1987).

announced his eight suggestions including accepting direct presidential election later called "6.29 Declarations" (however, the opposition called "6.29 Surrender"). In this "Epoch-Making Eight-Point Reform" included the following concessions:

1) Prompt constitutional revision with direct presidential elections before February 1988.

2) Campaign-law revisions to "ensure maximum fairness and justice" in the presidential elections.

3) Release of political prisoners, except those guilty of treason or serious criminal offenses, and restoration of Kim Dae Jung's civil and political rights.

4) Effective guarantees of basic human rights and an extension of habeas corpus.

5) A free press.

6) Autonomy for local governments and universities.

7) Cessation of harassment of and restrictions on political parties.

8) A nationwide campaign against corruption and crime.

Roh offered to resign his chairmanship of the DJP if President Chun refused to endorse his proposals. On 1 July, Chun announced his agreement.

In the result of the declaration, the number of the protests remarkably decreased and the political parties organized a committee for the constitutional revision. On September 17, the committee reached agreement for the new

draft and the National Assembly approved the draft Constitution almost unanimously (254 yeas and 4 nays) on October 12. The new Constitution of the Republic of Korea was finally approved in a referendum on October 25, by more than 92 percent of valid votes. The first election under the new Constitution was held on December 16, 1987 and then Roh Tae Woo defeated a divided opposition with a plurality of 36.6%.<sup>268</sup> Therefore, the new president Roh Tae Woo whose administration was considered as the government of the first peaceful transition of power and more legitimate government than previous one was inaugurated at February 1988 and Koreans hope to enjoy more freedom and democracy in near future.

#### **B. SIGNIFICANCES OF THE CURRENT CONSTITUTION**

In all of the previous events of constitutional changes, except for the Constitution of the Second Republic, have been recognized as the illegitimate and undemocratic process

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<sup>268</sup> Results of the Presidential Election of December 16, 1987:

Roh Tae Woo (Democratic Justice Party)

8,282,738 votes (36.6%)

Kim Young Sam (National Unification and Democracy Party)

6,337,681 votes (28.0%)

Kim Dae Jung (Party of Peace and Democracy)

6,113,375 votes (27.0%)

Kim Jong Pil (New Democratic Republican Party)

1,823,067 (8.1%)

because those events always accompanied with illegitimate political upheaval such as military coup and the main purpose of those changes was to prolong the presidential term in office in order to continue their illegitimate government. Furthermore, because of those unusual conditions (even some cases martial law enforced during the amendment proceeding), the legislature never had an opportunity to function as a forum for responsible debate. Therefore, the legitimacy of the government had been always a crucial political question among those period and many Koreans were opposed to their legitimacy. However, since the 9<sup>th</sup> Amendment was accomplished through government-opposition collaboration for the first time in Korean constitutional history and approved in a referendum as provided in the existing constitution, the current Constitution has more legitimacy than does any earlier constitutions.<sup>269</sup>

The current Constitution also has many significances in addition to the legitimacy issue. First, it strengthens the power of legislature which used to be relatively weaker than the executive power and sometimes even ignored its power by

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<sup>269</sup> Yoon, at 106

the president. Secondly, individual rights are further protected with number of addition in <sup>the</sup> new Constitution, for example, the most significant improvements are in the areas of criminal procedure and the freedom of expression (Article 20, 21 and 26). Thirdly, the power of judiciary is also strengthen in the new Constitution. The judiciary used to be called the "servant of the executive" because the authoritarian government abused the judiciary and even interrupted trials in order to award the judgment for their sake. Finally, more importantly, the new Constitution articulates the establishment of the Constitutional Court for judicial review. In the previous constitutions, even though the constitutions prescribed judicial review systems in one form or another, varying from the European style to American style, the judicial review system has not received the full attention, which has been recognized the most useful safeguard for the democracy.

In these views described above, Korean people finally can realize and enjoy the very precious democratic principles such as the separation of powers, independence of the judiciary, free speech, judicial review and so on. I will discuss how the current Constitution guarantees these

democratic values as well as how American constitutional doctrines influences into the new Constitution.

#### IV. JUDICIAL REVIEW IN KOREA

##### A. The Origin of the Judicial Review System

Judicial review, in its original North American sense, is the power of courts to decide upon the constitutionality of legislative acts; in other words, the judicial control of the constitutionality of legislation.<sup>270</sup> It has been said that judicial review is the most distinctive feature of the constitutional system of the United States of America, and it must be added that it is the most distinctive feature of almost all constitutional systems in the world today.<sup>271</sup> Although judicial review of legislation has been considered one of the main contributions which the constitutional system of the United States gave to the political and constitutional sciences,<sup>272</sup> this American system of judicial review is not the only one that exists in present constitutional law. According to professor Brewer-Carias' methodology of judicial review in the current world, there are three different systems of judicial review, namely American or diffuse system, the Austrian or concentrated system of judicial review, originally established in the

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<sup>270</sup>. Brewer-Carias, *supra* Note 1, at 1.

<sup>271</sup>. E. S. Corwin, JUDICIAL REVIEW, in *Encyclopedia of the Social Science*, Vol. VIII, 457, (London, 1932). Reprinted in *Id.*

<sup>272</sup>. Brewer-Carias, *supra* note 1, at 3.

1920 Austrian Constitution and the mixed systems, mainly Latin American, with the main features of both the American and Austrian systems.<sup>273</sup>

The distinction between the American and the Austrian systems of judicial review is based on the judicial organs that can exercise the power of constitutional control.<sup>274</sup> The American system entrusts that power to all the courts of a given country and it is for this reason that the system is considered to be a decentralized or diffused one.<sup>275</sup> On the contrary, the Austrian system entrusts the power of control of the constitutionality of laws either to one existing court or to a special court, and it is therefore considered a centralized or concentrated control system.<sup>276</sup> There are also systems of control of the constitutionality of legislation which combine the diffuse system with the features of the concentrated system.<sup>277</sup>

The first part of this chapter describes the supremacy of the constitution that had offered main concept of the

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<sup>273</sup>. Brewer-Carias, *supra* note 1, at 3.

<sup>274</sup>. *Id.*

<sup>275</sup>. *Id.*

<sup>276</sup>. *Id.*

<sup>277</sup>. *Id.*, at 4. Alternative terminology would call the systems "centralized" and "decentralized." Mauro Cappelletti, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, 46 (1971). "The decentralized type gives the power of control to all the judicial organs of a given legal system... The centralized type of control confines the power of review to one

judicial review since its foundation. The second part examines the original system of judicial review, which was established by the 1803 decision in *Marbury v. Madison* (1 Cranch 137).

### 1. Constitution and Its Supremacy

The whole possibility of judicial review of constitutionality is seen not only as the ultimate result of the consolidation of the 'rule of law,' but as integral part of the concept of the Constitution as a higher and fundamental positive law. One of the fundamental trends in modern Constitutionalism is the concept of the Constitution as a normative reality and not as an occasional political compromise of political groups, changeable at any moment when the equilibrium between them modifies itself.<sup>278</sup> In this sense, Constitutions become effective juridical norms which overrule the whole political process, the social and economic life of the country, and which give validity to the whole legal order.<sup>279</sup> In other words, if a constitution is to be seen as a real and effective norm, it must contain rules applicable directly to state organs and to

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single judicial organ."

<sup>278</sup>. *Id.* at 95.

individuals.<sup>280</sup> The constitution was originally a fundamental law limiting state organs, and declaring the fundamental rights of individuals, as a political consensus given by the people themselves and therefore directly applicable by the courts.<sup>281</sup> The adoption of this concept in continental Europe, as a result of the French Revolution, was later modified by the monarchical principle that turned the concept of the Constitution into a formal and abstract code of the political system, given by the monarch and not to be applied by the courts.<sup>282</sup> Nevertheless, in the European continental legal system the concept of the Constitution has changed and is again closer to its original conception as an a higher law with norms applicable to state organs and to individuals, judged by the courts. In this later sense one can consider a statement from the United States Supreme Court in *Trop v. Dulles* (356 U.S. 86, (1958)):

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are rules of government. When the constitutionality of Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than

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<sup>279</sup>. Corwin, *supra* note 8, at 95.

<sup>280</sup>. *Id.* at 96.

<sup>281</sup>. Brewer-Carias, *supra* Note 1, at 96.

<sup>282</sup>. *Id.*

good advice.

In contemporary constitutional law and in relation to judicial review, this judicial control of the constitution is essentially possible when a constitution exists as a real norm enforceable by the courts, but moreover when it has supremacy over the whole legal order.<sup>283</sup> This supremacy of the constitution over the other rules of law, and particularly over Acts of legislature, implies that the constitution is the supreme norm which establishes the supreme values of a legal order. This position of supremacy can be taken as the parameter for the validity of the remaining legal rules of such a system.<sup>284</sup>

## **2. The American System of Judicial Review**

In the United States we can in a sense say that the constitutional adjudication institution has been developed as an arbitrator in dispute resolution between federal government and state government.

The legislative history of the first Judiciary Act, the state ratifying Conventions, and the Philadelphia Convention,

provide evidence that the framers clearly intended to empower the Supreme Court by assigning it the responsibility of supervising the federal system. The first Congress granted the Supreme Court the appellate jurisdiction necessary to adequately address the Court's responsibility. Many of the powers granted to the Supreme Court by Congress were founded on the idea of a federal judicial arbiter, this was accomplished because many of the state ratifying conventions understood and accepted this concept. The result of the 1786-1789 period is that both schools of thought had accepted the Supreme Court as the arbiter in federal-state relations.<sup>285</sup>

Federalism in the U.S. has been developed primarily by the Supreme Court in the interpretations of the commerce clause and the 10th Amendment. The commerce clause contributed a basis for extending federal power, while the 10th Amendment contributed to the limitation of the extension of federal power and the protection of state power.

To date, there really have been many decisions on federal and state power. The decisions have depended on the

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<sup>283</sup>. Brewer-Carias, *supra* note 1, at 97

<sup>284</sup>. *Id.*

political and historical situations of the times, and are ample reflections of their economic backgrounds. As a whole, there have been two main streams in the decisions.<sup>286</sup>

When Alexis de Tocqueville visited America and described the political system of the United States more than 150 years ago, he considered the way the Americans had organized their judicial power to be unique in the world.<sup>287</sup> He specially pointed out that 'that immense political power' of the American courts 'lies in this one fact': "The Americans have given their judges the right to base their decisions on the constitution rather than on the laws. In other words, they allow them not to apply laws which they consider unconstitutional."<sup>288</sup> Following the same idea, he said: 'if anyone invokes in an American court a law which the judge considers contrary to the Constitution, he can refuse to apply it.'<sup>289</sup>

The judicial authority to enforce the constitution

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<sup>285</sup> On historical background, see JOHN R. SCHMIDHAUSER, *THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957*, 16-17 (1958).

<sup>286</sup> For more detailed information on these cases, see JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* 82-102 (1992); WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 76-168 (7th ed. 1991).

<sup>287</sup> A. de Tocqueville, *DEMOCRACY IN AMERICA*, reprinted in Brewer-Carias, *supra* note 1, at 136.

<sup>288</sup> *Id.*

against unconstitutional acts is conventionally traced to Chief Justice John Marshall's opinion in *Marbury v. Madison* and its claim that the written constitution is included within that law for which it is "the province and duty of the judicial department to say what the law is."<sup>290</sup> The ultimate and necessary foundation upon which judicial review rests is the belief that the constitution is the supreme expression of the people's will.

Chief Justice John Marshall claimed in *Marbury v. Madison* that the judiciary was intended, and by its nature was singularly equipped, to say just what the law is - whether subordinate or fundamental. Thus, in the case of final pronouncements, the Supreme Court, and only the Court, can, ought, and must speak as the oracle of the Constitution.<sup>291</sup> The conclusion of that case were based on two main arguments, first, the supremacy of the constitution as a fundamental law to which all other laws must be submitted; and second, the power and duty of the courts to interpret the laws and not to apply laws repugnant to the

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<sup>289</sup>. *Id.*

<sup>290</sup>. *Marbury v. Madison*, 5 U. S. (A Cr.) 137, 177 (1803).

<sup>291</sup>. Albert P. Melone & George Mace, *JUDICIAL REVIEW AND AMERICAN DEMOCRACY* 4 (1988).

constitution.<sup>292</sup> This fundamental duty of the American courts has been clearly summarized by the Supreme Court in *United States v. Butler* with the following words:

The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty - to lay the article of the Constitution which is invoked beside the Statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can, is to announce its considered judgement upon the question. The only power it has, if such it may be called, is the power of judgement. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.<sup>293</sup>

As a result of federal system, three branches of judicial review have been distinguished in the United States: a national judicial review, referring to the power of all courts to pass judgement upon the validity of acts of Congress under the United States Constitution; federal judicial review, referring to the power and duty of all courts to prefer the United States Constitution over all conflicting state constitutional provisions and statutes;

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<sup>292</sup>. E. S. Corwin, *MARBURY V. MADISON AND THE DOCTRINE OF JUDICIAL REVIEW*, 12 Mich. L. Rev. 538 (1914). Reprinted at Brewer-Carias, *supra* note 1 at 137.

<sup>293</sup>. 297 U.S. 1 (1936).

and a states' judicial review, referring to the power of state courts to pass judgement upon the validity of acts of the state legislatures under the respective state Constitutions.<sup>294</sup>

In the United States there is no special judicial body empowered to decide upon the constitutionality of state acts. Thus, all the courts, state courts, federal courts and the Supreme Court have the power of judicial review of constitutionality, and none of them have their jurisdiction limited in any special way at all over the decision of constitutional questions.<sup>295</sup> General original jurisdiction in the federal judicial system in the United States is vested in the district courts which are a large number of tribunals of territorial competence located throughout the country, generally coinciding with the territories of the states. The jurisdiction of these district courts extends to numerous types of controversies. It is in the course of controversies that constitutional issues may be raised.

The federal judicial districts are organized into larger judicial units known as circuits, and in each of

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<sup>294</sup>. Corwin, *supra* note 8, at 457.

<sup>295</sup>. Brewer-Carias, *supra* note 1, at 138.

these there is one court of appeal. These courts of appeal do not have original jurisdiction and are strictly appellate tribunals, with very extensive jurisdiction derived from the fact that all the final decisions of the district courts may be appealed to them.

Judicial review in the United States is truly judicial in that it is carried out by organs of the judicial branch. It is courts doing what courts always do: determining what the law is and in the process applying the applicable hierarchy of law. This is in contrast to some systems where the organs of constitutional review, while insulated from the political branches, are not called courts, even if called courts, are not thought of as part of the ordinary judiciary.<sup>296</sup> This characteristic of judicial review in the United States has been described as a political function that has been "carefully disguised" behind the "fiction" of courts determining the law.<sup>297</sup>

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<sup>296</sup>. William Burnham, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES, 314 (1995). See Mauro Cappelletti, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 141-143 (Oxford U. 1989).

<sup>297</sup>. *Id.*

## B. History on Judicial Review System in Korea (1948 to 1987)

since the establishment of the first modern Constitution in 1948, Korea has undertaken judicial review in one form or another, varying from the European style to American style, or from the diffuse system of judicial review to the concentrated system of judicial review. Since each amendment has concentrated primary on the term of the presidency or the type of government, the judicial review system has not received the full attention it deserves.<sup>298</sup> In practice, the constitutional review or judicial review in Korea had been dormant until late 1980s. During the 40 years of Korean constitutional history, the Supreme Court or the Constitutional Committee had reviewed less than ten cases.<sup>299</sup>

The first Constitution of 1948 authorized a Constitutional Committee to review a statute "[w]henver the

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<sup>298</sup>. Dae-Kyu Yoon, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 151 (1990).

<sup>299</sup>. For the twelve years of the First Republic (1948-60), the Constitutional Committee reviewed only seven incidents. Because of the short history of the Second Republic, the Constitutional Court did not have any opportunity to review the case. However, during the Third Republic (1962-71) when American style judicial review system was adopted, the Supreme Court struck down two statutes and these two cases had been only cases that the Court declared the unconstitutionality of the challenged statutes. During the Forth (1972-1980) and Fifth (1980-1987) Republics, when the Constitutional Committee had the power of

decision of the case depends on the determination of the constitutionality of the law." <sup>300</sup> The Constitutional Committee (*Honbop Wiwonhoe*) was a combination of German and French practices.<sup>301</sup> Under the article 81, the jurisdiction of the Committee was limited to legislation, while the Supreme Court had the power to review of the constitutionality or legality of administrative decrees, regulations or dispositions in accordance with the provisions of legislation. Only the courts, not executive organs on national or local level, had the power to request a review.<sup>302</sup> The review of the Committee commenced only when the constitutionality of a law was "prerequisite to a trial."<sup>303</sup> The Committee consisted of the Vice President, five Supreme Court justices, and five lawmakers.<sup>304</sup> A two-thirds majority was required to declare a law unconstitutional.<sup>305</sup>

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judicial review, the Committee had no constitutional review case. Also see, Ahn, *Supra Note* , Kim *Supra note*, Youn *Supra note*  
<sup>300</sup>. HONBOP [Constitution] art. 81 (1948), *translated in supra note 5*, at 4.

<sup>301</sup>. Yoon, *supra note 139*, at 153.

<sup>302</sup>. HONBOP [Constitution] art. 81 (2) (1948).

<sup>303</sup>. HONBOP [Constitution] art. 81 (2) (1948). This requirement of "prerequisite to a trial" is generally understood to be the Korean equivalent of "case and controversy" in the American Constitution. See Young Sung Kwon, HONBOPHAK WOLLON [Treaties on Constitutional Law] 627-28 (1981). *Reprinted in Yoon, supra note 139*, at 153.

<sup>304</sup>. HONBOP [Constitution] art. 81 (3) (1948).

<sup>305</sup>. HONBOP [Constitution] art. 81 (4) (1948).

In its 11-year history the Constitution Committee reviewed only seven cases altogether. Thus the Committee's performance was not as active as it might have been. The student Revolution of April 19, 1960, led to the fall of the First Republic, actually a prolonged dictatorship, which was replaced by the Second Republic. The Constitution of the Second Republic (1960-61), which was designed to prevent abuse of political power and protect civil liberties to a greater extent than that of the First Republic,<sup>306</sup> provided for the Constitution Court as a standing body with nine judges. The Constitution Court was an attempt to eliminate the political problems that had undermined the operation of the Constitutional Committee under the First Republic.<sup>307</sup> Differences between the Constitution Committee and the Constitutional Court were: 1) while the Constitution Committee operated on an *ad hoc* basis, the Constitutional Court was a permanent organ; 2) political neutrality was not required or expected from political appointees to the Constitution Committee, but members of the Constitutional Court were not allowed to engage in political activities; 3) since the Constitutional Court was composed of members who

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<sup>306</sup>. Yoon, *supra* note 139, at 156.

<sup>307</sup>. Dae-Kwon Choi, *LAW AND SOCIAL CHANGE: THE KOREAN EXPERIENCE* 222 (1976) (unpublished, Ph.D. Dissertation, University of California (Berkeley)).

were qualified as judges, its orientation was judicial rather than political.<sup>308</sup> The Constitutional Court had the power to review the constitutionality of a legislation without a *sub judice* case. This abstract control of laws was characteristic of the new judicial review system. When a case was pending before a court, the parties as well as the court could request judicial review of a statute by the Constitutional Court, regardless of whether the determination of its constitutionality was a prerequisite to trying the case.

For fear that former high officials of the previous government whose civil rights were suspended might be prematurely reinstated, the government delayed implementation of the Constitutional Court Act until April 17, 1961.<sup>309</sup> Ironically, the entire Constitution was short-lived, as the military overturned the government the following month by a *coup*, and the Constitutional Court had no opportunity to function at all.<sup>310</sup>

The Third Republic (1962-72) adopted the American style of judicial review system-or so called the diffuse system

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<sup>308</sup>. Yoon, *supra* note 139, at 157.

<sup>309</sup>. Tcholsu Kim, HYUNDAE HONBOPRON [Modern Constitutional Law] 869 (1979).

<sup>310</sup>. Yoon, *supra* note 139, at 158.

where the Supreme Court has the power of judicial review.

Article 102 of the Constitution of 1962 provided:

- (1) The Supreme Court shall have the power to make final review of the constitutionality of legislation when its constitutionality is prerequisite to a trial;
- (2) The Supreme Court shall have the power to make final review of the constitutionality or legality of administrative decrees, regulations or dispositions, when their constitutionality or legality is prerequisite to a trial.<sup>311</sup>

The expansive judicial review authority of the Supreme Court under the Constitution of the Third Republic led to what one commentator has termed "judicial supremacy" in Korea.<sup>312</sup> However, it was not clear whether judicial review was also granted to lower courts. In 1966, however, the Supreme Court ruled that "all the courts have the power to determine the unconstitutionality of a legislation regardless of the level of the court. Yet only the Supreme Court can make a final decision about the constitutionality."<sup>313</sup>

During the Third Republic, more review cases were brought before the courts as the Supreme Court assumed the final authority for constitutional review. This was a development that served to demonstrate that the courts were significantly capable of exercising restraint on government

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<sup>311</sup>. HONBOP [Constitution] art. 102 (1962), translated in LAWS OF THE REPUBLIC OF KOREA 1, 24 (Korean Legal Center, 1969).

<sup>312</sup>. Choi, *supra* note 149, at 222.

powers.<sup>314</sup> During this period, the Supreme Court struck down two statutes: Article 59(1) of the Judiciary Act and Article 2(1) of the Government Tort Liability Act.<sup>315</sup>

Under the Constitution of the Forth Republic (1972-80), the Supreme Court no longer had the power to determine the constitutionality of legislation. The Constitution Committee, which was identical to that of the 1960 Constitution, was resurrected and accorded the power of judicial review.<sup>316</sup> The article 109 (1) of the Constitution of the Fourth Republic provided that:

The Constitution Committee shall judge the following matters:

1. The constitutionality of a legislation upon the request of the court;
2. Impeachment;
3. Dissolution of a political party.

The new Constitution Committee was a standing organization with nine members to be appointed three each by the President, National Assembly and Chief Justice. The members were not allowed to join any political party nor could they

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<sup>313</sup>. Yoon, *supra* note 139, at 159 (citation omitted).

<sup>314</sup>. Yoon, *supra* note 139, at 164.

<sup>315</sup>. These two statutes were only two occasions that the Court declared the unconstitutionality. However, after the Constitution of the Third Republic took effect, a number of statutes were challenged their constitutionality such as the Anti-Communist Law of 1961 and the National Assembly Election Law. Furthermore, several statues were held unconstitutionality by the lower courts in the late 1960s. More details, See, Kim & Lee,

<sup>316</sup>. Youm, *supra* note 5, at 6.

participate in any political activities. When the constitutionality of a legislation was a prerequisite of a trial, the trial court would request a decision of the Committee through the Supreme Court, and would judge according to the Committee's decision.<sup>317</sup> The courts still had the power to review the constitutionality or legality of lower laws such as decrees, regulations or dispositions, when their constitutionality or legality was a prerequisite to a trial.<sup>318</sup> In order to hold a law unconstitutional, the concurrence of two-thirds (six or more members) was required.

During the 1972 to 1980, the Committee, though a permanent organ, did not make a single decision on constitutionality.<sup>319</sup> The Committee on its own initiative had no power to review a law for its constitutionality but had to await request from the Supreme Court for such review. During the above period, there were altogether 19 requests for constitutional review addressed to the Supreme Court but not a single case reached the Constitution Committee, because the Supreme Court held all the laws involved to be constitutional.<sup>320</sup>

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<sup>317</sup>. HONBOP [Constitution] art. 105 (1972).

<sup>318</sup>. HONBOP [Constitution] art. 105 (2) (1972).

<sup>319</sup>. Yoon, *supra* note 139, at 166.

<sup>320</sup>. *Id.*

The Constitution of the Fifth Republic (1980-87) provided for judicial review similar to that under the Fourth Republic, with the only difference residing in the conditions governing requests for review. Article 108 of the Constitution of 1980 established that: "When the constitutionality of a law is a prerequisite to a trial, the court, if it construes that the law at issue runs counter to the Constitution, shall request a decision of the Constitution Committee, and shall judge according to the decision thereof."<sup>321</sup> Thus, the court possessed the initial power to rule on the constitutionality of a statute being subjected to trial. If the court held the statute to be constitutional, there would be no further judicial action by the Constitution Committee.<sup>322</sup> As long as the new Constitution has recreated the Constitution Committee of the Fourth Republic without any attempt at activating it, it would be difficult to expect a more active role than before on the part of the Committee in reviewing the constitutionality of laws.<sup>323</sup> The Committee had reviewed no legislation at all during its existence.

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<sup>321</sup>. HONBOP [Constitution] art. 108 (amended 1980).

<sup>322</sup>. Youm, *supra* note 5, at 6.

## C. INSTITUTIONAL COMPARISON

### 1. United States

The most dazzling jewel in the judicial crown of the U.S. is the revered and often controversial U.S. Supreme Court. It is the sole court mentioned specifically in Article III or in any part of the Constitution. All other federal courts have been created by statute. In the U.S., constitutional questions are brought up as a subject matter of general civil, criminal and administrative cases and judged together with the accompanying issues of the case. Thus eventually, Constitutional Law comes to work as a judicial norm in all kinds of courts. It is therefore false to say that the U.S. Supreme Court is the only institution of constitutional adjudication. The Supreme Court, more precisely, has the right of final authoritative interpretation.

In the U.S. Supreme Court, there are no special inner organizations or procedural regulations concerning judicial review. The Supreme Court simply administers the process of judicial review according to the provisions that prescribe its jurisdiction and its general procedures.

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<sup>323</sup>. Yoon, *supra* note 139, at 168.

The Supreme Court of the U.S. is composed of one Chief Justice and eight Associate Justices.<sup>324</sup> Ranging from five to eight Justices in the first eighty years of its history, the Court has remained at nine ever since the first term of President Grant in 1869.<sup>325</sup> This odd number makes it unlikely that tie votes will occur. When a tie vote does occur, the decision of the lower court from which appeal has been taken to the Supreme Court is affirmed.

Tenure of the Justices is not fixed, thus they can hold an office for life, unless they are removed due to impeachment or conviction.<sup>326</sup> Therefore, mandatory retirement at a certain age does not exist. Detailed provisions concerning the retirement of the justices are

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<sup>324</sup> Art.1. of the Judiciary and Judicial Procedure.

<sup>325</sup> HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 177 (5th ed. 1986). The Court has continued with nine Justices since 1869. Prior to this time, its membership was fixed by Congress, and comprised five in 1789, six in 1790, seven in 1807, nine in 1837, ten in 1863, and eight in 1866. Recently there has not been a big argument about the number of Justices in the U.S. Supreme Court, but rather some arguments concerning the desirable number of judges at the federal appellate court level. Compare Stephen Reinhardt, *Too Few Judges, Too many Cases*, A.B.A. J., Jan. 1993, at 52 (insisting upon expansion of the numbers) with Gerald B. Tjoflat, *More Judges, Less Justice*, ABA. J., July 1993, at 70-73 (objecting to a numerical increase for several reasons).

<sup>326</sup> See ABRAHAM, *supra* note 311 at 44. "In accordance with constitutional requirements, impeachment for 'Treason, Bribery, or other high Crimes and Misdemeanors' may be [initiated] by a simple majority of the members of the House of Representatives, there being a quorum on the floor. Trial is then held in the Senate, which may convict by a vote of two-thirds of the members of the Senate present and voting, if a quorum is present." *Id.*

found in Articles 371 to 376 of the Judiciary and Judicial Procedure Act. Essential to the independence of the judiciary is the security of tenure, particularly in the case of appointed judges.<sup>327</sup> The splendid rhetoric, "judicial independence," would be mocked and derided without the armor of "a long term of office, preferably life, adequate remuneration, and stringent constitutional and/or statutory safeguards against removal."<sup>328</sup>

"The President shall nominate, and, by and with the advice and consent of the senate, shall appoint Justices of the Supreme Court."<sup>329</sup> When the office of Chief Justice is vacant, the President may appoint a Chief Justice among the existing Justices filling that vacancy with a new Justice, or can appoint a new Chief Justice directly from the outside. The latter has been the common choice.

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<sup>327</sup> Life tenure would provide "that independent spirit in the judges... essential to the faithful performance of so arduous a duty." Charles J. Cooper, The Federal Judiciary, Life Tenure, and Self-Government, 4 Cornell J. L. & Pub. Pol'y 500, 501 (1995) (quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Besides, "Life tenure would place the judges 'in a situation altogether unprecedented in a free country,' rendering them independent in the fullest sense of the word. There is no power above them, to control any of their decisions." *Id.* (quoting Brutus, N.Y.J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 407, 418 (Herbert J. Storing ed., 1981)).

<sup>328</sup> *Id.*, at 41.

<sup>329</sup> See U.S. Const. art. II, § 2, cl. 2

The formal legal procedure for the appointment of Justices is as follows:

First, the President designates and proclaims a justice nominee and notifies the Senate. The Senate Judiciary Committee decides whether or not to approve the nominee. If the committee disapproves after screening the fitness of the nominee, the nomination is rejected. If the committee approves, it is transmitted to the plenary session. The Senate decides by majority vote whether or not to confirm. While the legal process of appointing Justices is comparatively simple, gaining legitimacy for appointments is not. Ensuring democratic values in appointments is achieved by understanding the doctrine of democracy and demonstrating the level of American democracy. This effort is made through a hearing, testimony, and investigation, which is done during the approval procedure but can be made outside of these official procedures as well.

Efforts outside of the official process are usually made by so-called unofficial participants. These unofficial participants are generally divided into three groups. The first consists of the American Bar Association (ABA) and legal professional groups, the second consists of interest

groups and pressure groups outside of law circles, and the last is comprised of the Justices of the U.S. Supreme Court themselves. These unofficial participants are involved in the whole process of judicial appointments in diverse ways.

First, the President not only listens to the opinion of staff and law officers who assist him in the White House, but also refers to the information and materials that are collected by the FBI and the opinions of politicians. These sources are used in various ways based on the style of the President. Once a nominee is designated and proclaimed by the President, various kinds of citizens' groups and pressure groups that have an interest in the appointment develop lobbying activities to voice their opinions.

At this stage, the Standing Committee of the Federal Judiciary, affiliated with the ABA, also launches a comprehensive evaluation operation of the nominee. It collects extensive data for judging the fitness of the nominee and brings out the results of its analysis in its opinion. Even though there have been differences according to the President's political style and methods of dealing with the Senate, ABA opinions have been influential in the President's nominee withdrawal and the Senate's approval procedures. Because these procedures present themselves as a

living example of democracy in practice, they show various aspects of how political powers are arranged and what the political situations are at a given time. Therefore, the appointment procedure cannot be fixed in a definite form, and is arguably complicated. Political parties play an important role in these procedures. When the President is of one party and the Senate majority is of the other party, Justice appointments must be a compromise between the two parties.

Nonetheless, all of these procedures can be summarized as an effort to have a sincere Justice for the people. The U.S. method of judicial appointment is becoming a good model for securing legitimacy and democratic justification in composing constitutional adjudication institutions.

The U.S. Constitution says nothing about qualifications of the justices. To date, around forty of the Justices had not had a legal professional career at the time of their appointment, although all the Justices had been lawyers. In the past, political figures were appointed as Chief Justice and Justices, but since the 1970s, there has been a tendency for these positions to be filled by judges of the lower courts. Many of the Justices come from distinguished

families. More recently, more of them have come from prestigious schools such as Harvard, Yale and Columbia.<sup>330</sup>

Ultimately, we can say that qualifications of the Justices actually become clear during the nomination procedure by the President and approval procedure by the Senate. No legal qualifications exist; rather factual democratic procedure dominates the appointment procedure. Each Justice's own sense of value and view of life exert a large influence upon his or her adjudication.

## **2. Korea**

Generally speaking, at the time the U.S. Constitution began to have an effect on Korea, the American-educated elite came back to Korea and began to contribute to the formulation of Korean Constitutional Law. Due to the numerous Koreans that have studied in the U.S., the transplantation of the U.S. system into Korea cannot be neglected. The present Korean Constitution has the Korean Constitutional Court as its constitutional adjudication institution, which can be said

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<sup>330</sup> COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991 278-81 (1992).

to have been created to some degree under the influence of the U.S.

The Constitutional court has nine justices including one Chief Justice like the United States Supreme Court.<sup>331</sup> The right of appointment is given to the President like the United States, but the selecting process is different from the United States and, at least, closer to that of the U.S. in that a special non-standing committee is not established for the nomination. Basically, the nine justices are nominated three each by the President, National Assembly and Chief Justice of the Supreme Court.<sup>332</sup>

The Chief Justice has the same rights as the other Justices in the adjudication process. He represents the whole court and directs the Court's administration. He should be appointed not by the Assemblies but by the President. However, he should be appointed from among the judges and he is the only one who should get the concurrence of the National Assembly in appointment.<sup>333</sup>

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<sup>331</sup> S. Korea Const. Art 111, § 2.

<sup>332</sup> "Of the adjudicators [referred] to in Sec.2., three shall be selected from among persons chosen by the National Assembly, with the remaining three to be selected by the Chief Justice." S. Korea Const. Art 111, § 2.

<sup>333</sup> "The head of the Constitutional Court shall be appointed by the President from among the adjudicators with the concurrence of the

In the tenure of judges, Korea has both tenure and age limits unlike the United States. The tenure office of judge is six years and the age limit is sixty-five for Justices and seventy for the Chief Justice.<sup>334</sup> As in Germany, Justices are automatically retired upon reaching the age limit even though it is before the completion of their term of office.

The qualifications of the Korean Justices are specified in relatively detailed legal and constitutional provisions which are very similar to those of Germany. The Justices should have qualifications to be a judicial officer<sup>335</sup> and are appointed among persons who are more than forty years old and who have worked more than fifteen years in one of the following jobs: Judge, public prosecutor, lawyer, legal work in a national organization (national and public corporations government-invested corporation) with lawyer's license, and law professors at an accredited law school with a lawyer's license.<sup>336</sup> This means that a law professor, even with many years of teaching and research experience, cannot

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National Assembly." Id. at Art 111, § 4.

<sup>334</sup> art.7 KCCC

<sup>335</sup> See S. Korea Const. art. 111 § 2.

become a Justice unless he passes the national judicial examination.<sup>337</sup> Therefore, in the composition of the KCC, law professors' participation cannot be found at all so far. Most Korean law professors do not take the national judicial exam.<sup>338</sup>

A Justice cannot hold other offices during the tenure. He or she cannot serve concurrently as a congressman, civil servant or consultant executive in a corporation or private organization, and cannot manage his own business for profit.<sup>339</sup>

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<sup>336</sup> See art.5. § 1 KCCC.

<sup>337</sup> The lawyer's license is granted to the person who has completed a two year training program at the Judicial Research and Training Institute (JRTI) of the Supreme Court after passing the national judicial exam in Korea. The Lawyer Act provides for the qualifications of lawyers as follows, "Any person who is a national of the Republic of Korea and who falls under any of the following Subparagraphs shall be qualified as a lawyer: 1. Person who has passed the Judicial Examination and completed the required course of the Judicial Research and Training Institute; and 2. Person who has the qualifications for judge or public prosecutor." Lawyer Act, art. 4.

<sup>338</sup> See Chang Soo Yang, The Judiciary in Contemporary Society: Korea, 25 CASE W. RES. J. INT'L L. 303, 306 (1993). "Nearly all students in Korea who want to be a law professor prefer to study abroad after graduation rather than enter JRTI (Judicial Research and Training Institute) for the apprenticeship and apply for the national bar examination.... Only four university professors are qualified as a lawyer." Id.

## D. JUDICIAL REVIEW AND THE CONSTITUTIONAL COURT

### 1. Foundation of the Constitution Court

With the Constitution of the Sixth Republic, judicial review has resurrected. The Constitution Court first adopted in the 1960 Constitution has been reinstated. Article 113 (3) of the Constitution provided that the organization, function and other necessary matters of the Constitutional Court shall be determined by statute.<sup>340</sup> In order to draft the constitutional court act, the Ministry of Justice formed a 5 member task force composed of working staffs from the Court, the Ministry of Legislation, and the former Constitutional Committee on November 5, 1987.<sup>341</sup> After examining many issues, including whether the subject matter of constitutional complaint should include ordinary court's judgments, the task force decided to exclude ordinary court's judgments in its proposal on December 18, 1987, and completed the first draft around early January of 1988.<sup>342</sup> In the month of January 1988, the Ministry of Justice as well as private organizations of public law scholar held

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<sup>339</sup> Art.14 KCCC.

<sup>340</sup> Honbop

<sup>341</sup> Constitutional Court, *The First Ten Years of The Korean Constitutional Court (1988-1998)*, December 2001, <[www.ccourt.go.kr/english/decision03.htm](http://www.ccourt.go.kr/english/decision03.htm)>

series of seminars and public hearings to resolve the unsettled issues. The main issue was whether ordinary court's judgments should be challengeable on constitutional complaints. Discussions clearly divided two opposite opinions: legal experts from academia and litigation attorneys asserted the necessity of including such jurisdiction<sup>343</sup> and however, the judges otherwise argued that it was too early to accept such power to Korean Constitutional Court. A task force committee member Judge Lee Kang-kuk argued against the inclusion for the following two reasons;

First, the West German model of constitutional court, especially, the system of constitutional complaint, is extremely rare worldwide. To introduce it into Korea, a country with completely different social and political backgrounds, carries a risk. Secondly, the West German Federal Constitutional Court is an integral part of the judiciary along with the Supreme Court, and is a genuine judicial institution composed only of federal judges. In Korea, the judicial power belongs to the ordinary courts headed up by the Supreme Court, and the Constitutional Court stands independently of these courts and its members are merely required to have the qualification of a judge but not to be a career judge. Subjecting judgments of ordinary courts to the challenges on constitutional complaint means that the Constitutional Court exercises the judicial power, and results the creation of the fourth court higher than the Supreme Court.<sup>344</sup>

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<sup>342</sup> *Id.*

<sup>343</sup> *Id.* Attorneys Choe Kwang-ryool, Lee Sang-kyu, Kim-sun, and scholars Lee Kang-hyuk, Gye Hee-yul, Kim Nam-jin, etc., acknowledged the necessity to include while the ordinary courts opposed the inclusion.

<sup>344</sup> *Id.*

Furthermore, because of the unstableness of the Constitutional Court or the Constitutional Committee which comes and goes during the previous amendment, it is inappropriate to subject the decisions of such powerful entity to review of the Constitutional Court.

However, for the other side, Attorney Sang-kyu Lee argued that the most crucial goal to have a constitutional court must be the safeguard for the fundamental human rights guaranteed in the Constitution. For archiving this goal, all the acts of all the three branches must be subject to review through the constitutional complaint process. If ordinary courts' judgments are completely excluded from the jurisdiction of the constitutional complaint process, they constitute a sanctuary free from the checks of the principle of separation of powers.<sup>345</sup> Other legal experts emphasized the importance of understanding the intent behind the entire constitutional amendment and especially the intent behind its provisions concerning the establishment of the Constitutional Court.<sup>346</sup> This new constitution was the product of the long struggle for Koreans' pro-democratic movement and therefore it must reflect the will to

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<sup>345</sup>. *Id.*

<sup>346</sup>. *Id.*

strengthen the powers of the Constitutional Court and the independence of the Judiciary which were being too passive.

Professor Huh-young who was influenced by German constitutionalism during his study in Germany and also known as one of the most notable constitutional law scholars asserted that the scope and subject matter of constitutional complaint must be established in the perspective of obtaining the effectiveness of the protection of basic rights. He argued that all constitutional institutions are ultimately established for the purpose of realizing the values of the basic rights and therefore have no power to justify their acts violating these values.<sup>347</sup> Therefore, even judgments of the ordinary court must receive constitutional evaluation through the constitutional complaint process lest they go against the correct interpretation of the Constitution or are based on an incorrect interpretation violative of the spirit of the Constitution.<sup>348</sup>

Based on these discussions and despite the demands from the legal scholars, the Ministry of Justice drafted the bill and announced its intent to legislate in early May, 1988 and

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<sup>347</sup> . *Id.*

<sup>348</sup> . *Id.*

it excluded ordinary courts' judgments from the constitutional complaint process but allowed a constitutional complaint against the court's denial of a party's motion for constitutional review of a statute. The Korean Public Law Association and the Korean Bar Association maintained that ordinary courts' judgments themselves must be included.<sup>349</sup>

In the mean time, the Administration and the ruling party decided that it would be more desirable for the new bill to be submitted in form of a parliamentary legislation by a political party since it was aimed at protection of basic rights. Therefore, the ruling party took over the draft of the Ministry of Justice and after several revisions submitted it to the National Assembly on July 4. Three opposition parties also submitted their own bill on July 18, incorporating substantially from the Korean Bar Association's proposal. The ruling party's bill provided for only four full-time Justices including the President of the Constitutional Court and excluded ordinary courts' judgments from the subject matter of the constitutional complaint process but instead allowed a constitutional complaint

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<sup>349</sup>. *Id.*

against the court's denial of a party's motion for constitutional review of a statute. However, the opposition parties' proposal provided that all nine Justices were full-time, the jurisdiction included ordinary courts' judgments in the constitutional complaint process, and even allowed direct petition for constitutional adjudication if exhaustion of all appellate processes were to result in irreparable injury.

The Third meeting of the Judiciary Committee of the 143rd Extraordinary Session of the National Assembly on July 21, 1988 reviewed the two proposals and decided to form a five-member review sub-committee for more effective review of the proposals. The sub-committee was composed of two ruling party members and three opposition party members. The sub-committee reviewed the two proposals until July 22 and rejected both in favor of a new proposal, which was submitted to the Plenary Session as the Judiciary Committee's proposal. It incorporated mainly the elements of the ruling party's proposal. As a result, six out of nine justices were full-time, and ordinary courts' judgments were excluded from the constitutional complaint process. The new proposal was passed without any objection at the 5th meeting

of the Judiciary Committee on July 23 and then at the Second plenary Session of the 143rd Session of the National Assembly. The bill was sent to the Administration on July 27, 1988, was promulgated as Act No. 4017 on August 5, and went into effect on September 1. The official commentary on the current Constitution states:

The principle of the separation of the legislative, executive and judicial powers is basic to modern constitutional democracy. The amended Constitution is thus designed to assure that the president will not have excessive power, as he did so often in the past.... Any citizen who feels the State has abused his rights can petition the Constitution Court for rectification..... The independence of the judiciary is stringently safeguarded.... The creation of the Constitution Court is intended to more effectively preserve and defend the Constitution, while avoiding the politicization of courts of law due to their involvement in constitutionality controversies.<sup>350</sup>

Needless to say, the establishment of the Constitution Court has taken a great attention from not only the drafting committee but also from legal academia. In addition to the establishment of the Court, however, for this amendment Korean people finally began to believe that this change has paved the way for easier access to constitutional adjudication. It also has been discussed on adopting the so-called American style of the constitutional review that

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<sup>350</sup>. Korea Overseas Information Service, Supra Note at 48-50.

had exercised such a review in the period of the Third Republic (1962-71) during the drafting. However, since a number of influential Korean public law experts had undertaken advance studies in Europe, particularly in Western Germany, structures of judicial review based on German and Austrian models has been their alternatives to the so-called American system.<sup>351</sup> Moreover, Korea is not a federal state like America, and the judiciary hierarchy is organized in a unitary system of three levels-district courts and family courts of first instance, high courts, and supreme courts.<sup>352</sup>

## **2. The Jurisdiction of the Constitutional Court**

The two main jurisdictions of the Constitutional Court are its power to adjudicate the constitutionality of statutes and constitutional petitions. The Court also has jurisdictions over impeachment, the dissolution of political parties, and competence disputes between the state organs.

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<sup>351</sup>. West & Youn, *Supra* note at 77.

<sup>352</sup>. (1) District courts and family courts of first instance (subdivided into single-judge and collegiate trial divisions, also containing appellate divisions which hear appeals of cases decided by single judges); (2) High courts (hearing appeals de novo from administrative agency decisions and from collegiate divisions of district courts); and (3) Supreme Court (hearing appeals from high courts and appellate divisions of district and family courts, and exceptional appeals from courts of first instance). See Court Organization Act, Law No. 51 of

Article 111 of the current Constitution provides;

(1) The Constitution Court shall adjudicate the following matters:

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Disputes about the jurisdictions between State agencies, between State agencies and local governments and between local governments; and
5. Petitions relating to the Constitution as prescribed by law.

(2) The Constitution Court shall be composed of nine adjudicators qualified to be court judges, and they shall be appointed by the President.

(3) Among the adjudicators referred to in Paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from person nominated by the Chief Justice.

(4) The head of the Constitution Court shall be appointed by the President from among the adjudicators with the consent of the National Assembly.<sup>353</sup>

Among the above competencies, concrete judicial review is the very thing that has been directly affected by the United States. Concrete judicial review is the only and representative competence of constitutional adjudication which has continuously existed since the first republic in Korea. Actually, when enacting the Korean Constitution of the first republic, provisions on concrete judicial review

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Sept. 26, 1949, as last amended by Law No. 4017 of Aug. 5, 1988.

<sup>353</sup>. Korean Overseas Information Service, CONSTITUTION: THE REPUBLIC OF

were adopted that had been present since its drafting-stage without an objection.

When we think that the device of judicial review is the invention of the U.S. Supreme Court built up by the precedent of *Marbury v. Madison* (1803) and spread to the other countries including Germany in the early twentieth century, the influence of the U.S. experience becomes more understandable.

Even though Korea has received some elements of judicial review from Germany, it can be said that in a wide sense these factors were originally modeled on the U.S., even if received via Germany. Among the factors, some have been transformed into the Germanized style. Admitting the general effect over the individual effect as the force of ruling "against the Constitution" can be offered as a typical example. Of course, Korea admits the general effect like Germany,<sup>354</sup> but, as stated before, because of the principle of *stare decisis* in the U.S., the U.S. reaches

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KOREA 36 (1987).

<sup>354</sup> See art. 47 KCCC. A law or legal provision declared to be unconstitutional loses its force. However, the point of time when the provision loses its force is different between Korea and Germany. In Germany the unconstitutional provision becomes naturally void from the beginning (*ex-tunc Wirkung*). In Korea the unconstitutional provision, unless being criminal law provision, loses its force from the day of ruling unconstitutional. See art. 47 § 2 FCCC.

nearly the same result as having a general effect when we see it on the whole.

The U.S. Supreme Court has an exclusive first instance jurisdiction over a conflict between two or more States, and has a non-exclusive first instance jurisdiction over litigation in which a foreign ambassador is a party and conflicts between the United States and a state. With the exception of these limitations, the Supreme Court has appellate jurisdiction.<sup>355</sup> The appellate jurisdiction has relatively more importance and actually more cases than the other. The interpretation and application of the Constitution is judged mostly in appellate cases.

Concerning judicial review, there are occasions when the constitutionality of laws and ordinances is reviewed under appellate jurisdiction by the litigant's appeal and directly reviewed under the certiorari issued to a U.S. Court of Appeals or State Supreme Court upon the litigant's application.<sup>356</sup> Issuing of a writ of certiorari is subject to the discretion of the U.S. Supreme Court. The court that reviewing the certiorari should send all the records of the

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<sup>355</sup> See 28 U.S.C. § 1251 (1994).

<sup>356</sup> See 28 U.S.C. §§ 1254, 1257 (1994).

litigation to the U.S. Supreme Court. In this judicial review, the court does not necessarily review only whether the norm (law, administrative order etc.) is unconstitutional or not. The Supreme Court may reach a final decision in the case or may remand to a lower court which will reach a final decision in the light of the Supreme Court decision on the question of the constitutional law raised. The unconstitutionality of an administrative order and administrative measure is reviewable as well.

**a. Review of the Constitutionality of Legislation**

Pursuant to Article 111 (1) 1 of the Constitution and Article 41 of the Constitutional Court Act, the Constitutional Court can adjudicate on the constitutionality of a law upon the request of ordinary courts. However, this power of constitutional review coexists with the Supreme Court's power to adjudicate the constitutionality of presidential decrees, ministerial ordinances and other forms of administrative regulations. The Constitutional Court renders judgment on the constitutionality of a statute only upon the request of the court with original jurisdiction

over the case and in this process, the Supreme Court channels the request. Article 107 of the current Constitution provides:

(1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitution Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.<sup>357</sup>

Under this system of concrete norms control, when the constitutionality of a statute or statutory provision forms the premise of a case pending in an ordinary court, the ordinary court where raises the issue of the review can request the Constitutional Court to adjudicate on the constitutionality of that statute or that statutory provision. Such power of norms control may, however, become easily ineffective because its exercise is premised on an ordinary court's request. Our constitutional history already witnessed the near demise of constitutional adjudication systems in the past due to the inactivity of ordinary courts in exercising their request powers. Article 68 (2) of the Constitutional Court Act is an institutional response to that weakness: a party to a trial can obtain constitutional

review of the statute at issue without request of the court with original jurisdiction over the case, by filing a constitutional complaint when its motion for constitutional review is denied by its original court.<sup>358</sup>

The Constitution requires that all questions of the constitutional validity of legislation be submitted to the Constitution Court. The request for judicial review may be made by the trial court on its own or at the request of the party involved. When denied the referral of a constitutional question by the trial court, a party can pursue two additional ways for judicial review. The party may either raise its original question about the constitutionality of the law on appeal to a higher court, or may petition directly to the Constitution Court.<sup>359</sup> Unlike the United States Supreme Court, which exercise discretion in choosing cases to review through the use of writs of certiorari, the jurisdiction of the Constitution Court of

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<sup>357</sup>. HONBOP, art. 107

<sup>358</sup> Article 68 (2) of Constitutional Court Act provides that "If a request made under Article 41 (1) for adjudgment on whether the law is unconstitutional or not, is rejected, the requesting party may request an adjudgment on constitutional petition to the Constitutional Court. In this case, the party may not request again an adjudgment on whether it is unconstitutional or not, for the same reason in the legal procedure of the case concerned."

<sup>359</sup>. *Id.*, art 68 (2).

Korea is mandatory.<sup>360</sup> The Court's jurisdiction, however, is invoked only when the regular courts request review of the constitutionality of legislation. In other words, it is essential that the constitutionality of a law be formulated as a concrete issue or controversy for the Court to have jurisdiction.<sup>361</sup>

Referral of constitutional questions may be made by trial courts at the request of a party or *sua sponte*. The decision whether to refer the constitutional question relies on preliminary determinations by the court that (1) the constitutionality of a particular law is doubtful, and (2) the final judgment in the case will be predicated on an application of that law, or if only a portion of the law is of doubtful constitutionality, of the doubtful portion.<sup>362</sup>

#### **b. Impeachment**

The second jurisdiction of the Constitutional Court is to review the impeachment case. The current Constitution gives the National Assembly the power to initiate the impeachment process through indictment in Article 65 (1) and grants the Constitutional Court the power to adjudicate on the merits

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<sup>360</sup>. Youm, *supra* note 5, at 9.

<sup>361</sup>. *Id.*

of the impeachment in Article 111 (1) [2].

Under Article 65 of the Constitutional Court Act, the president is subject to impeachment by a two-thirds majority vote of the National Assembly for violations of the Constitution or other laws. Other officials are subject to impeachment by a simple majority vote. The Act also provides that the Constitutional Court may suspend an impeachment proceeding if a criminal action is pending.<sup>363</sup> If the impeached official resigns before judgment, the Constitutional Court dismiss the case as moot.<sup>364</sup> It also provides that a judgment of impeachment shall not exempt the accused from civil or criminal or other liabilities.<sup>365</sup>

Since the inception of an independent Impeachment Court during the 1st Republic, impeachment, though changing in forms, has made it possible to discipline high officials and others whose status are constitutionally protected and are outside the reach of an ordinary legal or personnel proceeding when they violate the Constitution and statutes.<sup>366</sup> The current Constitution grants the impeachment power for prosecution and indictment to the National Assembly and that of adjudication to the Constitutional

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<sup>362</sup>. West & Yoon, *Supra* note at 89.

<sup>363</sup> CCA, Art. 51.

<sup>364</sup>. *Id.* Art. 53 (2).

<sup>365</sup>. *Id.* Art. 54 (1).

Court. Impeachment is by nature not a criminal proceeding but a disciplinary one.

For the first time in Korean constitutional history, the incumbent President has been on impeachment trial. In 12 May 2004, the National Assembly passed an unprecedented motion to impeach President Roh Moo-hyun. A total of 193 opposition lawmakers voted in favor of the impeachment motion, which was filed for Roh's alleged violation of election law. The number exceeded the 181 votes, or two-thirds of the 271 incumbent lawmakers, needed to suspend the president's powers.<sup>367</sup> Roh, who became the head of state in a surprise election victory 13 months ago, has been relieved of his presidential powers after he received the official impeachment notice from the Assembly, Prime Minister Goh Kun began to act on Roh's behalf for up to six months. The Constitutional Court has 180 days to review the motion and rule on whether to uphold the impeachment motion, with a majority decision by the nine judges determining Roh's political future.

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<sup>367</sup> Korea Times, March 12, 2004.

### **c. Dissolution of Political Parties**

The institution of dissolving political parties functions as a means to defend or struggle for the basic order of free democracy. Introduced first by the 2nd Republic Constitution (Art. 13 (2) and Art. 83-3), it has been maintained till now though governed by different entities. Article 8 (4) of the 9th Amended Constitution provides that "if the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action for its dissolution in the Constitutional Court, and the political party shall be dissolved in accordance to the decision of the Constitutional Court." The power to bring the dissolution action is granted to the Administration while the ultimate decision is made by the Constitutional Court. Since a political party serves an important political role in a democratic state, it is protected by a procedural and substantive privilege not granted to other organizations, and it can be dissolved only by the decision of the Constitutional Court.

#### **d. Competence Dispute**

Competence dispute is aimed at facilitating the operation of state agencies by clarifying the scope and nature of powers allocated to them and protecting the normative force of the Constitution by maintaining the checks and balances. The 9th Amended Constitution grants the Constitutional Court the power to adjudicate competence dispute between state agencies, between a state agency and a local government, or between local governments. The Constitutional Court Act allows the petition for a competence dispute proceeding to be brought only when the respondent entity's action or non-action violates or has a clear danger of violating the rights of the petitioning entity.

#### **e. Constitutional Petitions**

More importantly, the current Constitution recognizes the power of the Constitution Court to adjudicate "Petitions relating to the Constitution as prescribed by law."<sup>368</sup> Article 68 of Constitution Court Act provides two kinds of constitutional petition procedure as follows:

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<sup>368</sup>. HONBOP CHAEPANSOBOP [Constitution Court Act], Law No. 4017 (1988), art 68 (1), translated in I CURRENT LAW OF THE REPUBLIC OF KOREA, at 91-13 (1997).

(1) Any person who is infringed his fundamental rights guaranteed by the Constitution due to exercise or non-exercise of the public power, may request to the Constitutional Court an adjudgment on constitutional petition excluding a trial of the court: *Provided*, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.

(2) If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected, the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.<sup>369</sup>

This constitutional provision enables citizens who feel that their rights have been violated to petition the Constitution Court directly for rectification.<sup>370</sup> The Constitution Court Act of 1988 provides matters necessary for the organization and operation of the Constitution Court and the procedure for its adjudement.<sup>371</sup> As for the procedure for judicial review, the Constitution Court renders judgment on the constitutionality of a statute upon the request of the court with original jurisdiction over the case.<sup>372</sup> If the request is made by court other than the Supreme Court, it is referred through the Supreme Court to the Constitutional

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<sup>369</sup> HONBOP, art. 68

<sup>370</sup>. Youm, *supra* note 5, at 8.

<sup>371</sup>. HONBOP JAEPANSOBOP [Constitution Court Act], Law No. 4017 (1988), art 1.

<sup>372</sup>. HONBOP JAEPANSOBOP [Constitution Court Act], Law No. 4017 (1988), art 41 (1).

Court.<sup>373</sup>

Constitutional petition is aimed at protecting people's basic rights from exercises of governmental power and allows them to petition for constitutional review of those exercises of governmental power. It is recognized in various forms in Germany and other countries with independent constitutional courts. Constitutional complaint serves both a subjective function of providing relief to individuals whose rights are infringed and an objective function of checking unconstitutional exercises of governmental power and thus upholding the constitutional order. Aside from the ordinary, remedial form of constitutional petition, the Constitutional Court Act adds the element of objective norms control (a constitutional petition brought under Article 68 (2) of the Constitutional Court Act to request review of a statute), unique only to the Korean system.

In a landmark decision of 1990 and one of the most controversial cases, the Constitutional Court affirmed that the Constitutional Court possessed concurrent jurisdiction to review the constitutionality of enforcement regulations notwithstanding the provision of Article 107 (2).<sup>374</sup> In

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<sup>373</sup>. *Id.*, art 41 (5).

<sup>374</sup>. Oct. 15, 1990, 89 HonKa 178, 2 KCCR 365.

Explanation of Abbreviation and Code for Constitutional Court's Cases is as follows:

this case, a petition was filed to challenge the constitutionality of the Judiciary Agent's Act Enforcement Regulation promulgated by the Supreme Court under the Act.<sup>375</sup> The petitioner claimed that the Supreme Court, in its administration of licensing procedures for paralegal professional, known as BobMuSa (the Certified Judicial Scrivener), gave discriminatory advantages to court clerks and employees of the public prosecutor's offices over individuals who gained their experience working for private lawyers.

As mentioned earlier, article 107 (2) of the Constitution provides that the Supreme Court has the power of final review over the constitutionality of rules and regulations. It only means that, when a trial depends on

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KCCR : Korean Constitutional Court Report  
KCCG : Korean Constitutional Court Gazette  
Case Codes

- Hun-Ka : constitutionality case referred by ordinary courts according to Article 41 of the Constitutional Court Act

- Hun-Ba : constitutionality case filed by individual complainant(s) in the form of constitutional complaint according to Article 68 (2) of the Constitutional Court Act

- Hun-Ma : constitutional complaint case filed by individual complainant(s) according to Article 68 (1) of the Constitutional Court Act

- Hun-Ra : case involving dispute regarding the competence of governmental agencies filed according to Article 61 of the Constitutional Court Act

For example, "96Hun-Ka2" means the constitutionality case referred by an ordinary court, the docket number of which is No. 2 in the year 1996.

<sup>375</sup>. Law no. 1333 (April 25, 1963) (last amended by Law no. 3828, art. 4(2) (May 12, 1986)).

the constitutionality of rules or regulations, there should be no need for the issue to be referred to the Constitutional Court but, unlike statutes, it should remain within the Supreme Court's jurisdiction and therefore subject to its final review. However, the provision does not apply to a constitutional petition filed on grounds that basic rights have been violated by rules and regulations themselves. The 'governmental power' subject to constitutional adjudication, as in Article 68 (1) of the Constitutional Court Act, refers to all powers including legislative, judicial and administrative. Statutes enacted by the legislature, regulations and rules promulgated by the executive, and rules made by the judiciary may directly violate basic rights without awaiting any enforcement action, in which case they are immediately subject to constitutional adjudication.

Article 107 (2) of the Constitution gives the Supreme Court the final authority on constitutionality of the rules and regulations that form the premise of a trial. Whether it can be interpreted to give the Constitutional Court a review power on rules and regulations has been debated. Finally the Constitutional Court ruled that, for the purpose of

maintaining consistency in interpreting the Constitution, its jurisdiction naturally encompasses the right to adjudicate enforcement regulations issued pursuant to statutes.<sup>376</sup> This decision made it clear when rules and regulations directly violate people's basic rights, their constitutionality is reviewed by the Constitutional Court, and upon that premise, invalidated a provision of the Rules of the Supreme Court for the first time in Korean constitutional history.<sup>377</sup>

Immediately after the announcement of the decision, the Supreme Court officially objected to it by publishing the Constitution Research Group of the Ministry of Court Administration's report on rules and regulations review. The gist of the report is that Article 101 of the Constitution identifies the Supreme Court as the highest court overseeing the judiciary while Article 107 (2) gives the Supreme Court and other ordinary courts the exclusive power to review non-statutory inferior laws such as rules and regulations. The report went on to argue that it is possible and also necessary to first challenge the rules and regulations that directly infringe upon basic rights in judicial review of administration, in order to satisfy the rule of exhaustion

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<sup>376</sup> Ahn, *Supra* note 56, at 96.

<sup>377</sup> *Id.*

of prior remedies. Therefore, the report pointed out, if the Constitutional Court were to review rules and regulations, exercise of such power must be preceded by an organization and structure that can sustain such exercise.

Responses from the academia and law practitioners were mixed. Some supported the view of the Supreme Court while the majority supported the Constitutional Court's decision. Supporters of the Court's decision argued that the converse of Article 101 (2) mandates, if rules and regulations *do not* form the premise of a trial, their review must be left with the Court. They also argued that the term 'final' in Article 107 (2) describes the Supreme Court's position in the hierarchy of the ordinary courts' system, not any final review power it has over its relationship with the Constitutional Court. Others noted contradictions in Article 107 (2) that the provision intended for review of laws covers administrative actions, which are not laws, while failing to mention local government laws such as ordinances and rules. They argued that it should not be treated as absolute, and should be revised or repealed through constitutional amendments. On the Supreme Court's position that the rules and regulations, which directly infringe on basic rights, are essentially administrative actions and

therefore can be subject to ordinary judicial review, some argued that not all such rules and regulations are action-like, and many of them may infringe through their norm-like aspects. Professor Ahn summarized this debate as follows:

The stand-off between the two high courts of Korea is not likely to be easily resolved, and there is no easily discerned line of demarcation between them. One may legitimately argue that the Supreme Court is in a superior position to the Constitutional Court. The Chief Justice of the Supreme Court has a constitutional power to nominate three of the nine justices of the Constitutional Court. And the Supreme Court has unchallengeable power to control and administrate the national judiciary. On the other hand, the Constitutional Court is a peak without a visible pyramid to administer. Functionally, however, it has final say on the meaning of the "supreme" law of the land. Additionally, popular support for this new institution is much stronger than the other, older judicial body, with its unpopular history.<sup>378</sup>

Former Justice Byun Jung-soo who wrote the opinion of this case recalled his decision in his memoir describing how difficult to make the final decision for this case. According to his book titled "BopJungYeoJung" ("The Journey to the Court": My Memoir of the Days in the Constitutional Court), there had been enormous obstacle and interruptions from the Supreme Court, the media, and as legal academia as well as lobbies from judges and politicians. Furthermore, during the discussion with justices, most justices were

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<sup>378</sup> Ahn, *Supra* note 56, at 96.

opposed to his opinion, and particularly the justices who were appointed by the Supreme Court strongly raised the issue that his decision would lead to a disparagement from the Supreme Court and given such power to the Constitutional Court exceeded its authority described in the Constitution. Furthermore, those justices demanded Chief Justice to postpone the pronouncement of the decision. Knowing this and being afraid of the possibility of dismissal of the case, Justice Byun leaked such confidential information to the press. It turned out bigger than he expected. Korean news media began to question the conspiracy between the Supreme Court and the Constitutional Court and this news had taken a great attention. Finally, as Justice Byun intended, the Constitutional Court ruled and pronounced its decision. Justice Byun recalled as follows:

"I tried so hard to persuade my colleague in order to declare the unconstitutionality. When the National Assembly found that I gave the press the confidential information, they even tried to impeach me. However, this decision has a great valuable meaning in terms of ending the Supreme Court's dominated power in the judiciary, ... confirming that the Constitutional Court has the power to review of constitutionality of administrative decrees, regulations or actions."<sup>379</sup>

Compared to the debates during the time of the decision,

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<sup>379</sup> Byun Jung-soo, *BobJungYeoJung* ("The Journey to The Courts: My Memoir of the Days in the Constitutional Court"), 213 (1997).

most legal scholars now agree to this landmark decision and therefore, the Constitutional Court's power to review has been extended to all of the statutes, administrative decrees, regulations and governmental actions or non-actions if those laws and governmental actions or non-actions infringe the fundamental human rights guaranteed by the Constitution.

### **3. Statistical Review of the Constitutional Court Case**

From September 1988 to December 31, 2003, the Constitution Court had disposed of 8,978 cases out of 9,558 cases legitimately filed with the Court. The records are made up with 472 reviews of constitutionality of legislation and 9,066 constitutional petitions.<sup>380</sup>

As of May 1995, the Constitution Court had disposed of 42 cases referred by the ordinary courts for ruling on the constitutionality of legislation. The total number of cases referred amounted to 290, however 92 referrals were subsequently withdrawn, and 20 cases remained pending. Constitutional review of legislation wound up with 32 declaration of unconstitutionality, 1 decision of unconstitutional in part, 3 decisions of inconsistent with

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<sup>380</sup>. Sang-Hie Han, SOUTH KOREA, in ASIA-PACIFIC CONSTITUTIONAL YEARBOOK 237, 246 (Saunders & Hassall ed., 1996).

Constitution and 6 decisions of Constitutional on condition of proper interpretation.

**Case Statistics of the Constitutional Court of Korea**

As of Dec 31, 2003

Type	Total	Constitutionality of Law <sup>1)</sup>	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Petitions			
						Sub-total	\$68 I	\$68 II	
Filed	9558	472			20	9066	7897	1169	
Settled	8978	434			16	8528	7497	1031	
Dismissed by Small Benches	3335					3335	3229	106	
Decided by Full Bench	Unconstitutional	249	83			166	34	132	
	Unconformable to Constitution	74	25			49	10	39	
	Unconstitutional, in certain context	44	15			29	6	23	
	Constitutional, in certain context	28	7			21		21	
	Constitutional	755	186			569	3	566	
	Annulled	198				2	196	196	
	Rejected	2947				6	2941	2941	
	Dismissed	971	19			6	946	835	111
	Miscellaneous	4					4	3	1
Withdrawn	373	99			2	272	240	32	
Pending	580	38			4	538	400	138	

Records against constitutional petitions show 20 declarations of unconstitutionality, 4 decisions of inconsistent with Constitution, 3 decisions of

unconstitutional in part, 2 decisions of constitutional on condition of proper interpretation, 29 grants of petition, 77 confirmation of constitutionality, 966 dismissals for lack of jurisdictional prerequisites, 421 dismissals on the merits, 109 voluntary withdrawals of the parties and 395 cases remained pending.

#### **4. Modified Forms of the Constitution Court Decision & Standards of Review**

The Justices of the Korean Constitution Court have adopted the German practice of issuing judgments in several forms that dispose of constitutionality problems without actually invalidating legislation.<sup>381</sup> The modified forms of decisions are designed to avoid total invalidation of the statute in those cases where the Constitutional Court found it to be in violation of the Constitution. These are employed in order either to give deference to the legislature's policy-making privilege or to avoid the vacuum in law that would probably result from total invalidation. Since modified forms of decisions are not expressly provided either in the Constitution or in the Constitutional Court Act, their legal

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<sup>381</sup>. James M. West & Dae-Kyu Yoon, THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA: TRANSFORMING THE JURISPRUDENCE OF THE VORTEX? 40 Am.

grounds and legitimacy were weak and controversial in the beginning. However, before the end of its first year of operation, the Constitutional Court recognized the necessity of such special forms of decisions and firmly established their legitimacy by the end of the First Term of the Court in 1994 despite strong dissenting opinions throughout those decisions where the Court adopted those modified forms of decision.<sup>382</sup>

**a. The Decision of Nonconformity to the  
Constitution (or inconsistent with the Constitution)**

A judgment that a law is unconstitutional immediately entails that the statute is null and void, and all state organs bound to implement the decision with prospective effect from the date of the Constitution Court judgment.<sup>383</sup>

A judgment that a law is "inconsistent with the Constitution" does not entail its nullity, however such a judgment constitutes a signal to the executive and legislative branches that the legislation in question must be modified in the near future to address a serious

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J. Comp. L. 73, 99 (1992).

<sup>382</sup>. Justice Byun always wrote the dissenting opinions in those decisions. See *Supra* note 335, at 372.

<sup>383</sup>. HONBOP JAEPANSOBOP [Constitution Court Act], Law No. 4017 (1988) art.

constitutional defect.<sup>384</sup>

Generally, the Court stated that nonconformity decision is a possible form of decision when the statute in question has not only unconstitutional but also constitutional aspects, and that the primary rationale for this special form of decision is respect for the policy-making privilege of the National Assembly.

In September 1989, the Constitutional Court first delivered "the decision of nonconformity to the Constitution" ("nonconformity decision") in the National Assembly Candidacy Deposit case where it reviewed the provisions of the Election of National Assembly Members Act that specified the candidates' obligations to make election deposit (1 KCCR 199, 88Hun-Ka6, Sep. 8, 1989). In this case, the Court stated that there is a general need for "nonconformity decisions" because a simple choice between unconstitutionality and constitutionality prevents the Court from taking a flexible and resilient approach to a reasonable interpretation of the laws that regulate the complex social phenomena; it may cause the vacuum in or confusion about law, destabilizing the legal system; and it

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47 (2).

<sup>384</sup>. West & Yoon, *supra* note 173, at 100.

can restrict the legislature's policy-making privilege.<sup>385</sup> The Court made it clear that this nonconformity decision is simply a mutated form of the decision of unconstitutionality provided in Article 47 (1) of the Constitutional Court Act; and therefore naturally has the binding force on all other state institutions.

Justice Byun Jeong-soo dissented to the modified form of decision, arguing that the Court can rule only on the issue of constitutionality, and the ruling should become immediately effective; and the Court cannot arbitrarily decide on the effective periods of its ruling. Justice Kim Chin-woo also dissented, arguing that an unconstitutional statute can remain effective only under exceptional circumstances in which the vacuum in law implicates a threat to national security, and that the Act must be voided on the date of the ruling in this case.

While the two decisions on election deposits maintained the legal effects of the unconstitutional laws until they were revised, another kind of nonconformity decision did not: in the Industrial Dispute Arbitration Act case (CC 1993.3.11, 88Hun-Ma5), the Court delivered an "unqualified decision of nonconformity to the Constitution that

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<sup>385</sup> Web.

immediately suspended application of the statute at issue and compelled the legislature to take necessary actions by a fixed point in time after which the statute would become void. In other words, the law prohibiting every collective action of all civil servants is invalid. However, there are several ways of curing such unconstitutionality. The legislature has wide discretion in policy-making in terms of deciding, for instance, the range of the types and the ranks of civil servants to be allowed to take collective action, and is therefore in a better position to determine the most desirable way of remedying unconstitutionality. The Second Term Court has continued to deliver a number of nonconformity decisions in order to secure the stability of the legal system by way of granting provisional validity to the unconstitutional laws. In particular, a great number of nonconformity decisions has taken place in the field of tax law because it requires legislature's policy considerations more than other fields of law: for example, the equity between tax-payers and tax-defaulters and the shortage of revenue.

**b. Decisions of Limited Unconstitutionality or  
Constitutionality**

Another modified form of the decision - "constitutional on condition of proper interpretation"- is familiar to American jurists in a different terminology used when a statute is facially constitutional yet unconstitutional "as applied."<sup>386</sup>

In a 1989 decision, the Court, in a constitutional complaint challenging Article 32-2 of the Inheritance Tax Act, issued a decision of limited constitutionality for the first time, using the expression "[the law] is not unconstitutional as interpreted. . . ": in a language that has been accepted as standard on this issue. It explained that, although the statute in question had unconstitutional aspects, if it could also be interpreted in ways consistent with the Constitution, the Court could deliver "the decision of constitutionality/unconstitutionality as interpreted or applied" as could be naturally be derived from the doctrine of preference for constitutionality in statutory interpretation (CC 1989.7.21, 89Hun-Ma38). Specifically, in expressing his concurring opinion of this case, the first President Cho Kyu-kwang elaborated that if the text and the legislative intent of the statute has room for both the

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<sup>386</sup>. West & Yoon, *supra* note 173, at 100.

decisions of constitutionality and unconstitutionality, the Court must choose the preferred, constitutional version of the statutory interpretation. In doing so, the Court can use both "unconstitutional as interpreted" and "constitutional as interpreted" as proper forms. As the two forms are different only in expression but the same in essence and for all practical purposes, the choice between them is merely a matter of choosing the appropriate means.

The first decision using the form of "[the law] is unconstitutional as interpreted" is the Notice of Apology case in April 1991 in which the unconstitutionality of Article 764 of the Civil Act was considered (CC 1991.4.1, 89Hun-Ma160). This case fully adopted the reasoning of President Cho Kyu-kwang in the above case.

The stance on the decision that "unconstitutional as interpreted" and the "constitutional as interpreted" are not different in nature has remained unchanged. The choice depended on appropriateness of the means in that it depended only on whether the Court wanted to uphold or exclude a particular interpretation of the statute (CC 1992.2.25, 89Hun-Ka104; 1994.4.28, 92Hun-Ka3).

On December 24, 1997, the Court took an extraordinary step of striking down the Constitutional Court's judgment on the grounds that the Supreme Court's judgment defied the binding force of the Constitutional Court's previous decision of limited constitutionality, and applied the unconstitutional aspect of the statute. The Court unambiguously ruled that, aside from a decision of unqualified unconstitutionality, other decisions such as "unconstitutional as interpreted", "constitutional as interpreted" and "non-conforming to the Constitution" were all, in principle, decisions of unconstitutionality and thus have the binding force provided in Article 47 (1) of the Constitutional Court Act. It also confirmed that "unconstitutional as interpreted" and "constitutional as interpreted" are the flip sides of the same coin and have the same effect of partially invalidating the law in question (CC 1997.12.24, 96Hun-Ma172, etc.).

In reviewing the constitutionality of Article 7 (1) of the Registration, etc. of Periodicals Act, the Constitutional Court found the Act unconstitutional as interpreted (CC 1992.6.26, 90Hun-Ka23). This decision showed that review of a statute constitutes an indirect review of regulations enforcing that statute.

Item 7 of Article 7 (1) of the Registration, etc. of Periodicals Act states that the periodical publishers "shall equip with related facilities designated by the presidential decree". Item 3 of Article 6 of the regulations, promulgated through the presidential decree to implement the Act, stated that the publishers should have ownership of such related facilities. The Court ruled that the statutory provisions were void insofar as they were to be interpreted as requiring publishers to own those facilities. Note that this decision reviewing the statute accomplished constitutional review of the regulations. In outlawing a particular version of interpretation of a statute, it also outlawed the regulations promulgated with that interpretation in mind. The Constitution grants the power of constitutional review of regulations to the ordinary courts while endowing the Constitutional Court with that of statutes. Therefore, the Constitutional Court's indirect review of regulations, first recognized in this case, hints at a probable jurisdictional conflict with the Supreme Court.

This conflict finally occurred with a constitutional complaint (CC 1995.11.30, 94Hun-Ba40, etc.) on Article 23 (4) of the Income Tax Act (Act No. 3576, Dec. 21, 1982). This Article provided that the transfer value for the

purpose of transfer gains taxation should be the transfer price. Item 1 of Article 45 (1) provided that the acquisition cost as a necessary expense deductible from the transfer value should be calculated using the standard land value at the time of the acquisition. However, both provisions had provisos that if the presidential decree stated otherwise, both the transfer value and the acquisition cost could be determined by the actual rather than the standard land prices. The Constitutional Court ruled that these provisos would lose their validity if interpreted in such a way as to allow the Administration to apply the actual prices when the tax based on them exceeded the tax based on the standard land value. In fact, the presidential decree implementing this Act had prescribed that when the estimated tax based on the actual land price was more than the tax based on the standard land price, the actual price could be applied in calculating the tax. Therefore, this case virtually resulted in the Constitutional Court's review of the regulations. The Supreme Court regarded this decision as usurping their power of constitutional review of regulations, and went on to deny its binding force, stating that it was at most, an advisory opinion. The Supreme Court upheld its own judgement in

conflict with the Constitutional Court's decision (the Supreme Court Decision 1996.4.9, 95Null1405). The claimant won the suit in the Constitutional Court but was denied redress by the Supreme Court.

It has been argued that the Supreme Court went too far when it defied the Constitutional Court's decision. It is true that Article 107 (2) grants the Supreme Court the authority to review the constitutionality of rules and regulations. However, it is equally true that the Constitutional Court was granted the statutory review power, and the invalidation of the regulations in the case above was merely a by-product of this statutory review. Therefore, if the Supreme Court had correctly understood the significance and the necessity of "the decision of unconstitutionality as interpreted," it would not have regarded the Constitutional Court's decision usurpation of its own power.

Furthermore, as our Constitution restructures the framework for constitutional adjudication by setting up a new specialized court for that function, the Supreme Court's ultimate power to review rules and regulations will

inevitably be adjusted to fit this new framework. For instance, if the Constitutional Court invalidates a statute on the grounds that it violated the rule against blanket delegation, all regulations based on the original statute will be voided irrespective of the Supreme Court's will. In addition, the constitutional complaint process now allowed the Constitutional Court to review the rules and regulations that were directly infringing upon people's basic rights even without any administrative action based on that rule or regulation. In short, the power to review constitutionality, divided between the Constitutional Court and the ordinary courts, will work properly only under the two institutions' common understanding that evaluation of a statute inevitably influences the validity of the regulations promulgated to specify the contents of that original statute.

### **c. Standards of Review**

Before exploring the Constitutional Court's decisions, I introduce the standards of review which the Court applies. The following standards of review have been employed by the Constitutional Court.<sup>387</sup>

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- (1) The rule against excessive restriction
- (2) The Principle against arbitrariness
- (3) The principle of clarity of law
- (4) Prohibition of blanket delegation
- (5) The principle of statutory taxation and equal taxation
- (6) Protection of expectation interest (protection of confidence in law)
- (7) Due process of law

Article 37 (2) of the Constitution prescribes the principle of prohibition of excessive restriction by stating that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order or for public welfare." The same article further states that "even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." Therefore, even when compelling state interest warrant limitations on individual rights, the "essential content" of the freedom or right should be preserved. This article has been recognized as the safeguard for the fundamental rights as well as a pretext for the neglect these rights. Therefore, the Constitutional Court also seems to use this standard for its review the case.

For the first standard as described above, the Court explains as follows:

... In reviewing the constitutionality of those governmental actions restricting basic rights, especially liberty rights, the Court has usually

employed the rule against excessive restriction as the standard. This principle of proportionality, instead of creating substantively different levels of scrutiny, provides a unified standard under which the relationship between the legislative end and its means is scrutinized in three different aspects (appropriateness, necessity, and proportionality in narrow sense or balance) and which is applied to every restriction of liberties to demarcate and balance between the public interest and the liberty. Restriction of liberties by public authorities satisfies the principle of proportionality only when it is (a) aimed at a valid purpose (legitimacy of the end); (b) reasonable as a means chosen by the state to achieve and promote such purpose (appropriateness of the means); (c) the least restrictive among all equally effective options (necessity of the means or the doctrine of the least restrictive means); and (d) on a relationship of proportionality when the importance of public interest and the degree of infringement are balanced (proportionality in the narrow sense or balance).....

However, this kind of standard of review has different senses from that of the United States Supreme Court. Since unlike the US Supreme Court the Constitutional Court barely tries to apply the terms of standard of review and further never explicitly creates or forms the standards of review, it is not necessary to use such terminology. The above description was published by the Constitutional Court itself. It seems that the Court unnecessary and illogically tried to transform so called three-tier standard of review system in the United States Supreme Court to Korean Constitutional Court where the justices more willingly tries to employ the

standard from the constitutional text itself. The justices never explicitly mentioned their intention to employ the three standard review of the United Supreme Court. However, in a 1991 decision, the dissenting opinion indicated that necessity of the application of a double standard for judicial review of legislation.<sup>388</sup>

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<sup>388</sup> June 3, 1991, 89 HonMa 204, 3 KCCR 268, 276.

## V. PRESIDENTIAL GOVERNMENT

### A. Unending Issue of Constitutional Law of Korea: System of Government

Through revisions of the Korean constitutions during last four decades, which governmental system would accept for the next regime had always been a hot issue and this issue has been still discussing and crucial among the political parties as well as among the public law experts. All of those revisions, except of those of 1960 and those in the current Constitution of 1988, established grounds for extending the term of an incumbent president or provided ex post facto justification for military coup.

A half century ago, a German-born American scholar, Karl Loewenstein, warned that the presidential governmental system would hardly work outside the United States and most Korean constitutional scholar favor this idea.<sup>389</sup> His warning turned out true in South Korea. The presidential system in South Korea was the "kiss of death" for Korean democracy.<sup>390</sup>

Except for a short interruption during the Second Republic where a parliamentary cabinet system was adopted,

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<sup>389</sup>. Karl Loewenstein, *The Presidency Outside the United States: A Study in Comparative Political Institutions*, J.Pol., Aug. 1949, at 447-96.

<sup>390</sup>. Ahn, *Supra* note..

presidential system has been the rule throughout the entire period of the republican history of South Korea. Another key factor has been the method of the presidential election. During the constitutional revision, which election process, namely, direct election and indirect election, would be used has always been the crucial issue. Whether the president should be elected by a direct popular vote or by some indirect method has been the single most critical issue both in public view and in the political arena. On almost every occasion, a change from one to the other has been followed by a public disturbance.

#### **B. The Early Adoption of American Style of Presidency**

As discussed above, the original draft for the First Constitution was adopted the cabinet system of government. However, because Syngman Rhee's personal ego and desire to become the powerful leader in a newly formed nation and relatively more influenced by American favor, the presidential system with indirect election system was adopted. Being afraid of losing his power through the indirect election which was held by the Congress, Rhee and his followers amended the constitution for adopting the

direct popular vote. After the amendment, Rhee was elected for his second and third terms in 1952 and 1956, by a direct vote of the people.

During the Third Republic, born under the martial law, General Chung-Hee Park who had the power through the military coup in 1960 was elected President three times, in 1963, 1967 and 1971 by a direct popular vote. However, during the period of the notorious "Yusin Regime," an institution called the "Sovereign People's Council for the Unification of Korea," symbolically the highest body of the government, elected him twice more to the presidency in 1972 and 1978. Because the presidential election during this period held in a sport event arena like indoor stadium, this indirect election was named "Stadium Election" by the opposition.

Under the Constitution of Fifth Republic, Chun Doo-Hwan, another former general who became the political leader of South Korea through illegitimate political process against his higher authorities following the tragic death of President Park Chung-Hee, was indirectly elected by an electoral college for a single seven-year term.

The current Constitution of 1988 returned to direct presidential election that was the top request of Korean

people during the nation-wide protest at June 1987, reducing the term from seven to five years, and barring him from re-election. President Roh Tae-Woo, Kim Young-Sam, Kim Dae-Jung and the incumbent President Roh Moo-Hyun were elected under this system. The current Constitution without any amendment during last four different presidencies has been recognized new experience for Korean people.

As discussed above, the presidential government was not the first preference of the Korean people. It has been strongly suspected that it was the result of a recommendation of the United States Military Government in Korea and its Korean aids. Even though the USMGIK had strongly recommended adoption of the American style of government, the critical factor in Korea's adoption of presidential government was Dr. Syngman Rhee's strong personality.<sup>391</sup> However, the Constitution of the First Republic also carried several features of a cabinet system because it represented a compromise between President Rhee and the opposition who preferred the parliamentary government or it merely misunderstood the American presidential system as professor Ahn Kyong-Whan explains as follows:<sup>392</sup>

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<sup>391</sup>. Kim and Lee, *Supra* note 50 at 177

<sup>392</sup>. Ahn, *Supra* note 56 at 378

Notwithstanding its appearance in the document, the true nature of the presidential election in America should be characterized as "direct election." For all practical purposes, the electoral college does not have independent power to elect a president of its own choice. This seemingly clear fact was not well known in Korea. Many Korean politicians were confused, and some distortions by a few pro-government academics provided false justification for that confusion.

Considering the suspicious conspiracy at the beginning of the Korean constitutional history and continuous undemocratic revisions, all the controversies surrounding the methods of presidential election were mainly caused by public suspicion that any change were a mere pretext for an ulterior motive to prolong the incumbent president's or the ruling party's power.<sup>393</sup>

### **C. Problems in Current Presidential System**

Although Korea has adopted the presidential system originated from American constitutionalism, the constitutional powers vested with the president widely exceed the scope of its American counterpart.<sup>394</sup> An essential attribute of American presidentialism is a system based on the separations of power. For example, the right of the Congress to present a bill and the presidential right

to veto are symmetrical.<sup>395</sup> The United States Constitution is a document characterized by balance which has been maintained throughout the constitutional history of America. However, on the other hand, presidentialism in Korea has been a symbol of the supremacy of the President.

Under the Constitution of Forth Republic, the President was vested with almost omnipotent powers, including the right to dissolve the National Assembly, to declare martial law, and to take any measure suspending even the most fundamental constitutional rights of the people. It is generally recognized that this Constitution of the "Yusin Regime" was modeled following the French Constitution of the Fifth Republic in 1958, commonly known as "De Gaulle Constitution." Although the Constitution of the Fifth Republic sought more relaxed presidential powers, it still recognized the modified presidential system with its supremacy. In response to strong criticism from the opposition, the Chun's regime justified its governmental system with naming "New Presidential System" or "Korean Style of Presidential System" which was only known as the only pretext for his undemocratic regime. The presidential system under the Forth and Fifth Republic must be recognized

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<sup>393</sup>. Id.

<sup>394</sup>. Id. At 99.

as an undemocratic system even though the systems were provided by written constitution because it violated the principle of democratic constitutionalism which is the separation of powers. The President had excessive powers over the judiciary and legislature. The President could control the other branches at his will. During those periods, the legislature was criticized as a mere voting machine for the president and the independence of the judiciary only existed in the text book.

However, since Korean people called for the democratic change during the drafting period, the current Constitution accepted their demands and removed many undemocratic provisions in the previous constitution. Under the current Constitution, the President's powers have been reduced and the legislature and judiciary were given more powers.

Despite those changes, however, the President still has relatively more power than those of the President of the United States. Except for the appointment of the Prime Minister, the President has unbridled power to appoint and dismiss cabinet members at his will.<sup>396</sup> The position of

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<sup>395</sup>. Id.

<sup>396</sup>. Article 86 (1) of the Constitution states: "The Prime Minister shall be appointed by the President with the consent of the National Assembly." It is unclear whether the removal of a prime minister is

Prime Minister was originally introduced in Korea as a compromise between the American advisors and Korean intellectuals who favored European parliamentary system.<sup>397</sup> Furthermore, all major bills are prepared by the Executive and reviewed in the Party-Administration Coordination Committee before being presented to the Legislature.

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subject to the same consent requirement. However, in practice, the President never asked the National Assembly on such consent and therefore, the National Assembly's consent on new prime minister usually regards as the consent on the removal of the former prime minister.

<sup>397</sup>. Loewenstein, Supra note

## VI. THE INTERPRETATION AND APPLICATION OF INTERNATIONAL HUMAN RIGHTS COVENANTS IN KOREAN COURTS

### A. Ratification of Major International Human Rights Covenants

In April, 1990 South Korea ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>398</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>399</sup>, and the Optional Protocol to the ICCPR<sup>400</sup>. Since Article 6 (1) of the Constitution provides that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea," the Covenant has the same effect as domestic laws without the enactment of separate domestic regulation.

The United Nations had adopted these Covenants in December 1966 and the Covenants entered into effect in 1976.

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<sup>398</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, 003 U.N.T.S. 3; G.A.Res. 2200, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

<sup>399</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171; G.A.Res. 2200, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

<sup>400</sup> Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 302-46; G.A.Res. 2200, U.N. GAOR, 21<sup>st</sup> Sess., Sup. No. 16 at 59, U.N. Doc. A/6316 (1966) [hereinafter Protocol]. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 1992, at 114, 123, 154, U.N. Doc. ST/LEG/SER.E/11, U.N. Sales No. E.93.V.11 (1993).

Needless to say, these covenants were drafted to embody the ideals enumerated in the U.N Charter and Universal Declaration of Human Rights. These covenants have influenced the world community as core international norms and universal standards for the protection of human rights along with other regional human rights instruments such as the European Convention for the Protection o Human Rights and Fundamental Freedoms.

South Korea's ratification of the Covenants and Optional Protocol has opened new era for human rights protection and promotion for Korean people. Before the current administration, South Korea had been viewed in the international community as a Nation which does not respect human rights. Renowned human rights experts and international non-government organizations such as Amnesty International, the International Commission of Jurists, and the International League for Human Rights have expressed concern about human rights infringements in South Korea. In their reports, Korean citizens have experienced illegal arrests and detentions, torture, imprisonments resulting

from unfair trials, unexplained disappearance, and deaths from unknown causes.<sup>401</sup>

The fact that a State has become a State Party to human rights covenants, however, does not guarantee that the status of human rights in that State will improve immediately. Numerous countries have signed the Covenants<sup>402</sup>, yet it is unclear whether ratification in many of these countries has resulted in greater respect for human rights. In fact, signatories may not be making the continual and adequate effort to extend fundamental freedoms and basic rights as required by their domestic laws and the Covenants. For some countries, ratification may simply be a pretense of performing the responsibilities required in the

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<sup>401</sup> See ARTICLE 19 WORLD REPORT 1988, at 149-53 (Kevin Boyle ed., 1988); ASIA WATCH ET AL., FREEDOM OF EXPRESSION IN THE REPUBLIC OF KOREA (1988); Jerome A. Cohen, Arms Sales and Human Rights: The Case of South Korea, in HUMAN RIGHTS AND U.S. FOREIGN POLICY 255 (Peter G. Brown & Douglas MacLean eds., 1979); FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION ET AL., HUMAN RIGHTS CONDITIONS IN SELECTED COUNTRIES AND THE U.S. RESPONSE 219-37 (1978); HUMAN RIGHTS IN KOREA, supra note 8; INTERNATIONAL HUMAN RIGHTS LAW GROUP, TO THE PRECIPICE AND BEYOND: A REVIEW OF POLITICAL DEVELOPMENTS IN THE REPUBLIC OF KOREA, JANUARY 1986-JULY 1987 (1987); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS & INTERNATIONAL HUMAN RIGHTS LAW GROUP, DEMOCRACY IN SOUTH KOREA: A PROMISE UNFULFILLED (1985); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS & INTERNATIONAL HUMAN RIGHTS LAW GROUP, HUMAN RIGHTS IN THE REPUBLIC OF KOREA (1983); GILBERT D. LOESCHER & ANN D. LOESCHER, HUMAN RIGHTS: A GLOBAL CRISIS (1978); A. GLENN MOWER, JR., HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 137-49 (1987); STEPHEN A. OXMAN ET AL., SOUTH KOREA: HUMAN RIGHTS IN THE EMERGING POLITICS (1987); 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); WORLD HUMAN RIGHTS GUIDE 185-88 (Charles Humana comp., 3d ed. 1992).

international community, while in reality their citizens may still be suffering from severe infringements of the human rights guaranteed by the Covenants<sup>403</sup>. Therefore, a country's ratification of the Covenants does not automatically guarantee human rights protection.

In the case of South Korea, in July 1991 the government submitted its initial report<sup>404</sup> to the Human Rights Committee (HRC) in accordance with article 40 of the ICCPR. The report was examined by the HRC in July 1992 and will be discussed in Part I of this article. While reviewing the issues discussed in the report, bear in mind that the initial report will become a model for all future reports submitted to international human rights bodies.

Under article 40 of the ICCPR, the State Party undertakes to submit reports on the measures it has adopted

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<sup>402</sup> As of December 1991, there were 100 State Parties to the ICESCR and, as of July 1992, 111 State Parties to the ICCPR.

<sup>403</sup> Many countries ratified the Covenant on Civil and Political Rights, but have failed to live up to its provisions. Ratification was a propaganda ploy which, to some extent, masked the large-scale fraud which the governments perpetrated among their peoples in giving lip service to human rights. See International Covenant on Civil and Political Rights: Hearing Before the Comm. on Foreign Relations of the United States Senate, 102d Cong., 1st Sess. 19 (1991) [hereinafter Hearing] (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

<sup>404</sup> Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Initial Reports of State Parties Due in 1991; Addendum, Republic of Korea, U.N.GAOR, Hum.Rts.Comm., U.N.Doc. CCPR/C/68/Add.1 (1991) [hereinafter Initial Report].

which give effect to the rights recognized in the ICCPR and demonstrate the progress it has made in granting its citizens the enjoyment of those rights<sup>405</sup>. The reports should indicate the factors and difficulties affecting the implementation of the ICCPR<sup>406</sup>. The State Party is required to submit an initial report within one year of ratifying the ICCPR and subsequent reports every five years thereafter. The HRC reviews the reports and transmits appropriate comments to the State Party<sup>407</sup>. The rules of procedure and practice of the HRC provide that the Committee review takes place in a public meeting with the representatives of the State Party<sup>408</sup>.

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<sup>405</sup> "The State Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein." ICESCR, *supra* note 1, art. 16(1).

<sup>406</sup> Theo Van Boven, *The International Systems of Human Rights: An Overview*, in *MANUAL ON HUMAN RIGHTS REPORTING* 8, 80, 81, U.N.Doc. HR/PUB/91/1 (1991) [hereinafter *MANUAL ON REPORTING*].

<sup>407</sup> *Id.* at 80.

<sup>408</sup> *Id.* at 121-22. In its review of State reports, the Human Rights Committee is neither a judicial nor a quasi-judicial body. Its role is not to pass judgment on the implementation of the provisions of the ICCPR in any given State. The main function of the HRC is to assist State Parties in fulfilling their obligations under the ICCPR, to make available to them the experience the HRC has acquired in its examination of other reports, and to discuss with them any issue related to the

## **B. The Interpretation on International Human Rights Covenants in Korean Courts**

### **1. Relationship Between Domestic Laws and the ICCPR**

With respect to inquiries made by the HRC aimed at delimiting the relationship between domestic law and the ICCPR, the Korean government stated:

Since Article 6(1) of the Constitution of South Korea provides that '[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea,' the Covenant, which was ratified and promulgated by the Government with the consent of the National Assembly, has the same effect as domestic laws without the enactment of separate domestic regulation. The Korean government has concluded that the Constitution does not conflict with the Covenant<sup>409</sup>.

The South Korean government's confirmation that, under the Constitution the ICCPR has the same effect as domestic laws and does not require enabling legislation, implies that the ICCPR applies directly to domestic cases<sup>410</sup>. The South Korean government's apparent acceptance of the ICCPR's

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enjoyment of rights enshrined in the ICCPR in a particular country.

<sup>409</sup> Initial Report, supra note 363, at 2. By the same token, the government delegate stated that Korea had acceded to the ICESCR and ICCPR in order to solidify the protection of human rights in Korea and to join the international effort to promote human rights. "All the rights provided for in the Covenant were guaranteed by the Constitution, which stipulated that all treaties duly concluded and promulgated should have the same effect as domestic laws. Together, the two instruments formed the cent[er]piece of human rights law of the Republic." CCPR/C/SR.1150, supra note 27, at 2-4.

direct applicability contrasts with the U.S. position that the provisions of articles 1 through 27 of the Covenant are not self-executing<sup>411</sup>.

Looking only at the application of the ICCPR, the South Korean government's interpretation seems more positive than

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<sup>410</sup> LAWYERS FOR A DEMOCRATIC SOCIETY & NATIONAL COUNCIL OF CHURCHES IN KOREA, HUMAN RIGHTS IN SOUTH KOREA 7 (1992) [hereinafter COUNTER REPORT].

<sup>411</sup> A U.S. representative has stated:

At this time, I would like to stress [that] the substantive provisions of the Covenant should be declared to be nonself-executing--this would mean that the Covenant provisions, when ratified, will not, by themselves, create private rights enforceable in U.S. Courts, it could only be done by legislation adopted by the Congress. Since existing U.S. law generally complies with the Covenant, we do not contemplate proposing implementing legislation.

See International Covenant on Civil and Political Rights: Hearing Before the Comm. on Foreign Relations of the United States Senate, 102d Cong., 1st Sess. 9, 15 (1991) [hereinafter Hearing] (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

In opposition to this view, the Association of the Bar of the City of New York argues: A declaration that the covenant is not self-executing, and would require separate legislation specifically implementing its provisions, would severely undermine the significance of ratification by further postponing the practical effectiveness of the Covenant until after another series of legislative actions. The Covenant does not require that treaties be implemented by legislation before they become U.S. law. The question of whether the parties to a treaty intended specific provisions to be self-executing has long been treated as a question for judicial interpretation and has turned largely on the specificity of the treaty language and its amenability to self-execution. The interpretive question of which provisions of the covenant are intended to be self-executing should be left to the courts, as in the case of other treaties, and should not be the occasion for yet another delay in making those parts of the Covenant which are obviously intended to be self-executing immediately binding on courts and government officials.

Id. at 76.

The government of South Korea made reservations regarding self-execution of the ICCPR under articles 14(5), 14(7), and 22. See ICCPR, *supra* note 2. In opposition to this, the Korean Bar Association submitted an opinion calling for the withdrawal of those reservations. See Hyun-Suk Yoo, Kukje Inkwon Kyuyak-kwa Popyool Samu [International Human Rights Covenants and Legal Affairs], 169 INKWON-KWA JUNGUI [HUM. RTS. & JUST.] 98 (1990).

that of the United States, given that there is little difference between the contents of the relevant articles in the two countries' Constitutions<sup>412</sup>. When asked as part of the HRC review whether the ICCPR could be nullified by subsequent domestic legislation, the South Korean government delegate answered that:

[M]any members had asked about the relationship between the Constitution of the Republic of Korea and the Covenant. Under [A]rticle 6(1) of the Constitution, the Covenant had the same effect as domestic law. He [the delegate] could not accept the claim that the guarantees contained in the Covenant might be overturned by subsequent domestic legislation, since such a suspicion underestimated the Republic of Korea's commitment to human rights and the increasing public awareness of the rights enshrined in the Covenant, thanks to the Government's public awareness campaign<sup>413</sup>.

It is unlikely, however, that a government delegate's commitment to uphold the ICCPR has any legal meaning or binding effect on government authorities or the courts. Rather, this statement suggests that the ICCPR is not superior to domestic legislation (laws enacted by the

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<sup>412</sup> "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." KOREA CONST. ch. I, art. 6(1). Cf. U.S. CONST. art. 6, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

<sup>413</sup> U.N.GAOR, Hum. Rts. Comm., 45th Sess., 1154th mtg. at 3, U.N.Doc. CCPR/C/SR.1154 (1992) [hereinafter CCPR/C/SR.1154] (statement of Mr. Kook Hyun Yoo).

National Assembly or administrative agencies). In principle, subsequent domestic legislation may supersede the ICCPR where there is a conflict<sup>414</sup>. If such is the case, the significance of South Korea's ratification of the ICCPR will diminish markedly.

With respect to an individual's access to domestic courts on the basis of the ICCPR, the South Korean government delegate commented: "[I]f an individual claimed that his rights under the Covenant had been infringed, the court would normally rule on the basis of domestic legislation; in the rare cases where that was not possible, the Covenant could be invoked directly by the courts."<sup>415</sup>

## **2. Direct Applicability**

Again, because the two Covenants have been duly concluded and promulgated with the consent of the National Assembly as required by the Constitution<sup>416</sup>, under Article 6(1) they

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<sup>414</sup> This is similar to the view that the domestic effect of the ICCPR is the same as laws enacted by the National Assembly.

<sup>415</sup> CCPR/C/SR.1154, supra note 372, at 3.

<sup>416</sup> Article 60 provides:

The National Assembly shall have power to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace [treaties]; [treaties] which will

"have the same effect as the domestic laws of the Republic of Korea." There is no dispute that the ICCPR directly applies to domestic cases involving human rights violations<sup>417</sup>. Thus, as mentioned in the government's initial report, the ICCPR has been effectively incorporated into the domestic legal arena without the enactment of separate domestic legislation. Anyone whose rights under the ICCPR have been violated may directly invoke the ICCPR before a domestic court for damages or for cancellation or nullification of the State organ's acts.

On the other hand, Korean scholars generally believe that the ICESCR is not directly applicable to domestic cases<sup>418</sup>. They distinguish between the obligations of the government under the two Covenants: while the obligations of the government under the ICCPR must be carried out immediately after accession, those under the ICESCR are to be progressively realized within the limitations of State Parties' situations and circumstances.

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burden the State or people with an important financial obligation; or treaties related to legislative affairs.  
KOREA CONST. ch. III, art. 60(1).

<sup>417</sup> See Choong-Hyun Baek, *Kookje Inkwon Kyuyak-ui Pop-juk Uiui* [The Legal Significance of the Ratification of International Human Rights Covenants], 21 JUSTICE 7 (1988); Jung-Bae Chun, *Kukje Inkwon Kyuyak-kwa Hankook-ui Hyunsil* [International Human Rights Covenants and the Reality of Korea], 140 POPJO CHUNCHU 75 (1992); Yoo, *supra* note 33, at 98-104.

It is doubtful that a clear distinction can be made between civil and political rights on the one hand, and economic, social, and cultural rights on the other; both categories of human rights are interdependent<sup>419</sup>. Nonetheless, rights under the ICESCR which shall be "progressively realized" are distinguishable from rights under the ICCPR which require "immediate" relief. The ICCPR rights were specifically developed to protect against direct intervention and oppression by state power<sup>420</sup>. It is uncertain how a court, in interpreting the term "progressive," will consider factors, such as time, resources, and social circumstances, which affect the enjoyment of rights<sup>421</sup>.

### 3. Hierarchy

Where there are conflicts between domestic laws and the Covenants, which prevails? Three main views delineate the

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<sup>418</sup> Baek, *supra* note 376, at 8; Yoo, *supra* note 370, at 100.

<sup>419</sup> See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 2, 28-45 (1989); Han S. Park, *Correlates of Human Rights: Global Tendencies*, 9 *HUM.RTS.Q.* 405 (1987).

<sup>420</sup> See Henry J. Steiner, *Political Participation as a Human Right*, 1 *HARV.HUM.RTS.Y.B.* 77, 130-32 (1988).

<sup>421</sup> Similarly, direct applicability of the Social Charter, which parallels the ICESCR at the European Community level, is hardly recognized among the European countries. See A.P.H.C.M. JASPERS & L. BETTEN, *25 YEARS: EUROPEAN SOCIAL CHARTER* (1988).

opinions concerning the proper scope of domestic laws under Article 6(1) of the Constitution which provides that "treaties ... shall have the same effect as the domestic laws."<sup>422</sup>

Under the first view, "domestic laws" in Article 6(1) merely refers to laws enacted by the National Assembly.<sup>423</sup> According to this view, because the domestic force of international laws (including treaties) is derived from the Constitution, they are inherently inferior to the Constitution. The status of treaties is identical to that of domestic laws enacted by the National Assembly. Thus, if domestic laws and treaties come into conflict with each other, the principle of *lex posterior derogat priori* applies.<sup>424</sup>

The second view distinguishes international norms, such as the Charter of the United Nations, from other treaties. The rank of the latter is the same as that of domestic laws enacted by the National Assembly. According to this view, because international norms are generally approved and respected in the international community, for domestic

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<sup>422</sup> KOREA CONST. ch. I, art. 6(1)

<sup>423</sup> See Yong Song Kwon, HONPOPHAK WOLON [Principles of the Constitution] 170 (1990).

<sup>424</sup> Sun Tae Lee, South Korea: Implementation and Application of Human Rights Covenants., 14 Mich.J.Int'l L. 705, 726, 1993

purposes they should rank below the Constitution but above other domestic laws.<sup>425</sup>

According to the third view, if subsequent domestic laws come into conflict with the Covenants, the conflicting provisions of the domestic laws become invalid. This occurs not only because the provisions for the protection and promotion of human rights set forth in the Covenants are in accord with the Constitution, but also because the State Parties undertook the obligation to carry out the necessary legislative measures to protect the rights recognized in the Covenants. An infringement of the rights enshrined in the Covenants is regarded as a violation of the Constitution.<sup>426</sup>

The first view does not distinguish the Covenants from ordinary laws. Therefore, the application of the Covenants may be replaced by subsequent domestic laws. Even in this case, as the third view points out, obligations of the government under the Covenants should remain. For example, the government should take steps to adopt legislative or other measures as may be necessary to give effect to the rights recognized in the ICCPR as required by article 2(2). Moreover, the government must also submit reports to the HRC or the Committee of Economic, Social and Cultural Rights on

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<sup>425</sup> LEE, *Supra* not 428 at 727

the measures it has adopted which give effect to the rights recognized or the progress made in the enjoyment of those rights. The first view does not reconcile the gap between the theoretical and actual obligations under the Covenants. This view also lessens the significance of accession to the Covenants in the prevention of human rights abuses by State Parties.<sup>427</sup>

In the case of the second view, it is unclear whether the Covenants are within the scope of generally approved and respected international norms. Even if such is the case, according to this view the Covenants still rank below the Constitution. However, there are some rights under the Covenants, such as the inherent right to life,<sup>428</sup> and special protection of working mothers and juvenile offenders,<sup>429</sup> which are not specifically addressed in the Constitution. Because South Korea has expressed its commitment to such rights, the government should take necessary measures to protect them even if they are not mentioned in the

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<sup>426</sup> LEE, *Supra* Note 427 at 727

<sup>427</sup> LEE, *Supra* note 427 at 727

<sup>428</sup> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." ICCPR, art. 6(1)

<sup>429</sup> The ICCPR's provision for juvenile offenders reads: (2)(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible adjudication. (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. ICCPR, arts. 10 (2)(b), 10 (3).

Constitution. Therefore, at least as far as such rights are concerned, the Covenants supplement the Constitution and, for these rights, there are no grounds with which to argue that the Covenants rank below the Constitution. Furthermore, the obligations of the government under the Covenants listed in the first view still apply under the second view.

From the foregoing commentary, one may conclude that Article 6(1) of the Constitution simply provides that international laws are, upon their ratification and promulgation under the Constitution, effectively incorporated into the domestic legal system without separate legislation,<sup>430</sup> and that the Article does not stipulate a hierarchy between domestic laws and the Covenants. In other words, "domestic laws" in Article 6(1) of the Constitution is a general term meaning "laws of South Korea," referring to the Constitution as well as to laws passed by the National Assembly. Thus, the Covenants cannot be superseded by subsequent domestic laws or other legislation.

With regard to the relationship between the Constitution and the Covenants, attention should be directed to the special characteristics of the Covenants. Whereas

ordinary international laws and treaties usually deal with conflicts between different States, the Covenants endeavor to protect and promote the human rights of individuals and minorities<sup>431</sup> regardless of citizenship. The Covenants are the products not of negotiation between countries concerned about their national interests, but of universal ideals and common sense aimed at extending fundamental freedoms to people oppressed by state power. In this respect, the Covenants are distinguishable from other international treaties. Instead of the government of each State Party performing its obligations to governments of other State Parties, the Covenants create government obligations toward individuals.

The obligations of the States under the Covenants are basically to individuals within their borders, rather than to counterpart governments, although reports concerning the observance of the Covenants are submitted to international human rights bodies. Accordingly, with regard to the protection and promotion of human rights, the Constitution and Covenants are not positioned to conflict with each other.

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<sup>430</sup> In this sense, it may be said that South Korea belongs to the group of "monist" countries which do not need a separate legislation or transformation procedure for the application of international law. See *The European Convention For the Protection of Human Rights* (Mireille Delmas-Marty ed., 1992).

<sup>431</sup> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." ICCPR, art. 27.

The Covenants simply complement the interpretation and implementation of the Constitution towards a more complete protection of human rights, and they provide international standards and precedents. Nevertheless, if under unpredicted circumstances a constitutional provision is interpreted so that it no longer protects human rights, the Covenants should be used to challenge that interpretation.<sup>432</sup>

### **1. Ordinary Court**

Since the ratification of the Covenants, no Korean court, including the Supreme Court, has decided a case on the basis of the Covenants. In several criminal cases, defendants indicated under the National Security Law and other laws argued that they were not guilty because such laws conflicted with the Covenants and were invalid, but the courts did not accept their arguments. The courts found the defendants guilty, but the courts did not indicate whether the laws at issue were contrary to the Covenants. Under Korean law, if a trial court refuses to rule on the basis of the Covenants despite the argument of the accused, no procedure is available to appeal and obtain an adjudication

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<sup>432</sup> LEE, *supra* note 477 at 729.

on the basis of the Covenants. The defendant can only file a petition with the Constitutional Court insisting that the law in question is unconstitutional. Currently, the courts' view of the relationship between the domestic laws and the Covenants is unclear. It seems that the courts are reluctant to admit the Covenants as a source of law in domestic cases, probably due to their ignorance of international human rights law.<sup>433</sup>

## 2. Constitutional Court

The Constitutional Court of South Korea (the Court) rules on the constitutionality of laws, regulations, and other administrative actions of government authorities upon petition by individuals or ordinary courts. In 1990, the Dong-A Ilbo, a defendant in a damage suit, was ordered by a civil district court to publish a notice of apology and pay damages to the plaintiff, whose reputation was damaged by an article appearing in a monthly magazine owned by the Dong-A Ilbo. In April 1991, the Court held that if article 764 of the Civil Code<sup>434</sup> is interpreted so that the Dong-A Ilbo must

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<sup>433</sup> LEE, *Supra* note 477 at 735

<sup>434</sup> "The court may, on the application of the injured party, order the person who has impaired another's fame to take suitable measures to restore the injured party's reputation, either in lieu of or together with compensation for damages." KOREA CIVIL CODE art. 764.

acknowledge its transgressions in a newspaper, such a provision would unconstitutionally conflict with the freedom of conscience protected by Article 19 of the Constitution.<sup>435</sup>

The Court ruled that, although the monthly magazine's article published by the petitioner injured another person's reputation, the petitioner is not required to publish an apology against its conscience in addition to paying damages. Deciding the unconstitutionality of the compulsory apology on the basis of Article 19 of the Constitution, the Court referred to article 18(2) of the ICCPR as follows:

Since the Constitution provides that all citizens shall enjoy the freedom of conscience, the freedom of conscience is protected as one of the fundamental rights.... The conscience that the Constitution stipulates covers not only the freedom of thought that does not allow for the state power to intervene in the ethical matters of the individuals such as the act of deciding between the right and wrong, or virtue and vice, but also the freedom of silence that is protected against coercion to express one's thoughts or ethical determinations.... This is derived from the will to protect more perfectly the freedom of spiritual activities which has become the root of democracy and has played a significant role in the development and improvement of human beings.... Furthermore, Article 18(2) of the International Covenant on Civil and Political Rights which our country ratified in 1990 also provides that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.... Therefore, the coerced apology, as it distorts and perverts one's conscience, is an unconstitutional restriction of the freedom of conscience which is one of the fundamental

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<sup>435</sup> 89 Honma 160 (Apr. 1, 1991)

spiritual rights to be protected under the Constitution.<sup>436</sup>

This is the first ruling of the Court that referred to the ICCPR while ruling on the constitutionality of a domestic law. The Dong-A Ilbo case indicates that the Court can and should refer to the Covenants in all domestic cases which substantively involve infringements of human rights, even if the Court rules only on the basis of the Constitution.<sup>437</sup>

On the other hand, in the Yoo Sang-Duk case,<sup>438</sup> the Court did not refer to the ICCPR. The petitioner, who was arrested for the violation of the NSL, argued: (1) during communications between the petitioner and his counsel, the officers of the National Security Planning Agency recorded the contents of their communications and took pictures; (2) the petitioner requested respect for the confidentiality of the communications with his attorney, but they did not stop recording; and (3) as a result, the petitioner's right to communicate with counsel guaranteed in Article 12(4) of the

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<sup>436</sup> This ruling might indicate that the Covenants are superior to domestic laws legislated by the National Assembly.

<sup>437</sup> This is very similar to the decision of the Federal Constitutional Court of the former Federal Republic of Germany. Under German Law, a law can be declared void solely on the basis of the Federal Constitution. The fundamental rights set forth in the Federal Constitution, however, must be interpreted with regard to the case law of the European Court Human Rights. See The European Convention For the Protection of Human Rights, 121-29.

<sup>438</sup> 91 Honma 111 (June 14, 1991).

Constitution<sup>439</sup> and article 14(3)(b) of the ICCPR<sup>440</sup> was violated.

The Court held that the recording and photographing by the officers of the National Security Planning Agency violated the petitioner's right under the Constitution to be assisted by counsel, but the Court was silent as to whether the ICCPR also prohibits such acts. As in the situation of the lower courts, this appears to be an example of the Court's unfamiliarity with the significance, effect, and contents of the Covenants. In this respect, it may be hasty to conclude that the Dong-A Ilbo case is a landmark decision that will be followed in the future.<sup>441</sup>

### C. Summary

Despite the ambiguity in the understanding and implementation of the Covenants, South Korea's ratification of the Covenants was a historic event in the enhancement of

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<sup>439</sup> "Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by law." KOREA CONST. ch. II, art 12(4).

<sup>440</sup> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." ICCPR, art. 14(3)(b).

<sup>441</sup> LEE, *Supra* note 477 at 736.

human rights for a Korean people who continually yearn for a democratic society. Given the Covenant's significant contribution to world peace and improvement of fundamental rights, powerful instruments are now available to help the Korean people bring their cases to the attention of the international community. Moreover, an independent source of law now exists which can be directly applied in the domestic arena as a supplement to the Constitution and domestic laws.<sup>442</sup>

Needless to say, however, each country must start by resolving human rights violations within its own territory. Article 10 of Korean Constitution provides that "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."<sup>443</sup>

The role of international human rights bodies such as the HRC under the ICCPR, and the Committee on Economic, Social and Cultural Rights under the ICESCR should be strengthened in order to monitor governments more effectively and to enforce the Covenants. Under Korean law,

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<sup>442</sup> Id.

the Covenants are duly incorporated into the domestic legal arena. The Covenants, therefore, should rank as a higher level and be directly applied to domestic cases with the fewest limitations possible.<sup>444</sup>

As far as the protection and promotion of human rights is concerned, domestic laws enacted by the legislature or other government authorities should not be obstacles.

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<sup>443</sup> KOREA CONST. ch. II, art. 10.

<sup>444</sup> LEE, *Supra* note 477 at 737.

## VII. CONCLUSION

During the past century, particularly after the opening of the Kingdom of Choson, the relationship between the United States and Korea has become more unique in many ways. Korea has in fact reaped more than a fair return from the United States for the benefits it has conferred on the United States. The benefit for the United States at the time, of course, was the opening of Korea. Among the Western nations that have tried to establish diplomatic relations with Korea in the late nineteenth century, the United States was the first to conclude a bilateral treaty.

Both countries have undergone many changes during the past hundred years. After two world wars in the first half of the twentieth century, the United States became a superpower of the world and Korea emerged from the seclusion of the Hermit Kingdom to the experience of two republics. Formal relations between the United States and the Korean Kingdom were preceded by a stormy military confrontation, but the treaty establishing diplomatic relations was consummated in an amicable atmosphere.

During the Japanese colonial rule for nearly four decades, only American missionaries, educators and

philanthropists maintained cultural ties with Korea, supporting at times the Korean struggle for independence.

A formal treaty relationship was restored when Japan was defeated and a government was reestablished in Korea, but the division of Korea forced the United States to recognize only the U.N. -sanctioned government in the southern half of the peninsula. The division eventually caused the United States to become engaged in a war in Korea to stave off communist encroachment from the northern half of the peninsula, communist forces that were supported by the People's Republic of China and the Soviet Union. The United States government still maintains troops to observe a precarious military demarcation line that divides the country, but the relationship between the United States and the Republic of Korea from the first to the fifth republics has been most cordial. Indeed, the United States has played an indispensable role in the emergence of the modern, developing Korea of today.

Korea and the United States maintain an amicable political relationship and growing commercial activities as

envisioned in the original treaty of amity and commerce concluded at May 22, 1882.

This exploration of America's influence on Korean constitutionalism from a historical perspective shows that models which treat traditional culture as the primary obstacle to constitutionalism in Korea require reexamination.<sup>445</sup>

Korean constitutional history since 1948 demonstrates an on-going crisis concerning the legitimacy of political power. This crisis is evident in the history of repeated constitutional revisions. Legal pretexts cannot provide legitimacy to authoritarian political power unless the law itself commands legitimacy through due process.

In Korea, the turning point came in 1987, when, political leaders representing opposing groups agreed to revise the constitution. For the first time in Korean history, these leaders complied with popular demands for democratization. As a result, the constitution has begun to enjoy legitimacy. Although the 1987 Constitution opened the door for democratization from a legal standpoint, the public

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<sup>445</sup> Dae-Kyu Yoon, *New Developments In Korean Constitutionalism: Changes and Prospects*, 4 *Pac. Rim L. & Pol'y J.* 395, 417 (1995).

perception of those in power did not change until a civilian president took office in 1993.

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. The Korean experience aptly shows that political changes precede legal changes. At the same time, recent judicial actions demonstrates that legal changes accelerate political changes. The increased significance of the market economy and of technology, combined with the trends toward globalization and towards the free flow of information, does not allow any society to remain isolated. Cold war ideology based on a zero-sum mentality is outdated. These trends demand new ways of thinking. The law can no longer be a means or subdue the populace simply for personal, or interest-based, purposes. Rather, law should become a facilitator of mutual interest.

With the launch of the 1988 Constitution and the Constitutional Court, the legal life of the Korean people has dramatically changed. The Constitution has become a

living document, and constitutional adjudication has become a mater of daily occurrence.

The influence of the United States constitutionalism has been conspicuous in major civil rights law areas since 1988. Such influence will increase in the future as Korea continues its journey toward full democracy and the rule of law, where the major dispute of society are expected to be resolved through an open and neutral forum of law.

Under past dictatorial regimes the Constitution was a dormant document, but in substance it was deeply critical of established governmental practices. The Constitutional Court has been charged with reviving these legal ideas, but since its power to enforce its own judgment is very limited, it must rely for its authority on the coherence of the decisions it renders. The Court can function only on an assumption that law matters, and that the Constitution has ceased to be a repository of merely rhetorical rights, as it was in the years gone by.

This century has seen Korea first colonized, then partitioned and cast into the abyss of civil war. These

tragedies bequeathed a cruel legacy of polarized extremism and extra legal dictatorship.

Considering all the factors implicated in domestic and international changes, the prospects for Korean constitutionalism are very encouraging. If Korea does not keep up with these changes, however, it will fall behind its competitors. In the current favorable domestic and international environment, the firm determination of the Korean people is the only element required to achieve the fulfillment of constitutionalism.

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