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NEW DEVELOPMENTS IN KOREAN CONSTITUTIONALISM: CHANGES AND PROSPECTS

Dae-Kyu Yoon[†]

Abstract: This Essay examines constitutionalism, or the legal expression of democracy. Explanations of Korea's underdeveloped sense of constitutionalism which are rooted in the culture of Confucianism do not provide an adequate explanation of the post-1948 Korean experience. A better model is provided by contrasting the uses of law by prior authoritarian regimes with current political developments including the rising role of entrepreneurial interests in Korean politics.

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- I. INTRODUCTION

Since the 1960s, the Republic of Korea has drawn world-wide attention for its formidable economic achievements. Since the 1980s, however, observers have focused less on Korea's economic success and more on the dynamic political changes that have been taking place. In 1993, for the first time since the military coup of 1961, Korea inaugurated a civilian

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government. This historic event deserves special attention from a world community that cherishes freedom, justice, and human dignity.

The purpose of this Essay is twofold. First, it examines, from the perspective of comparative jurisprudence, the impact of Korea's cultural heritage on the development of constitutionalism and democracy in that country. The second, and larger, purpose is to provide an historical overview of Korea's postwar democratic development from a constitutional perspective. Through this twofold examination, I hope not only to introduce the Korean constitutional system and its historical development, but also to provide a basis for better understanding the cultural factors that have deterred and/or facilitated the development of constitutionalism in Korea. This latter purpose arises because cultural heritage is often cited as a significant impediment to the realization of democracy in Third World nations.

"Constitutionalism" here means the legal expression of democracy and the dynamic political process of creating institutional conditions for achieving democratic ideals and the rule of law.¹ In other words, constitutionalism is the process of realizing the ideals and spirit of the constitution.

II. LEGAL DEVELOPMENT AND CULTURE

From the inauguration of the first constitutional government in 1948 until the late 1980s, Korea experienced authoritarian government. While Korea has recently undergone significant democratic reforms, the prospects remain uncertain. This disappointing record of Korean constitutionalism has frequently been attributed to Korea's cultural heritage, and in particular, to the persistence of Confucianism.

Yet the connection between culture and political development in Korea—between authoritarianism and Confucianism—is less clear than generally believed. In order to understand the complexity of this relationship, a brief review of Korea's cultural and political heritage is necessary.²

One of the most distinctive features of Korea's political history since the seventh century has been its strong centralism. This focus on the center is often said to have impeded the development of pluralism and toleration in Korean society. In turn, Korea's Confucian tradition and its social homogeneity have reinforced this push towards the center.³

In homogeneous societies like Korea, social norms, such as morals, mores, and religion, become more effective means of social control and integration than law. The reason for this is that such norms emerge organically from the social milieu and do not require state coercion. In such societies, the role of law is generally muted. In Confucian hierarchical and centralized society, inequality is based on, and justified by, status. Private law tends to operate peripherally,⁴ and public administration is conducted by orders or directives instead of permanent rules.

In the Confucian hierarchical system, artisans and merchants were assigned lower class status. This delayed the general development of commerce and industry. At the same time, Korea's centralism also acted as a deterrent to regional industrial development.⁵ Of course, the reverse is true for decentralized states such as feudal Japan. In that case, each fiefdom encouraged local industry in competition with other fiefdoms. In Korea, the stagnation of commerce and industry, which attended society's focus on the center, reduced the need for laws to govern commercial transactions. This further muted the development of the law.

Before Korea could experience its own version of the Enlightenment or the Reformation, it came under foreign rule. The Japanese colonial experience in Korea (1910-45) reinforced the negative aspects of law. Western laws introduced by the colonial authorities were used as a means to advance colonial interests, certainly not to sustain social justice or to guarantee individual rights. Resistance to Japanese rule often entailed the violation of imposed law. Such actions were considered to be patriotic expressions by Korean society.⁶

Independence from Japan, however, did not automatically bring about freedom. As was the case in most of the colonized societies of the Third World, the political constraints imposed by the foreign authority were replaced by similar constraints exercised by indigenous political forces.

Thus, in Korea, the cultural tradition and historical developments provided few conditions favorable to the development of constitutionalism. To those who emphasize the determinative influence of culture, Korean tradition was a force from which Korea could not escape. This kind of "cultural determinism"⁷ was a popular way of explaining the underdevelopment of Korean society.

Yet with the rapid postwar economic development of Korea and the other Asian NICs (Newly Industrialized Countries) where Confucian norms prevail, cultural explanations for "underdevelopment" suddenly demanded reinterpretation. In particular, how could Korea's economic success be explained in relation to culture? Confucian precepts, once blamed for Korea's social stagnation, came to be seen as responsible for economic development. The Confucian emphasis on education, harmony, and family ties is now seen as particularly conducive to economic development.⁸ Evaluations of the role of Confucian culture, thus, appear to vary according to particular stages in Korea's social and economic evolution.

Assuming, however, that Confucian culture contributed to Asian economic development, one still may argue that the same explanation should not be extended to the political arena, or to constitutionalism, because economic success can occur side-by-side with authoritarian rule. In fact, many point to the Korean case as one example of this. At this point, I do not feel the need to discuss the relationship between democracy and economic development. Rather, let me focus on a more relevant question: Should Korea be successful in its political development, how will cultural determinists account for such an improbable outcome? Their answer will probably be, once again, that Confucian culture is responsible. According to this position, culture may facilitate development at one time while restraining it at another.

Here I understand "culture" in the usual sense employed in the social sciences describing the moral or metaphysical predisposition to act in a certain manner. This predisposition includes the way of life and the distinctive ideas, attitudes, and sentiments established through repetition, which are shared in a given society.⁹ Tradition implies the transmission and continuity of intangible aspects of culture. As the matrix of human wisdom of a society, culture, or tradition, is the comprehensive entity from which any modern phenomenon acquires explanation. Thus, it can act as the source of all justifications, merits, or demerits.

Religion based on the teachings of great sages is one of the most important aspects of culture. Western history shows us that interpretations of Christianity have changed over time and place. Christianity, which once contributed to solidifying imperial or crown rule, now promotes individualism. Because history is always open to reinterpretation, and the role of

culture is constantly revised, the role attributed to Confucianism undoubtedly will vary with historical changes in Korean society. One of the significant characteristics of the Confucian Classics is their openness to reinterpretation. Thus, we can probably find some favorable elements for democratic development from Confucian culture just as we found them for economic development.

The same, of course, applies to Buddhism. In Thailand, for example, Buddhist culture has been blamed for underdevelopment of both the economy and of democracy. When the Thai people have finally achieved their developmental goals and retrospectively search for explanations, they will likely find their answers in their Buddhist traditions. From their current perspective, however, Thai scholars contrast the impediments to development found in Thai culture with the facilitating role of Protestant thought in Western development.¹⁰ Indeed, I am afraid that I might have insisted on discarding Confucian culture if I had written this paper two or three decades ago. Time is a key factor that changes our way of thinking. But the reinterpretation of tradition is history, and, in this sense, Benedetto Croce is correct when he says, "All history is contemporary."

Thus, I do not deny the influence or importance of culture, but I reject the notion that cultural heritage, while helping development in the West, has only hindered development elsewhere. An account of law solely in terms of its culture and tradition is an unbalanced interpretation.

A better approach is to take a broader perspective on society as a whole. The overemphasis on culture tends to minimize social, political, or economic factors and to underestimate the role of humans in changing society.¹¹ If Korea achieved her economic success through the determinative efforts of people, why should their determination not also be displayed in the sphere of constitutional development? People interact with their external environment to create new histories. Thus, culture is constantly modified.

Leaving this cultural discussion behind, I want to turn to the historical record of constitutionalism in Korea because this record itself tells a great deal of the story.

III. AN OVERVIEW OF THE CONSTITUTIONAL RECORD

A. *Frequent Constitutional Changes*

Since the establishment of the first constitution in 1948, Korea has changed its Constitution nine times, an average of almost once every five years. This alone demonstrates the instability of Korea's political process. Moreover, until recently, every change of regime has entailed a change in the Constitution. Constitutional changes have come about largely through 'abnormal' extensions of the presidential term of office, often in conjunction with the exercise of martial law.

The original Constitution of 1948 faced its first revision in 1952, when President Syngman Rhee attempted to extend his term by instituting martial law and by changing the Constitution to allow a direct popular vote for the presidency. Article 53 of the 1948 Constitution provided for an indirect vote by the National Assembly. In 1952, the Assembly was controlled by political parties opposed to Rhee. Despite this opposition in the Assembly, Rhee succeeded in his constitutional revision. It was the height of the Korean War (1950-53), and the Assembly met in the temporary capital of Pusan where the government had taken refuge. Martial law was declared, and enforced, to repress all political activity. The Assembly's vote for the constitutional revision was taken in the middle of the night with all 166 members standing in an atmosphere of fear. The amendment bill passed, as expected, without a dissenting vote. As a result, Rhee was reelected president.

A second constitutional revision, pushed through in 1954, enabled Rhee to enjoy an unlimited term as president. In this case, an egregious irregularity allowed the revision to pass with one vote less than the constitutionally mandated two-thirds majority of the National Assembly. Ultimately, however, Rhee's constitutional manipulations failed to guarantee him the presidency once he lost popular support in 1960.

The fall of Rhee's government by popular revolt entailed another constitutional change. The rush in drafting a new constitution, however, failed to accommodate differing views or to provide procedural justice. This third revision adopted a parliamentary system to replace the

presidential system. This change so drastically altered the Constitution that the new government was dubbed the Second Republic.

A fourth revision, also in 1960, accommodated legislation for the retroactive punishment of those found guilty of election irregularities, corruption, and misappropriation of public property. A result of popular pressures, this amendment provided a constitutional exception to the principles prohibiting *ex post facto* penalties.

The Second Republic, however, was short-lived, as political instability encouraged the military to interfere in civilian affairs. In 1961, a coup succeeded. Predictably, a new constitution was drafted in 1962 by the military authorities. The major change was to reinstate a presidential system with direct popular elections. Thus, the Third Republic arrived. Because the Assembly had been dissolved, the new Constitution had to be implemented by plebiscite. Martial law, however, was not lifted until ten days before the referendum.

A sixth revision was undertaken in 1969 to ensure a third term for the general-turned-President, Park Chung-hee. The 1962 Constitution limited the presidency to two terms. To avoid fierce resistance from opposition Assemblymen, the ruling party clandestinely called its members of the Assembly into session. They met after midnight in a building across from the main hall of the Assembly building. They went so far as to keep the lights out until the discussion actually got under way. By the time the opposition members caught on and stormed into the meeting, it was too late. The amendment authorizing a third term for Park passed without their participation. Subsequently, it was approved by a referendum.

President Park forced another revision in 1972 to secure the unlimited extension of his presidential term. On this occasion, the Constitution and all political activity were suspended by a presidential emergency decree. With neither public hearings nor open debate, the amendment was put to a referendum. At the same time, Park was afraid he might lose the direct popular vote for president. As a precaution, the electoral process was changed, and the president was selected by an indirect vote of a special electoral body. Members of this body were elected by popular vote from candidates carefully screened by the authorities. President Park, as expected, was reelected without a dissenting vote. The new Constitution also vested the president with powers to override the other branches of

government and contained additional restrictions on the Bill of Rights. This revision was so sweeping that it created the Fourth Republic.

Park's assassination in 1979 brought another constitutional revision in 1980. The vacuum created by the death of Park was filled by a group of his military protégés led by General Chun Doo-hwan. The new military leaders changed the constitution once again. They sought to establish the political legitimacy of their power by symbolically distancing themselves from the authoritarian rule of the previous government. Following the example of the 1961 military coup, however, the military authorities declared martial law, banned political activities, and suppressed freedom of speech.

Under this new constitution, although the president was still elected by indirect vote, he was limited to one seven-year term. The presidential term could still be extended by constitutional revision, but such a change could not apply to the president in office at the time. This explicit prohibition was a distinctive component of the new constitution and its one redeeming feature. Although the new constitution also removed many undesirable provisions of the previous constitution, it still conferred vast authority on the president. This new political regime, based on this constitution, became the Fifth Republic. As expected, Chun, the latest general-turned-politician, was selected president by his hand-picked electoral college.

In the latter part of the 1980s, public protests against the authoritarian military government intensified, and the political authorities faced a dilemma: whether to extend their rule by extraordinary means, such as martial law, or whether to accommodate popular sentiments. Unlike previous regimes, those in power conceded to public demands. Thus, the constitutional revision of 1987 represents a dramatic departure from previous changes in both its process and meaning.

For the first time in the history of Korea's constitutional revisions, the 1987 Constitution was the result of a relatively unrestricted collaboration between the government and the opposition. This revision was also accomplished according to the procedures provided by the existing constitution. In this sense, the new and current Constitution, which established the Sixth Republic, has more legitimacy than any earlier version. Pivotal to the current Constitution is the reinstatement of a direct popular vote for the

president. In addition, the president is limited to one five-year term. The new Constitution also strengthens the power of the legislature and further protects individual rights.

In the 1987 presidential election, conducted under the new Constitution, Chun's military comrade Roh Tae-woo was elected with the support of conservatives who had vested interests in the old system. A more important reason for Roh's election, however, was the split between the two main opposition leaders: Kim Young-sam and Kim Dae-jung. Roh Tae-woo received 36.6% of the vote while Kim Young-sam commanded 28.0%; Kim Dae-jung held 27.0%; and Kim Jong-pil had 8.1%. Still, Chun relinquished the presidency after the expiration of his term, and Roh won the presidency in accordance with the Constitution. In that sense, it can be said that a peaceful transfer of power occurred for the first time in Korea's constitutional history. The current civilian government of Kim Young-sam was also elected under this Constitution.

With the exception of the 1987 Constitution, every previous constitutional revision arose from unusual conditions. None of these revisions, however, occurred in response to popular demands. The procedures used in those constitutional revisions clearly show how authoritarian governments can mobilize their resources to mask unjust acts with a facade of legality.

Despite the current success of the 1987 Constitution, the first priority for effective constitutional revision in Korea remains ending public disaffection with, and distrust of, the legitimacy of the Constitution and of the government. This can be achieved by adopting fair and just procedures for constitutional revision which allow open public debate.¹²

Against the problematic background that accompanied earlier constitutional revisions, it is refreshing to note that the current Constitution is free from those problems of legitimacy that plagued previous governments. For example, the Roh administration was challenged not for any constitutional defect, but because of Roh's military affiliation. Roh, after all, was an intimate comrade of Chun Doo-hwan from the Korean Military Academy. He was also an active participant in the 1979 coup following Park's death. A full general, he did not start his new career in politics until he retired as Chief of the Military Security Forces. His was a "transitional government" that paved the road to full-fledged civilian government. The inauguration of

the civilian government of Kim Young-sam in 1993 shows that the current Constitution has opened a new chapter in Korean constitutionalism.

B. Separation of Powers: Executive Dominance over the Legislature

Since the formation of republican government in Korea, the relationship between the legislative and executive branches has been characterized by weak legislatures and strong executives. Notably, each time the chief executive sought an additional presidential term, the legislatures provided legal support. The governing party has consistently controlled the National Assembly to such an extent that it seems as if the legislature was a subordinate agent of executive authority. With the complete subordination of the majority party in the legislature to the executive, the opposition party was forced to assume the role of restraining both the majority legislative party and the executive.

Typically, Korean political parties have operated as the personal power base of individual politicians. Not even ruling parties are exempt from this phenomenon, and once the president has lost power, his party collapses. Examples can be found in the Liberal Party under President Rhee's regime of the First Republic, the Democratic Republican Party under President Park of the Third and Fourth Republic, the Democratic Justice Party under President Chun's Fifth Republic, and Democratic Liberal Party under President Roh's Sixth Republic.

Apart from exceptionally brief periods in the early 1950s and at the end of the 1980s, the ruling party has enjoyed majority control of the legislature. Most Assemblymen of the ruling party are fully under the control of the President, who is also the head of the party. In the past, running for office on the ruling party ticket guaranteed success in many districts. For this reason, the party's endorsement was often more important than the support of the constituency. Once endorsed, the candidate usually enjoyed clear sailing with a properly financed campaign and with the cooperation of public organizations. Then upon entering office, a ruling party legislator had to toe the party line and obey party orders. To do otherwise would have been political suicide.

These circumstances have turned the National Assembly into a place of confrontation, not a forum for debate and dialogue. When the legislature

is not run on the basis of dialogue and debate, the tyranny of the majority is manifest, and democracy is reduced to the mere procedural formality of majority rule. Often, in the past, a ruling-party-controlled Assembly demonstrated extreme loyalty to the president. For example, when he openly condemned extended one-man rule in 1979, Kim Young-sam, then the head of the opposition party, was expelled from the National Assembly by a majority vote. Three weeks later, President Park was assassinated.

In 1988, however, the political climate improved markedly. Even though Roh won the 1987 presidential elections, his party failed to gain a majority in the National Assembly elections held the following year. Out of the 299 seats, Roh's party took 125 seats (40.1%), while Kim Dae-jung's party gained 70 seats (23.4%), Kim Young-sam's party held 59 seats (19.7%), and Kim Jong-pil's party won 35 seats (10.7%), including proportional representation.

Because no party held a majority in the legislature, the government was deadlocked. The politicians attempted to overcome this stalemate through a political realignment designed to preserve their vested interests. This reshuffle occurred in January 1990, when the conservative opposition parties of Kim Young-sam and Kim Jong-pil merged with the party of President Roh to form the new Democratic Liberal Party ("DLP"). Following the 1992 National Assembly elections, this new party held a secure majority in the Assembly.

In the presidential campaign that followed, Kim Young-sam overcame fierce factional strife within the DLP and secured the party's nomination. He fared well in the presidential election of December 1992, receiving 41.4% of the vote compared with 33.4% for Kim's arch-rival Kim Dae-jung, and 16.1% for entrepreneur Chung Ju-young.

The legitimacy of Kim's government was secured not only by his credentials as a life-long opposition politician who had struggled for democracy against military dictatorships, but also by the fair competition of the electoral process. President Kim successfully consolidated his civilian authority by removing ex-military figures and corrupt politicians from influential positions. Thus, the current political regime enjoys *de facto* as well as *de jure* legitimacy.

The current civilian government has pledged many reforms to build a "New Korea." As early as March 1994, the National Assembly passed three

important bills to forbid improper and plutocratic election campaigning and to extend freedom of speech. These reforms, which address elections, political funds, and local autonomy, are expected to contribute significantly to cleaner politics by reducing the costs of election campaigns and by making political funds more transparent.¹³

C. *Passivity in Judicial Review*

Constitutionalism is enhanced when judicial review of governmental acts and legislation ensures that the government performs its duties within the bounds of the constitution. Thus, the respect accorded judicial review is one of the best indicators of the status of constitutionalism in a legal system. Given Korea's disappointing history of constitutionalism, recent developments in judicial review by the Constitutional Court are significant. Indeed they amount to a revolution in Korea's constitutional history.

Judicial review has been a feature of Korean government since the establishment of the first modern constitution in 1948. The form of review, however, has changed through the various constitutional revisions. In fact, under each new constitution, a different type of judicial review system was adopted.

Surprisingly, through Korea's many constitutional changes, the judicial review system itself has never been a target of controversy. Because these constitutional revisions concentrated on the term of the presidency or on the executive branch's relationship to the legislature, the judicial review system did not receive a great deal of attention. The primary reason was that the courts had never actively practiced judicial review. This, in turn, was simply a reflection of the authoritarian nature of Korea's politics.

Under the Constitution of the First Republic (1948-60), the Constitutional Committee had the final voice in reviewing legislation passed by the legislature. It was neither a political organ, as in France, nor a judicial organ, as in the former West Germany. The Constitutional Committee was composed of the Vice President, who served as the ex officio chairman, five Justices of the Supreme Court, three members of the House, and two members of the Senate. This peculiar composition, representing all three branches of government, was believed to ensure fairness through the participation of the Justices, while deferring to public opinion

through legislative participation with minimal participation by the executive branch. In this way, the Constitutional Committee represented a political compromise among the three branches.

In its eleven-year history, the Constitutional Committee reviewed only seven cases. Of these, it ruled that two laws were unconstitutional. Both article 24(1) of the Agricultural Land Reform Act, which limited appeals to the Court of Appeal only, and article 9(1) of the Special Decree for Criminal Punishment Under Emergency, which granted original jurisdiction for specified crimes to the district court, were declared to be unconstitutional. In both cases, the court's decision was contrary to provisions which limited appeals to the Supreme Court. The small number of cases reviewed is symbolic of the Committee's limited role. Yet, while the Committee's peculiar composition did not facilitate a more active role, the Constitutional Committee was, to some extent, able to uphold the principle that the Constitution was binding upon all of the laws of the land.

After the Student Revolution of April 1960, the new regime replaced the Constitutional Committee with the Constitutional Court. Based on the model of a similar court in the former West Germany, members of Korea's Constitutional Court were qualified as judges. Thus, its orientation was judicial rather than political. Unfortunately, the military ousted the civilian government the following year in a coup, and the Constitutional Court did not have an opportunity to function.

The Third Republic (1962-72) adopted a system of judicial review patterned on the American model. Under that constitution, the Supreme Court was given final authority to review the constitutionality of legislation and other government acts.

Encouraged by the successful history in the United States, judicial review by the Korean courts was launched with the expectation that certain politicized issues would become subject to litigation. With the power of review vested in ordinary courts, there was hope that the courts' discourses on the Constitution would lead to a consolidation of constitutionalism. In fact, the higher courts had many opportunities to review the constitutionality of laws when the lower courts made bold decisions ruling certain laws to be unconstitutional. The results, however, fell short of expectations. For fear of politicizing the judiciary, the Supreme Court maintained a policy of restraint, and frequently reversed the lower courts' holdings.

The highlight of the Third Republic's American-style system of judicial review was the Supreme Court's decision that the State Damage Redress Act of 1971 was unconstitutional. Article 2(1) of that act excluded servicemen from the right to redress by law because they were eligible for compensation under accident indemnity and survivor's pension plans. This decision, however, was the only instance in which the Supreme Court had held a legislative act unconstitutional in the ten years of its operation. It occurred at a time when the president began to reveal his designs for extending his term of office. Although the courts asserted judicial independence on this occasion, it proved a vain attempt. In the new constitution drafted the following year, fearing more assertive courts, Park's regime removed the final authority of judicial review from the courts.

The Constitution of the Fourth Republic (1972-80) re-instituted the Constitutional Committee. This version of the Constitutional Committee was a standing organization with nine members: three appointed by the President, three by the National Assembly, and three by the Chief Justice of the Supreme Court. The members were not allowed to join political parties and could not participate in political activities. Members could not be removed except by impeachment or for criminal convictions during their terms. The qualifications of members, determined by law, were similar to qualifications for Justices or high-ranking officials.

Even though the Constitutional Committee was a standing body, it did not make a single decision concerning the constitutionality of a law between 1972 and 1980. The Committee had no power to review the constitutionality of a law on its own initiative. Instead, it had to await a request from the Supreme Court for such a review. But, if the Supreme Court had already decided that a certain law was unconstitutional, it naturally would not refer the law to the Committee. In any event, the Constitutional Committee did not have an opportunity to conduct any review because the Supreme Court never requested the Committee to do so. Thus, if any agency was to blame for the Committee's inaction, it was the Supreme Court.

On the whole, the constitutionality of any particular law was never actively discussed during the Fourth Republic. The political situation was hardly conducive to such discussion. The regime was much too concerned about popular demands for constitutional revision to allow any such

discussions to develop. Not surprisingly, the Constitutional Committee did not really function at all. This result quite likely had been planned when the Committee was established at the start of the Fourth Republic.

The Constitution of the Fifth Republic (1980-87) maintained the Constitutional Committee in spite of its disappointing performance under the previous regime. The Committee remained completely inactive and existed more in name than in practice.

The Sixth Republic, in an effort to usher in a more democratic order, introduced fundamental reforms in the judicial review process. The Constitutional Court, first adopted in the 1960 Constitution, was reinstated under the 1987 Constitution. Although the 1960 Constitution provided a German type of Constitutional Court, as noted above, it never had an opportunity to function because of the military coup of 1961.

Thus, it is somewhat surprising that one of the most remarkable developments in Korean constitutional history has been the significant activity of the Constitutional Court since 1988. The influence of its decisions has been far-reaching. Moreover, it has altered public attitudes toward the constitution, towards constitutional discipline, and towards law in general.¹⁴

Nominations to the Constitutional Court are limited to persons who qualify as judges. Under articles 5 and 6 of the Constitutional Court Act (Law No. 4017 of August 5, 1988), the court is composed of nine Justices: three nominated by the President, three by the National Assembly, and three by the Chief Justice of the Supreme Court.

The current Constitutional Court system has been improved by removing significant legal limitations of the previous systems. Under article 68(1) of the Constitutional Court Act, the Court was given jurisdiction over constitutional petitions. This device allows the Court to protect fundamental rights in the event that existing laws do not afford remedies through ordinary court proceedings.

A more significant improvement concerns the process of reviewing the constitutionality of legislation. Under the Constitutional Committee system of the previous regimes (1972-87), the Committee could not exercise its authority unless an ordinary court made a request *ex officio* or the parties moved for review. The authority to initiate a review resided in the ordinary courts not in the Committee. Under the current Constitutional Court system, however, article 68(2) allows the concerned parties to petition

directly to the Constitutional Court when an ordinary court rejects their request for review.¹⁵

The Court is primarily concerned with the review of the constitutionality of legislation and with constitutional petitions. It has taken an active role and judged many significant laws to be unconstitutional. Since the Constitutional Court was reestablished in September 1988, it has received 2,361 cases and, as of November 30, 1994, disposed of 1,897. Among the 1,897 cases handled, the Court decided 626 cases on their merits and dismissed 1,078 cases in the screening process. The other 193 cases were withdrawn by the parties concerned. Of those cases in which the constitutionality of legislation was reviewed, the Court has rendered 235 judgments on the merits. Among those, fifty-nine laws were declared unconstitutional either in whole or in part. Thus, approximately twenty-five percent of these judgments resulted in the invalidation or partial repudiation of legislation. This is a highly significant figure.

As a result of this active role, the Constitutional Court has greatly contributed to changing public and bureaucratic attitudes toward the constitution and toward the powers of government. These powers are finally being scrutinized against the standards of the constitution. It is clear that this activism is more a function of the current political environment, which has eliminated many of the obstacles that previously had blocked the satisfactory functioning of the system, than of the Constitutional Court System itself. Nonetheless, the active role of the Constitutional Court has meant the expansion of constitutionalism. Active discussions on constitutional questions have brought new blood into the field of public law. Previously, authoritarian politics and the lack of constitutional decisions limited constitutional scholarship to dogmatism. Now, however, constitutional decisions have become one of the most important sources of law.

D. Neglected Civil Rights

Another excellent measure of constitutionalism in society is the degree of protection afforded to civil rights. This is an arena in which public authority and private interests are often in conflict.

In Korea, the long period of authoritarian governance inevitably distorted the will of the public and the law to fit the political purposes of the

moment. Administrative expediency and efficiency were unduly emphasized while fairness and procedure were neglected. Discretion was exercised in favor of enforcement at the expense of civil rights and administrative fairness. Laws often delegated legislative powers to administrative agencies and granted them broad discretion. What aggravated the situation in Korea was the fact that nominally countervailing institutions, such as the legislature and judiciary, were too weak to curb the vast discretionary power enjoyed by the executive.

The effects of this administrative discretion are best seen in the process of arrest. Because the criminal justice system represents a direct confrontation between the powers of government and the basic rights of individuals, the conduct of criminal procedures provides insight into the status of law in society. Placing a person in custody is a direct infringement of the liberty of that person, and the process provides a vivid manifestation of the coercive power of government. Therefore, in societies where the rule of law prevails, strict restrictions are placed on the state's authority to arrest individuals.

The theory in Korea, as in Western societies, is that personal freedom is guaranteed under the constitution. This guarantee is elaborated in the Criminal Procedure Code and in other laws. Also, in theory, criminal investigations should be conducted without placing suspects in custody. Arrests should be limited to exceptional cases, to protect society, or to preserve evidence. When an arrest is made, the suspect is entitled to retain counsel and to file an application with the court for an examination of the lawfulness of the arrest. The suspect may be released on bail and will be released following an acquittal in a court proceeding.

While these provisions are intended to protect personal freedom, they have often been ignored in Korea in the interest of furthering government policy, or to facilitate the work of investigative authorities. Indeed, arrests, searches, and seizures without warrants have frequently occurred particularly against political dissidents.

In addition, guarantees of personal freedom have been nullified by numerous exceptions. For example, the Anti-Communist Act and the National Security Act both lifted most of the restrictions on arrest and custody. Under these laws, a defendant could be kept in custody beyond the limits provided by the Criminal Procedure Code. These laws were often

abused, and human rights were seriously infringed. Martial law was regularly enforced for political purposes resulting in many abuses of basic legal protections and civil rights.

Under these circumstances, law enforcement agencies, such as the police and prosecutors, have engaged in extremely arbitrary practices. Investigative agencies routinely practiced torture in "political" cases. In one 1987 incident, a university student died from torture suffered while in police custody. That event ignited fierce public protests against the government and helped usher in democratic reforms.

A different type of abuse can be seen in the regular disregard of unfavorable Supreme Court decisions demonstrated by administrative agencies. These agencies typically maintain that the Supreme Court has erred in interpreting the text of the law and insist on the propriety of their own interpretations. In one 1983 case, a taxpayer sued challenging the principle of local taxation. The Supreme Court ruled in favor of the plaintiff. Despite this, the local tax office refused to revoke the assessment or change the amount of the tax. As a result, the plaintiff was obliged to continue paying unlawfully high taxes. This was a clear denial of the Supreme Court's role as the final interpreter of the law and a usurpation by the administrative agency of the role of final arbiter.

Common law courts have various equitable powers including the 'contempt' power. Judges acting under the common law can issue writs of mandamus compelling agencies to act or injunctions prohibiting acts. Thus, common law courts have broad remedial powers.

In a civil law country like Korea, however, the courts lack the power to enforce their judgments regarding administrative agencies or to enjoin administrative dispositions which the courts determine to be unlawful. This weakness, however, cannot serve as an excuse for administrative agencies' disregard of court decisions. The fact that there are no provisions in the law specifying the courts' powers to enforce decisions or to enjoin administrative dispositions in no way relieves administrative agencies from their responsibility to recognize the Supreme Court as the final interpreter of the law.

In the current political climate, however, positive changes in governmental attitudes towards civil rights are taking place. Through the democratization process, powers the state may apply to its citizens are now

perceived to be limited. Bureaucratic attitudes toward citizens are also changing. Increased importance is being placed on human rights. Public institutions, once utilized to justify the arbitrary exercise of public power, have begun to consider the citizen's perspective.

In particular, change appears to have occurred among investigative authorities, including the prosecutor's office, the police department, intelligence agencies, and the inspection board. All of these agencies previously had been manipulated for political purposes. The changes in criminal procedures are most notable. Previously, illegal arrests and detainments had almost been the rule, especially in anti-state or anti-government cases. Now, however, law enforcement agents are changing their practices.

These attitudinal changes have also had an impact on the judiciary. The ordinary courts and the Constitutional Court are gaining importance as organs for the institutionalization of the rule of law. They have made many progressive decisions which would have been almost impossible under authoritarian rule. For example, a district court recently decided to indemnify a person for forty-five hours of unlawful detention.¹⁶ Also, the Supreme Court upheld the Korean version of the *Miranda* case in 1992, holding that confessions were not lawful evidence when the right to refuse to make a statement was not given.¹⁷

Furthermore, in another recent decision, the Supreme Court ruled that police custody without an arrest warrant, another formerly routine practice, is unconstitutional. As a result, police officers now have no right to hold suspects who protest against their illegal detention. Consequently, prosecutors and the courts have changed the procedures governing applications for, and the issuance of, arrest warrants. Under the old system, warrants could be issued only during certain hours. Now, they are available twenty-four hours a day.¹⁸

The Constitutional Court has also rendered a number of progressive decisions, ruling as unconstitutional provisions which unduly restricted civil rights in political activities, criminal procedure, labor relations, and other areas. One historic decision of the Constitutional Court was delivered in July 1993. The Court ruled that the dissolution in 1985, of the Kukje-ICC Business Group by the Chun government was unconstitutional. The former chairman of the group claimed that his group had become the "object of hate" of the Chun administration since it failed to contribute enough money

to the ruling party. Thus, the group, the seventh largest *chaebol*, was forcibly dissolved and was merged into, or taken over by, other corporations under a so-called "industrial rationalization scheme."

The suit, filed against the then finance minister, sought legal redress for this infringement on the right to own private property. Both Article 127 of the 1980 Constitution and Article 126 of the 1987 Constitution prohibit the nationalization, or public ownership, of a private enterprise unless the action is necessitated by urgent national defense or economic concerns. The Constitutional Court ruled that the actions taken by the Finance Minister, on instructions from the president, were unconstitutional. This ruling by the Constitutional Court reconfirmed a simple principle of democracy and capitalism which had often been ignored by the government.¹⁹

These cases are signs of the changes that have been occurring in Korean society. Constitutionalism can not be achieved merely by laws on the books or by the existence of legal institutions. Political will must also be present. As the recent social changes in Korea indicate, political change strongly influences legal practice.

The question is whether constitutionalism will continue to take hold and become truly institutionalized in Korea. I believe the prospects for this are good. The current environment, both within and outside Korea, provides conditions which are quite favorable for the development of constitutionalism and the further erosion of four decades of authoritarian rule.

IV. THE NEW ENVIRONMENT FOR THE TRANSITION TO CONSTITUTIONALISM

A. *Economic Progress*

Economic development has changed the balance of power among the various social classes and interests in Korean society. In the past, the state's initiative and political influence was naturally predominant. However, rapid economic growth has expanded the power of the private sector. This, in turn, has led to the growth of the middle class and associated interest groups.

The result has been a profound, if gradual, change from the bottom-up. The private sector now feels that government authority hinders free

enterprise. It demands greater liberalization and an increased emphasis on private initiative. In this light, business tycoon Chung Ju-young's bid for the presidency in 1992 represents a symbol of the increasing strength of the private sector. Clearly, this strengthened private sector requires changes in bureaucratic attitudes.

Economic growth was once held to be a *sine qua non* for the perpetuation of power in authoritarian hands. This no longer seems to be the case. The capitalist system requires freedom of action, freedom of choice, individual responsibility, and private initiative. All of this can best be guaranteed under liberal democracy which, in turn, tends to be associated with capitalist economies. Historically, Western political systems developed hand-in-hand with the market economy. In Latin American countries, for example, the collapse of the economy under authoritarian rule touched off democratic reforms. In Korea, however, economic growth served as a driving force in bringing about political reform. Continuing the process, such reforms are considered a prerequisite to further economic development.

These changes in the economic arena call for political developments appropriate to the new economic conditions. Capitalism demands a constitutional system capable of guaranteeing fair competition and predictability.

B. The Collapse of the Cold War System

Since World War II, the Korean peninsula has been one of the points of greatest tension in the ideological confrontation between East and West. The deep antagonisms between North and South Korea provided favorable conditions for the development of authoritarianism and militarism. In the South, from 1961 to 1987, military-backed authoritarian governments professed staunch anti-communism as the primary policy of the state, and they prevailed. The political anxieties of the South have been fueled by the bellicose propaganda of the North. Conflicts outside of the Korean peninsula have also had an impact. The War in Vietnam, for example, increased the fears of South Koreans about a communist attack from the north and provided a timely pretext for the consolidation and expansion of the government's powers through the constitutional changes of 1972. Thus, the

ideological conflict between East and West has reinforced the power of authoritarianism in the South

With the collapse of the former Soviet Union, however, the ideological confrontation on the Korean peninsula has decreased. This has rendered the continuation of authoritarianism in Korea less tenable. Also, a revival of nationalism has increased Koreans' interest in unification. This sentiment has intensified noticeably since the unification of East and West Germany.

The pursuit of peaceful unification, however, requires a national consensus based on free choice. An authoritarian regime is not appropriate in this context. Rather, such a regime is a detriment to the pursuit of unification. Authoritarian rule is grounded upon the narrow interests of the ruling elite, while unification requires renunciation of such vested interests. Thus, an authoritarian political system is incapable of accomplishing unification. Under these circumstances, it is quite natural to expect the demise of military-backed authoritarianism.

C. Other Changes

The emergence of democracy in the developing countries, especially the Philippines and Taiwan, has had a strong impact on Korean politics. In addition, the military dictatorships once prevalent in Latin America are being replaced by new civilian governments. Also, the collapse of the Cold War system resulted in the collapse of dictatorships in Eastern Europe. In the end, authoritarianism has become an outmoded form of political rule.

Along with its various internal political impacts, the collapse of the Cold War system has contributed to a revitalization of international organizations including the United Nations. International cooperation, based on mutual understanding among societies, has enhanced political development and improved the level of respect accorded to human rights.

With the assistance of modern technology, international society becomes more closely connected through trade, communication, and transportation. If a country is to act as an honorable member of the international community, a civilized form of government is required. The more interwoven international society becomes, the more the domestic politics of each society are influenced by the international environment.

Constitutionalism is now emerging as the *zeitgeist* of the Third World and as a universal ideal for human dignity throughout the world.

V. CONCLUSION

This exploration of constitutionalism in Korea from a historical perspective shows that models which treat traditional culture as the primary obstacle to constitutionalism in Korea require reexamination. The progress already seen demands a broader perspective.

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 perception of those in power did not change until a civilian president took office in 1993.

Now, the replacement of the authoritarian political elites has been accomplished. This portends extensive change in Korea. The inauguration of a new civilian government provides the momentum to establish *de facto*, as well as *de jure*, legitimacy. Once the issue of political legitimacy has been resolved, the most important issue will be how to advance the process of democratization and establish the rule of law. In this process, what were once political matters will be transformed into legal matters. Therefore, the importance of the law increases as democratization proceeds.

The Korean experience aptly shows that political change precedes legal change. At the same time, recent judicial actions demonstrate that legal change accelerates political change.

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. Private initiative

becomes critical. These trends demand new ways of thinking. The law can no longer be a means to control or subdue the populace simply for personal, or interest-based, purposes. Rather, law should become a facilitator of mutual interests.

Considering all the factors implicated in domestic and international change, 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.

ENDNOTES

- ¹ See *Introduction*, CONSTITUTIONALISM & DEMOCRACY: TRANSITION IN THE CONTEMPORARY WORLD (D. Greenberg et al. eds.) at xvii, xix.
- ² For detailed explanations on Korean political culture, see DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 5-26 (1991); PYONG-CHOON HAHM, THE KOREAN POLITICAL TRADITION AND LAW 1-84 (1971); and GREGORY HENDERSON, KOREA: THE POLITICS OF THE VORTEX (1968).
- ³ YOON, *supra* note 2, at 15-16.
- ⁴ *Id.* at 16-20.
- ⁵ *Id.* at 9-10.
- ⁶ PYONG-CHOON HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE 144.
- ⁷ For a critique of cultural determinism, see YOON, *supra* note 2, at 32-35.
- ⁸ See DAVID AIKMAN, PACIFIC RIM: AREA OF CHANGE, AREA OF OPPORTUNITY (1986); ROY HOFHEINZ, JR. & KENT E. CALDER, THE EASTASIA EDGE (1982).
- ⁹ See D. Waldo, *Public Administration and Culture*, PUBLIC ADMINISTRATION AND DEMOCRACY 39 (R. Martin ed., 1965); D. Ashford, *Attitudinal Change and Modernization*, MODERNIZATION BY DESIGN: SOCIAL CHANGE IN THE TWENTIETH CENTURY 152 (C. Morse et al. eds., 1969).
- ¹⁰ See Satit Niyomyaht, *Cultural Ideas and Development in Thailand*, paper presented at the conference on *Culture & Development in a New Era and in a Transforming World*, held in Seoul, Korea, Sept. 20-22, 1993.
- ¹¹ D. Lev, *Judicial Authority and the Struggle for an Indonesian Rechtsstaat*, 13 LAW & SOC'Y REV., 37 (Fall 1978).
- ¹² On the prospects for future constitutional change in Korea, see Dae-kyu Yoon, *Constitutional Change in Korea: Retrospect and Prospects*, XXV ASIAN AFFAIRS 178-86 (June 1994).
- ¹³ See KOREA TIMES, Mar. 5, 1994.
- ¹⁴ For the introduction to and activities of the Constitutional Court, see J. West & D.K. Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, AM. J. COMP. L., Winter 1992, at 73-119.
- ¹⁵ Constitutional Court Act, Law No. 4017 of 1988, art. 68(2).
- ¹⁶ See LAW TIMES, Oct. 19, 1992.
- ¹⁷ See LAW TIMES, June 29 & Aug. 18, 1992.
- ¹⁸ See LAW TIMES, Mar. 17 & 24, 1994.
- ¹⁹ See KOREA HERALD, July 30, 1993.