Guest Editor's Introductory Article

Democratization and Legal Change in South Korea: Overview

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A remarkable change has occurred in Korean law since the constitutional transformation of 1987-1988. This collection of essays attempts to examine the nature of the changes that Korean law has experienced in the course of the democratization of Korean society, adding extensive discussions of the legal situation before 1987 to give background knowledge for understanding the democratic transformation. Choi Dai-Kwon analyzes aspects of constitutional law and practice before and after the introduction of the Constitution of 1987. Cho Kuk discusses reforms in criminal justice and their limitations with a focus on a number of criminal substantive laws. Kim Joongi identifies some of the idiosyncratic features of the state-market relationship by inquiring into three cases of corporate failure. Yang Hyunah traces the evolution of Korean family law with a critique of the discourses for and against the reforms. In this introductory article, I present an account of the sociolegal backgrounds of the changes examined by the four contributors and outline their arguments.

Keywords: legal change, constitution, authoritarianism, democracy, criminal justice, corporate governance, family law

When President Chun Doo Whan bowed to popular pressure in June 1987 and accepted the people's call for a direct presidential election, many foreign observers acclaimed South Korea for having achieved a "political miracle" following its economic one. After more than fifteen years, Korean society appears to have experienced a transformation that deserves the application of the old Korean saying sangjeon byeokhae or "a mulberry field turning into a blue sea."

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One of the most prominent changes has been 'no change' in the Constitution, unlike before 1987 when the Constitution had been revised eight times since its birth, often by unconstitutional means. The constitutional stability has been accompanied by an expansion of civil rights and the growth of civil society. In contrast to the top-down corporatist organization of civil society under authoritarian rule, the post-authoritarian era has witnessed the rise of a vibrant and autonomous civil society with its impetus mobilized from below. While popular movements have continued to stage campaigns against authoritarian governmental practices, new forms of social movement have emerged with a view towards democratizing not only politics and government but practices in all fields of social life. As is seen in the current rows over the Saemangeum development project and over the plan to build a nuclear waste storage site in Buan, environmental concerns have stimulated the most vociferous protests in post-authoritarian Korea. The current debate on the family head (*hoju*) system illustrates the extent to which Korean society has awakened to the significance of gender equality. Such voices from society have found new institutional channels, one of which is the constitutional review of legislation by the Constitutional Court, hailed as the greatest success of all devices of the new Constitution.

Modern Koreans have lived in a "contentious society" vis-à-vis the "strong state," in Hagen Koo's terms. With the asymmetrical relationship between the state and society, civil society "has always demonstrated a subversive, combative character" (Koo 1993: 232). While the contentious character of civil society revealed itself in persistent challenges to the authoritarian government, divides within civil society were not as loudly represented in public opinion until 1987. But, in parallel with a more or less uninterrupted development of democratic government and a strengthening of civil society vis-à-vis the state, divisions within civil society have erupted in acrimonious, and often disruptive, ways. Industrial disputes grew spectacularly in size and frequency following the democratic transition of 1987-1988, and have since metamorphosed from a major axis of the struggle for liberty and democracy to controversies involving conflicting private interests. Now, ideological conflict manifests itself less in the form of the wielding of the iron fist by an anti-communist state against radical dissidents than by way of disagreements between the "conservatives" and the "progressives" within civil society, mediated by the media and non-governmental organizations. Assertiveness grew at the individual level as well; the frequency of private lawsuits increased tenfold in the ten years after 1987 (Yi Eun-yeong 1999: 291).

These changes have been identified and analyzed by scholars of diverse disciplines. This special collection of essays focuses on some of the legal aspects of the transition from authoritarianism to democracy. Indeed, jurists have not neglected this topic. The Association for Democratic Legal Studies organized two symposiums examining the transformation of law and society under the Kim Young Sam and the Kim Dae-jung governments respectively (Minjujueui beophak yeonguhoe, ed. 1994; 1999). *The Journal of Legislation Research (Beopje yeongu)* has also published a special issue reviewing the modern history of the Korean legal system (Hanguk beopje yeonguwon, ed. 1998). This collection of essays is another attempt to reexamine the nature of the changes that Korean law has experienced in parallel with political, economic, and social changes. Yet it is smaller in scale compared to the previous projects mentioned above, as it is confined to four areas: constitutional law, criminal justice, corporate governance, and the family. Besides, the essays it contains do not share a single ideological point of reference.[1] In this introductory article, I present an account of the socio-legal backgrounds of the changes examined by the four contributors and outline their arguments.

Government and Constitutional Practice

Three presidents have peacefully completed their terms of office and a fourth is serving his under the present Constitution. Although the constitutional change of 1987 attained substantial popular support, few people must have believed that the new Constitution would last for more than fifteen years without a single revision. The Constitution has not only been preserved intact but is also regarded as a living norm with teeth, as it has been invoked to correct seemingly intractable habits of authoritarian government. Before the constitutional transition of 1987 Korea's constitution had been numbered among what constitutional lawyers describe as "cosmetic" constitutions, that is, constitutions stipulating democratic values and institutions that do not function in actual politics or government. Before then the gap between ideal and reality had been believed to be an irremediable feature of Korean constitutional practice, a feature not unique to Korea but prevalent in the majority of developing countries.

1. Compare the positions of Choi Dai-kwon and Cho Kuk as to the National Security Act.

Jurists often lament the gulf between the constitutional norm and constitutional reality in Korean governmental practice. But Choi Dai-Kwon finds from it a moment of transformation. According to Choi, even a cosmetic constitution lays down standards against which governmental practices can be judged and which can awaken public consciousness towards political change. In other words, a constitution should be more than a piece of paper, but even a constitution which is no more than a piece of paper may stimulate democracy insofar as it gives the people a claim for democracy, unlike those constitutions which literally deny liberal democratic values. Hence Choi objects to the "two-color picture" of South Korean political history, which makes a simple dichotomy of a dark "authoritarian period" and a "period after democratization." Not only does he consider the development of democracy as a cumulative process but he also highly valorizes the spirit of constitutional democracy sanctioned by the constitutions under the authoritarian regimes, which distinguishes Korea's authoritarianism from that of other countries such as China.

Then why did South Korea experience authoritarian rule? Choi rejects the 'cultural lag' theory that attributes the retardation of democracy to the persistence of Confucian values and attitudes. Instead he pays heed to factors of a more immediate past. He does not fail to refer to the legacies of Japanese rule. The foremost factor Choi pins down is directly related to personnel. He points to the undemocratic habits of the low-ranking functionaries whom the Japanese rulers co-opted and fostered, whose methods and practices were bequeathed to younger generations of Koreans. This was compounded by the failure to lustrate the sins of "anti-national acts" or the acts of pro-Japanese collaboration. Choi, like many other political historians, ascribes the failure to political expediency in response to mounting communism.

Choi concurs that the rise of authoritarianism and the persistence of anti-democratic practices had much to do with anti-communism. According to Jo Hi-yeon (1998), South Korea has become an "anti-communist regimented society." However, unlike Jo, who sees the anti-communism as based on a "pseudo-consensus," Choi admits that the national security problems were genuine. Yet, ironically, according to Choi, the repressive measures taken by the authoritarian regimes were "always impregnated with democracy," in the sense that such were justified in order to defend liberal democracy, which in turn had "the reverse effect of strengthening the democratic resolve" of the people.

What changes did the democratic transformation of 1987-1988 bring? Apart from the strengthening of the fundamental freedoms sanctified by the

Constitution, there has been a substantial progress of the rule of law. Whereas Choi Dai-kwon distances himself from the view that explains away Korean political culture by reference to Confucianism, he agrees that Confucian teachings instilled in the minds of Koreans the value of harmony and the aversion to litigation, which made traditional Korea an 'alegal' society. This puts Choi in the camp of what Yang Kun (1989) classifies as the "culture-centric position," along with Hahm Pyong-Choon, whom Choi cites. Whatever position Choi takes about traditional Korean legal culture, and regardless of how we appraise it, no one would disagree with Choi's observation that Korean society has become increasingly litigious since 1987. From this Choi concludes that the social relevance of law has increased.

No other device is better than the Constitutional Court as an example of the progress of the rule of law and the increase in popular resort to law. The Constitution of 1987 introduced a constitutional court for the second time in Korean constitutional history, the short-lived first experiment having been the Constitution of 1960 following the April Revolution. Until 1987 only a few cases had been put to constitutional review, whether before the Constitutional Council (under the First, Fourth and Fifth Republics), an ordinary court, or the Supreme Court (under the Third Republic), and in only five cases had statutory rules or delegated legislation been declared unconstitutional. Surprisingly, the Constitutional Council of the Fourth and Fifth Republics heard no cases at all. Unlike previous review bodies, the present Constitutional Court possesses the power to review the constitutionality of governmental measures including legislation upon petitions from individuals, as well as the power to review the constitutionality of legislation upon referral by ordinary courts. During the ten years after the establishment of the Constitutional Court in September 1988, a total of 4,193 cases were brought before the Constitutional Court, including 351 cases referred by ordinary courts, 586 petitions regarding the constitutionality of statutory laws, and 3,247 petitions against infringements of constitutional rights by governmental measures other than legislation. The Constitutional Court declared statutory rules unconstitutional in ninety-five cases, unconformable to the Constitution in thirty-seven cases, partly constitutional in six cases, and restrictively constitutional and restrictively unconstitutional in sixteen and eighteen cases respectively.[2] It also declared unconstitutional governmental measures

2. If a statutory provision is declared unconstitutional, it is set aside right away. A provision

other than legislative acts in fourteen cases (see Heonbeop jaepanso 1998: 495). The active functioning of the Constitutional Court has drawn great attention from foreign jurists, for whom the court has become a tourist attraction. Choi Dai-Kwon has written extensively about the working of the Constitutional Court including an article for English-speaking audiences.[3]

Another interesting part in Choi's essay is his analysis of nationalism as embodied in the Constitution. The Constitution incorporates the spirit of the Declaration of Independence of 1919 and aspirations for national unification. The Constitution of 1948 contained a provision enabling the enactment of a special law for punishing "anti-national acts" committed prior to independence. Among the instances of nationalism in constitutional law, Choi focuses on the unification issue. He examines the relationship between Article 3 declaring the Republic of Korea's territorial claim over the whole of the peninsula and its adjacent islands and Article 4 spelling out the commitment to peaceful unification. Choi dismisses the opinion that the two provisions conflict with each other and that Article 3 should be repealed. Neither does he recognize the need to work out a constitution for a united Korea that accommodates the positions of the two regimes. He believes that there can be no third way between the liberal democracy of the South and the totalitarianism of the North. Choi also believes in the constitutionality of a strictly interpreted National Security Act. Interpreting the constitutional and legal rules regarding inter-Korean relations is one thing; it is another to conduct social-scientific inquiry into the nationalism working behind the laws of the two Koreas. The rules that Choi examines and Choi's examination of those rules need to be made sense of in terms of "the politics of ethnic nationalism in divided Korea," in which a strong ethnic nationalism accounts for the two Korea's competitive claims over 'entire' Korea (see Shin, Freda and Yi 1999).

The constitutional principles regarding the economy make up the third area that Choi explores. Here he canvasses the evolution of the Constitution's approach towards the economic order, characterized as a transition from the model of an economy with a socialist overtone to that of a free market economy.

declared unconformable to the Constitution does not lose effect outright, but the National Assembly is bound to abolish or revise it so as to make the law compatible with the Constitution. A provision declared restrictively constitutional or restrictively unconstitutional is constitutional or unconstitutional depending on particular interpretations.

3. See the writings cited in Choi's article.

As for the present Constitution, Choi basically concurs with those who find in the Constitution no commitment to a particular type of market economy as opposed to those who argue that the Constitution provides for a particular one, such as a social market economy.[4]

Criminal Justice

Cho Kuk gives an account of the revision of the National Security Act, the replacement of the Social Security Act with the Security Surveillance Act, and the reform of the conversion system. The lineage of the National Security Act, the Social Security Act, and the conversion system can be traced back to the Peace Preservation Law and other control devices of imperial Japan and Korea under its rule, which were designed to clamp down on acts against *kokutai,* Japan's national essence (see Lee 1999). The National Security Act came into force in December 1948, shortly after a left-wing insurgency broke out in the Yeosu-Suncheon area. It purported to punish the act of "organizing an association or group with the objective of claiming the title of government in violation of the Constitution or of instigating disturbance against the state" (Article 1). The law punished not only the act of organizing an association with such an objective but also the act of holding membership of such an organization with knowledge of its objective, and also acts of "conspiring, instigating, and propagating" such an objective (Article 3). The Act proved to be a powerful instrument of repression, as almost 120,000 people were arrested or imprisoned under the Act in 1949 and 132 political parties and associations were suspended in the space of one month in late 1949 (Bak 1992, Vol. 1: 102).

In 1980 the National Security Act became broader in scope as it incorporated into its Article 7 Article 4 of the Anti-Communism Act of 1961, which punished various expressive acts not directly related to an organization. During the Chun Doo Whan presidency, 1,219 official prosecutorial investigations were made and 1,095 prosecutions filed under the National Security Act. The democratic transition of 1987-1988 did not at once bring a change to this; as many as 125, 215, and 274 people were put in custody under the Act in 1988, 1989, and during ten

4. As to the views regarding the type of market economy that the Constitution is interpreted to uphold, see Gim (2001).

months of 1990 respectively (see Bak 1992, Vol. 2: chaps. 3-5). The biggest reason was that during these three years students and social activists publicly expressed their support of Marxism and sympathy with the Juche idea, which they had avowed, if at all, more or less surreptitiously in the course of their struggle against the Chun Doo Whan government. Amidst an ambience of democratization, however, challenge was inevitable. In 1990, the most controversial part of the National Security Act was subjected to review by the Constitutional Court, which decided that Article 7(1), regarding the act of "benefiting an anti-state organization by acclaiming, encouraging, or siding with that organization and its members or in other ways," and Article 7(5), regarding expressive acts under the objective of benefiting an anti-state organization, were constitutional only insofar as the provisions applied to "acts which endangered national existence and security or harmed the fundamental order of free democracy."[5] The National Assembly responded by amending the Act, adding the extra condition of "knowledge that the act may endanger national existence and security or the fundamental order of free democracy" for a person to be punished under those provisions.

The demise of socialism following the breakdown of the Berlin Wall and changes in inter-Korean relations, namely the two Koreas becoming members of the United Nations, the conclusion of the North-South Basic Agreements, the enactment of the Act Concerning Exchange and Cooperation Between North and South Korea, and the implementation of the Sunshine Policy under the Kim Dae-jung presidency have abated recourse to the National Security Act. But no further change has been made to the law itself. The law is subject to controversy, and Choi Dai-kwon and Cho Kuk represent differing views. Choi does not challenge the Act since its past wrongs were corrected by the limits set by the Constitutional Court and the revision of 1990. Cho Kuk, on the contrary, questions the soundness of the law despite the revision, citing the concern expressed by the United Nations Human Rights Committee.

The English translation of *Sahoeanjeonbeop* may give a reader a false impression of the nature of the law. The Social Security Act is not welfare-related. It allowed continued detention of 'thought' criminals, including violators of the National Security Act, even after they had served their sentences. The detention was called "security custody." The law was repealed in 1988 and a new law

5. Decision of the Constitutional Court, 2 April 1990, 89 Heon-Ga 113.

entitled the Security Surveillance Act was enacted in 1989. The law does not resort to incarceration, but subjects such thought criminals to "security surveillance" conducted by administrative authorities. Cho Kuk criticizes the Korean judiciary, mainly the Supreme Court and the Constitutional Court, for neglecting to look into the real nature of the 'protective dispositions' practiced under the Social Security Act and the Security Surveillance Act.

With all the improvements made since 1987, particularly under the Kim Dae-jung government, the international community expresses its concern about the human rights situation in South Korea. The conversion system, under which a thought criminal was forced to renounce his/her political and ideological belief in order to be released, was abolished in 1998, after decades of excesses since Japanese rule. But Cho Kuk shows that the "law-abiding oath" that replaced it can hardly pass the test of international human rights law.

Cho calls into question the soundness of the Constitutional Court's decision that 'protective custody,' a protective disposition under the Social Protection Act against felons who are found to have the "danger of committing the crime again," is constitutional although its mandatory imposition is unconstitutional. The problem is well known, as it is associated with the notorious Cheongsong Protective Custody Center. According to Cho and other critics, it is a violation of the principle against double jeopardy, detaining indefinitely people who had served their sentences.

Cho Kuk seeks to unveil the limitations of the Constitutional Court as a harbinger of democracy despite the euphoria surrounding its apparently active functioning. For Cho, it is not only in respect of political-governmental issues that the Constitutional Court has defended the existing order. The Court has also been "conservative" with respect to moral issues within civil society and between individuals. Cho points to the Court's decision that the criminalization of adultery is not unconstitutional.

To be sure, whether to punish adultery or not has been a controversial issue within the women's movement, while it is becoming less persuasive to argue in favor of punishing adultery for the reason that it would strengthen the position of women against their unfaithful husbands. Many other legal issues involve conflicting moral values. Cho discusses the judiciary's lax approach in dealing with rape cases, for which the United Nations Human Rights Committee observes Korea with concern. Cho also criticizes the aggravated punishment of homicide of lineal ascendants.

Criminal law's treatment of obscenity, which Cho does not address, consti-

tutes another frontier where different moral standards compete and which illustrates the relationship between state law and civil society. The crux of the question in regulating literary and artistic expression has been whether the work carries enough artistic value. The scope of recognizing artistic value in erotic expressions has gradually expanded. The acquittal of the author of the novel *The Rebellious Slave (Banno)* marked remarkable progress in that regard.[6] Nonetheless controversies continued to occur in the 1990s. Ma Gwangsu, professor of Yonsei University, received a suspended sentence and was dismissed from the university for publishing *Happy Sarah* in 1992. Jang Jeongil also received a suspended sentence because of his *Tell Me Lies*. Both novels were banned and taken away from the bookshelves. As for films, the Performances Ethics Commission continued to conduct reviews prior to the releasing of films and often banned them without regard to Article 21(2) of the Constitution providing that "licensing or censorship of speech and the press may not be recognized," and Article 22(1) that "all citizens enjoy the freedom of academic and artistic pursuit." The Constitutional Court declared the practice unconstitutional.[7]

The Market

What are the meaning and features of *minjuhwa* (democratization) in the economy? For Kim Joongi, South Korea's democratic transition should have entailed the replacement of a strong state with market-based checks and balances. The financial crisis of 1997 demonstrated that the ten years of democratization had yet to bring a disciplined market economy. Kim infers lessons from three cases of corporate failure from both before and during the period of democratization, where he identifies both similar and differing ways in which the state and the chaebol interacted.

The Korean economy has been characterized by heavy state intervention in the market. But the methods and routes of state intervention have not been the same over the different periods. As delineated in Choi Dai-kwon's paper, the Constitution of 1948 embodied strong concern with social justice and national/public welfare such that it provided for the state management of enter-

6. Judgment of the Supreme Court, 9 December 1975, 74 Do 976.
7. Decision of the Constitutional Court, 4 October 1996, 93 Heon-Ga 13.

prises supplying publicly important goods and services (Article 87) and for worker rights to an "equitable distribution of profit" in private enterprises (Article 18). The constitutional revision of 1954 marked a shift towards a freer market economy as it removed the state management clause and restricted the nationalization of private enterprises. The state nonetheless actively functioned in allocating resources, such as applying multiple exchange rates to different import and export categories while administering an overhauled official exchange rate and using an import licensing system (Krueger 1997: 300). The government in this period, however, intervened in the market without a long-term plan. It was the Park Chung-hee government that shaped the relationship between state and market which development economists look upon as typifying the South Korean economy.

Article 111(2) of the Constitution of 1962 represented the logic of economic management during the Third Republic: "The state regulates and adjusts the economy to the degree necessary for satisfying the basic needs of the people and realizing social justice, and for a balanced development of the national economy." Here, the state intervened in the economy under a long-term plan with a clear rationale. The First Five Year Economic Development Plan (1962-66) was launched, one of the initial measures of which was to make the financial system amenable to the government's policy priorities. The Bank of Korea Act was revised in 1962 towards strengthening the influence of the Ministry of Finance in the operation of the Monetary Board. The Banking Act was also revised with a view to bringing commercial banks under greater governmental control. The government-controlled financial system was an effective tool for promoting exports. Banks offered preferential interest rates to exporters, and in return enjoyed an automatic rediscounting of export loans by the central bank.

Under the Fourth Republic, the Park administration tightened its grips on the economy as well as politics. Park's *Yushin* initiative of 1972, which halted the constitutional process and brought about a new constitution, came a few months after the astonishing Measure of August 3, the promulgation of the Emergency Decree on Economic Stability and Growth. The decree froze outstanding curb loans and their interest, and had debts rescheduled at reduced interest rates (see Kim 1997: 200-201).

The Constitution of 1972, or the *Yushin* Constitution, retained most of the provisions on the economy held in the previous constitution, with Article 111(2) being moved to Article 116(2). Yet state intervention became broader and deeper, and economic decision-making became concentrated in the hands of a small-

er number of bureaucrats. The reinforced developmental authoritarianism had much to do with the novel concern towards heavy and chemical industries (HCIs) in the overall economic strategy. The policy was designed to promote the import substitution of key industrial products that had been supplied from abroad and also to build a foundation for exporting HCI products in the long run. The HCI drive differed from the export promotion strategy of the 1960s in a number of respects. One of them was the way in which businesses were treated preferentially. While in the 1960s exporters had enjoyed uniform preferences — export subsidies, credit preferences, and tax arrangements, now, businesses that produced designated HCI goods were treated more favorably than others (see Krueger 1997: 314-19). Credit preferences were granted in the form of "policy loans," provided by banks upon the guidance of the government. The banking institutions were still under the control of the Ministry of Finance, whose approval was necessary for major decisions by commercial banks (Kim 1997: 203-04).

The HCI-oriented economic policy did not progress without cost. Rapid industrialization stimulated labor unrest, which combined with general discontent caused by authoritarian rule to generate socio-economic instability. Small and medium-sized businesses suffered from a chronic deficiency of capital as bank credit and investment were directed mainly to HCIs. Inflation, a deteriorating balance of payments, and the impact of the second oil shock in 1979 added to the discontent and public anxiety, which eventually led to the downfall of the Fourth Republic.

The Constitution of the Fifth Republic retained the provision on the regulation and adjustment of the economy by the state in Article 120(2), while it contained novel principles such as permitting farmland tenancies and the protection of consumer rights. The Chun Doo Whan administration appeared as authoritarian as that under Park Chung-hee, but the new authoritarianism was coupled with a greater liberalization of the economy. As for the financial market, major commercial banks were privatized and interest rates were deregulated. The government sought to diversify credit allocation by turning away from the system of financial preferences of the Fourth Republic. The interest rate gap between policy loans and ordinary loans was removed and export credit was downsized.

Along with liberalization, the regime took on the appearance of combating "economic concentration." The Monopoly Regulation and Fair Trade Act was enacted in 1980. Yet, as Kim Joongi points out, monopoly regulation and trade supervision were under the direction of the Economic Planning Board, which

subordinated competition policy to industrial and trade policy. As for banking and finance, the government imposed new standards on banks and other financial institutions so as to allocate greater amounts of credit to small and medium-sized companies, compared with the Fourth Republic, where the prioritization of HCIs in credit allocation favored the *chaebol* (Kim and Kim 1997: 35-36). Here too, new measures were possible because the government maintained its grip on the banking institutions, and made use of its traditional legal instruments to enforce them. For instance, the Banking Act was revised in 1982 to impose new credit control over large business groups.

It was in this context that the break-up of the Kukje Group took place, the first of the three cases Kim Joongi analyzes. The conglomerate exposed many of the flaws and absurdities that the chaebol are generally criticized for: an exceedingly unbalanced debt-to-equity ratio, over-expansion, inefficient and muddy management dependent on family ties, and so forth. The conglomerate was dismembered in 1984 according to a plan approved by the president and executed by the Minister of Finance. The main creditor bank played a part only under the direction of the Ministry of Finance. In the end, the group was broken up into pieces and sold off to other companies, which obtained huge benefits from the government in return.

Kim Joongi introduces in detail the decision of the Constitutional Court in 1993 upon the constitutional complaint filed in 1989 by Yang Jeong-mo, Kukje's founder. The proceedings created much sensation, given the magnitude of the case in those early days of democratization. The Chun Doo Whan administration's rationale at the time of the break-up that it intended to make it clear that even gigantic conglomerates could end up in disintegration because of mismanagement failed to win public sympathy despite the anti-*chaebol* message that it might have carried. The Chun administration was seen as more favorable than adverse to the *chaebol,* and its Kukje decision was believed to have been politically motivated. It was no surprise that Jo Yeong-nae, a popular civil-rights activist and lawyer with a social democratic leaning, represented the complainant and, after his much-mourned death, his law office continued to do so until the end of the case. In short, the Kukje problem was a rule-of-law and human rights issue rather than a matter of economic ideology.

The Constitutional Court declared that the exercise of power by the Minister of Finance in the Kukje break-up was contrary to a number of constitutional principles, including the principle of Rechtstaat and that of having an "economic order based on respect for the freedom and creativity of individuals and enter-

prises."[8] The latter, which is contained in Article 119(1) of the Constitution of 1987, was not absent in the past constitutions; it was declared in Article 120(1) of the Constitution of 1980, Article 116(1) of the *Yushin* Constitution, and Article 111(1) of the Constitution of 1962. Yet economic policy had prioritized the clause allowing "the regulation and adjustment of the economy by the state" in the second paragraph of those articles. Now that the first paragraph has been given teeth, capable of being invoked to invalidate excessive governmental interventions, the implications of the economic provisions in the Constitution invite fresh debate. Some libertarian economists call for a removal of economic provisions from the Constitution altogether, whereas others contend that the Constitution needs to be armed with provisions on the economy since the state has a role to play in industrial restructuring and welfare (see Gim 2001).[9] Yet often neglected is the use of the economic constitution in protecting the market from governmental failures and state excesses.

Kim Joongi delineates the economic liberalization of the post-authoritarian period. Among the reform initiatives of this period were deregulation in finance, namely a deregulation of interest rates, a liberalization of regulations on financial products, a reform of the credit control system, a reduction in non-performing loans, a readjustment of the business boundaries of financial institutions, and so forth (see Office of Bank Supervision 1996: 825-37). The deregulation efforts accelerated under the Kim Young Sam government. One of the reforms concerned the appointment of the chief executives of banks as there had been criticism of government interference in appointing bank executives. From 1993, the appointment of the chief executive of a bank was subject to the recommendation of the Bank President Recommendation Committee. The Committee obtained a statutory footing when the Banking Act was amended in 1997. Now all non-standing directors should be members of the Committee (see Jeon 1998). Yet the most significant reform under the Kim Young Sam presidency was the introduction of the Real-Name Financial Transaction System, according to which all financial transactions had to be conducted using the real name of the subject. The decision was imposed in 1993 by way of an emergency economic decree of

8. Decision of the Constitutional Court, 29 July 1993, 89 Heon-Ma 31.
9. Article 119(2) of the Constitution of 1987 rationalizes the state's "regulation and adjustment" in terms of new causes. It says, "the state may regulate and adjust the economy in order to secure balanced growth and stabilization of the national economy and the due distribution of income, to prevent market domination and the abuse of economic power, and to achieve the democratization of the economy through harmonious cooperation between economic actors."

the president and had never been incorporated in statutory law until it was lifted under the Kim Dae-jung administration in 1998.

With all the reform efforts, as Kim Joongi aptly points out, "the financial and banking sector still remained subjected to government intervention. "The mix of a decentralized weakened state and awkward remnants of governmental control fueled corruption and distorted incentives." Kim refers to the government's meddling in the decisions of investment trust companies regarding the purchase of listed equities without considering the interests of shareholders, which later turned out to be detrimental to the financial market.

The relationship between the government and the *chaebol* was typified by an awkward mixture of control and liberalization. Competition law was elaborated to tighten regulation and supervision. The Monopoly Regulation and Fair Trade Act had been revised in 1986, when it prohibited pure holding companies and direct cross-shareholding within a designated "large business group" and also restricted the total amount of capital investment to other firms by the designated large business groups (Fair Trade Commission 1996: 1275). The Act was revised again in 1990 to make the Fair Trade Commission the main office in charge of administering the law. The Act was amended a number of times towards introducing measures against the abuse of market dominant positions, the undue combination of enterprises, undue collaborative activities, certain unfair trade practices, and resale price maintenance.[10] In 1990, the government took measures to control the *chaebol*'s ownership and acquisition of real estate and to induce the sale of equity by the dominant shareholders of major listed companies. On the other side of the control, the deregulation of the financial market made it difficult to prevent the *chaebol* from over-expanding. As Kim shows, the conglomerates flocked to increase their borrowing from unregulated non-bank financial institutions.

The fuss between Hyundai Group and the Kim Young Sam administration, the second case that Kim Joongi looks into, was an illustration of the muddled relationship between the state and the market and between the government and the *chaebol* in the early 1990s. Kim enumerates the means by which the government punished a defiant *chaebol* that claimed political power to match its economic might: retaliatory tax audits and criminal charges for tax evasion, denial of share and bond issuances, forcing the repayment of existing loans and block-

10. For a brief history of anti-monopoly and fair trade legislation in Korea up until 1998, see Son (1998).

ing new loans, prosecutions for violations of election laws, and so on. Jeong Ju-yeong's attempt to stir negative sentiments against professional politicians won some support, but on the whole his failure testified to the endurance of the belief in Korean civil society that wealth and political power should not be concentrated in the same hands.

The third case, the collapse of the Hanbo Group, is interesting because it evinced that even the post-authoritarian *munmin* (civilian) government of President Kim Young Sam was not free from *jeonggyeong yuchak* (collusive connections between politicians and businesses) as the president's son was implicated in the massive bribery connection surrounding Hanbo, and because it was a prelude to the financial crisis that struck Korea in late 1997. Hanbo, and probably other large businesses, may have believed that their fortunes still depended on the caprice of political magnates, and it is probably true that there was still much space for political power and governmental influence in conditioning the market. But the environment had changed from what it had been under authoritarian rule. Many of the old governmental means of controlling the *chaebol* were unavailable. The weakening of governmental control did not, however, necessarily make the market transparent. If it was not direct governmental meddling that distorted the economic decisions of businesses, nepotism, favoritism, and cronyism permeated relations across the state, the market, and civil society, and generated irrationalities that could not be blamed on a few visible rotten apples. The politics of 'connection' became widespread under democracy and took the place of the old authoritarian browbeating.

The bankruptcy of Hanbo at the beginning of 1997 was followed by the collapse of a number of major companies and an acute liquidity crisis later that year. The in-coming Kim Dae-jung administration started its term with clearing the mess and implementing structural reform. It declared it would create a "market economy with democracy," with the catchwords of freedom, competition, and accountability.

Coming to terms with the low confidence of the international community in Korea's economy, the government took measures to dispose of non-performing loans and to recapitalize the banks and arranged for the Korea First Bank and Seoul Bank to be sold off to foreign investors. Banks with unsound capital adequacy ratios were required to go through an extensive rehabilitation process and many mainstay merchant banks, investment trust companies, life insurance companies and securities companies were either closed down or suspended, while others were ordered to implement rehabilitation plans. Initiatives were also taken

to reform the bank management structure. The Banking Act was amended in 1997 to strengthen the powers of the non-standing members of the board of directors of banks and was amended again in 1998, permitting foreigners to become senior managers. In order to make monetary policy more independent from government influence, the Bank of Korea Act was amended in 1997 to make the governor of the Bank, instead of the Minister of Finance and Economy, chairman of the Monetary Board. The formerly separate banking, securities, and insurance supervision authorities were merged into the Financial Supervisory Service subordinate to the Financial Supervisory Commission under the Prime Minister. The Monopoly Regulation and Fair Trade Act was so amended in 1998 to prohibit cross-guarantees of loans between subsidiaries of each of the thirty largest conglomerates. On the other hand, the law removed the existing ceiling on the total amount of their capital investments to other firms. Further, the 1999 amendment of the Act permitted holding companies under certain conditions (see Yi Gi-su 1999: chap. 2). A remarkable change was instituted in the area of corporate governance. The Commercial Code and the Securities Exchange Act were so amended as to lower the thresholds for shareholder derivative suits from 5 percent to 1 percent of the total issued shares in the case of unlisted companies and from 0.05 percent to 0.01 percent for listed companies, thereby strengthening the power of minority shareholders.[11]

Thus the post-financial crisis reforms were in the direction of enhancing the autonomy of the market and strengthening market-based supervision. The state's active intervention in the economy that deliberately got the relative prices of resources "wrong," which Alice Amsden (1989: chap. 6) describes as characterizing the successful working of Korea's developmental state, may have paid off at some stage, but it bred neglect for the rule of law, which is requisite for long-term stable economic development. The rule of law has become the leitmotif of the time, but the Kim Dae-jung government fell short of achieving the ideal. Again, the market may have achieved greater autonomy from the government, but it is undergoing a hard struggle against the politics of connection and corruption that crosscuts the public and private sectors.

11. The Securities Exchange Act was revised again at the beginning of 2000 to reduce the threshold to 0.005 percent for securities companies whose assets exceeded a certain amount.

The Family

Minjuhwa has brought changes to family law, as manifested in the 1989 revision of the family and succession law of the Civil Code. Citing Lynn Hunt's interpretation of the implications of the French Revolution as to the family, Yang accentuates the link between political order and family organization to the effect that 1987 was a "turning point" in the history of Korean family law. Yet, as Yang implies, political democratization has not automatically led to gender equality in family relations, and the struggle still goes on to remove the last vestiges of inequality. Yang comes up with a detailed account of the transformation of South Korean family law since the birth of the republic, namely the 1962, 1977, and 1989 revisions of the law, and a feminist critique of the dominant family law discourse, in which she finds a specter of colonialism and features of postcoloniality.[12]

Changes in Korean family law can be examined focusing on three issues: the organizing logic of kinship and family, matrimonial relations, and the intergenerational transmission of property. Yang acknowledges that a remarkable change has occurred with regard to the intergenerational transmission of property and implies that some success has been achieved in matrimonial relations. However, Yang argues, vestiges of patriarchy still remain in the organizing logic of kinship and family, which manifest themselves in the surname system and family headship.

As Yang emphasizes, unlike the conventional belief, many rules of family law that embody patriarchy and inequality between the sexes and between siblings were introduced under Japanese rule rather than were so deeply embedded in Korean history as to be labeled as "traditional." Family law in the Joseon dynasty was, to be sure, saturated with patriarchy and inequality, but, if daughters were discriminated against and the eldest son favored in inheritance, it was only in the late Joseon dynasty that the discrimination was introduced and practiced, without any backing of systematic reglementation. Under Japanese rule the unequal treatment of women in inheritance was fixed by law and the eldest son privileged by way of the family head (*hoju*) system. South Korea's Civil Code countenanced the unequal rules of succession when it was first introduced.

12. For a detailed history of Korea's family law and law of succession, see Yi (1992). A historical overview and critical/theoretical reviews are available in Yang (1998), on which Yang's contribution to this collection is based.

In intestacy, an unmarried daughter received half and a married daughter received only a quarter of a son's share. Although the widow was a co-inheritor of the property along with her children, her share was half of a son's portion. Moreover, the successor to family headship was entitled to an extra share of 50% on top of his/her normal share. The 1977 revision of the Civil Code equalized the shares of sons and unmarried daughters, but did not rectify the inferior status of married daughters. Fortunately, the same revision greatly improved the widow's condition, as it gave the widow a share 1.5 times greater than that of a son. The 1989 revision of the law removed the remaining inequalities in intestate succession. Now, married daughters are entitled to the same percentage that sons and unmarried daughters obtain, and the successor to family headship no longer enjoys any extra share.

As for marriage and marital relations, changes have occurred in eligibility for marriage, the management of property, and legal relations regarding divorce. The revisions have lowered the minimum age for marriage to eighteen for men and sixteen for women, from the original twenty-seven and twenty. The prohibition of marriage between persons with the same surname and place of ancestral origin still remains in the code, but, as we see in Yang's essay, it has lost effect as a result of the Constitutional Court's decision that it is unconformable to the Constitution and the failure of the National Assembly to revise the law accordingly.[13]

From the outset, the Civil Code has recognized separate ownership and management of assets that one of the parties of a marriage was entitled to before marriage or that one of the parties acquired under his/her name during marriage. Now, assets of unclear ownership are presumed to be under the co-ownership of both husband and wife, unlike in the original Civil Code, where they were presumed to be under the ownership of the husband. The original Civil Code provided that the husband bore living expenses if there were no agreement. Now, the two parties should share the expenses.

Today's Korea witnesses an alarming rise in the divorce rate. Divorce by consent has required few procedures from the beginning — no consultation or cooling off period prior to divorce. In order to set the divorce procedure in motion without consent, one of the parties should find a fault on the part of the spouse, such as adultery, abandonment or maltreatment of the parents, or the

13. Decision of the Constitutional Court, 16 July 1997, 95 Heon-Ga-6/13).

couple should be recognized as having "grave difficulties in continuing the marriage." The courts have gradually moved towards interpreting "grave difficulties" in a way that generously allows divorce without fault. Fortunately, the law has evolved to enhance fairness in settling relations after divorce. The 1989 revision of the law introduced a protective device for divorcees. One who gets divorced may claim against the other party a division of the wealth that the couple has cooperatively earned. If no agreement is effected, the Family Court decides upon petition by a party upon what terms the property should be divided. Now, it is up to the parties to decide equally who will have custody of the children, and, if there is no agreement, the Family Court decides, whereas before the 1989 revision custody lay with the father if no agreement had been made. Parental rights are exercised by either the father or the mother upon agreement or jointly if there is no agreement, whereas prior to the revision a divorced mother was barred from exercising parental rights. In addition, since the 1989 revision, the parent without custody enjoys the right of visitation.

With all these changes, inequality has not disappeared in the status of divorcees. A woman cannot re-marry within six months after divorce, because otherwise the problem of identifying the father might arise if the woman gives birth to a child without a sufficient passage of time. This rule has few adherents nowadays since a DNA test can solve the problem that justified it. The second instance is more fundamental. A woman is de-registered from her ex-husband's family register upon divorce and returns to her original register, but the children remain on their father's register regardless of who has custody and retain the father's surname. Campaigns are now being launched against this rule, which is a paradigm manifestation of the patriarchal family head system.

Much of Yang Hyunah's discussion is devoted to discerning the colonial origin and the postcolonial reproduction of the patriarchal ordering of the family by way of the family head system. As Yang stresses, the *hoju* system is an invented tradition that came into existence under Japanese rule, unlike the conventional belief that it is deeply rooted in Korean history; the central unit of kinship in the Joseon period had always been the lineage rather than the household or family (see Yang 1999). According to Yang, "the family head system has undergone a complex process of fusion between the Japanese and Korean 'traditional' families, adapted once again after de-colonization to fit the needs of capitalist society."

According to Article 779 of the Civil Code, a family consists of its head, his spouse, the head's consanguineous relatives and their spouses, and those regis-

tered into the family in pursuance of provisions of the code. When the Civil Code came into force in 1960, it removed many of the rights the family head had enjoyed during Japanese rule: the right to educate, supervise, and discipline the members of the family, the right to give consent to the segmentation of a member of the family, the right to give consent to a member of the family concerning marriage or divorce, the right to manage the family property and give consent to the disposal of the property of a member of the family, and so forth. Nevertheless, the family head continued to enjoy the right to decide the family's place of residence, extra shares in inheritance, and other privileges. These privileges had been gradually removed until 1989, when the law was revised to abolish the extra portion of inheritance for the successor to family headship. Although the privileges of the family head have disappeared in practical terms, the law still recognizes the status of the family head, and family registration still centers around this nominal status. Inequality between the sexes remains in succession to headship; a female descendant succeeds to headship only when there is no male descendant and a married woman cannot succeed except in limited circumstances, as she is already registered as a member of her spouse's family. This exemplar of male domination has a practical bearing when it comes to divorce, as we have seen.

The lawmakers are now examining a revision bill for the Civil Code. The most sensitive issue in the bill is whether or not to abolish the family head system. At the beginning of her paper, Yang asserts that the history of family law in Korea equates to a history of the women's movement. The women's movement has been at the center of the struggle to rid the Civil Code of patriarchy and inequality, and it is of course being mobilized in the current campaign for the abolition of the family head system. Yang's greatest contribution to the movement is perhaps her theoretical critique of the binary code bifurcating tradition and modernity that inheres not only in the arguments of the 'conservatives' but also in the discourse of the campaigners. For Yang, both 'traditionalists' and 'modernists' share an ahistorical understanding of tradition, which she has sought to disclose in her studies (Yang 1998; 1999).

The four contributors offer us a rounded account of the legal history of South Korea and in particular the achievements in the legal field in the course of the transition from authoritarianism to democracy. There are many significant topics that need to be addressed which this project could not afford to cover, such as the relationship between the two Koreas, trade and foreign investment, industrial

relations, immigration law and the treatment of migrant workers, democracy in education, the judicial system and dispute resolution, and the legal profession. It is expected that analysis of legal change will be conducted in close cooperation with the theorization of political and social change that has achieved substantial progress thanks to the academic effort of many social scientists concerned with modern Korean history and present Korean society. The guest editor thanks the four contributors for their enlightening essays.

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