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Korean Development of Democracy and Law

한국 민주주의의 발전과 법

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INTRODUCTION

The purpose of this research is to explain and analyze the last two decades of development of Korean democracy from a legal perspective. There have been tremendous changes in laws and institutions since the 1987 political shift toward democracy. The year 1987 is a watershed in the process of Korean political development, opening a new era of democratic government after a bloodless democratic revolution and the ensuing adoption of a new constitution in 1987.

This research will look at the process and significance of consolidation of democracy since adoption of the new constitution in 1987 in order to see how Korean democracy has been solidified and institutionalized through law. Since the focal point of this research is centered on uncovering the kinds of legal mechanisms that have been institutionalized and how law shave contributed to the development of democracy, this study will be limited to Korean development of the rule of law since 1987.

The recent development of a political democracy is another success story of the Korean people, following the nation’s success in economic development. Korea did not fall behind in the race of the third wave of democratization in the world.[1] She in stead became a model case for democratic development.

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1) See Samuel P. Huntington, *The Third Wave: Democratizationin the Late Twentieth Century* (Norman: University of Oklahoma Press, 1993).

This research consists of fifteen chapters. In the first chapter, before undertaking our main objective, this book will briefly review the pre-1987 situation as background to facilitate our understanding of post-1987 development. The second chapter will highlight the dramatic paradigm shift of politics and law by looking at changing political dynamics. The third chapter will look at the new role of elections, which enables determinative function for democracy. The fourth chapter will take the issue of corruption which has been placed in a new dimension under democratic political system. The fifth chapter will handle enhanced transparency in the political process. The sixth chapter will review normalized new mechanisms of separation of powers. In chapters seven and eight, judicial reform and the active role of the constitutional court will be examined. Chapter nine will look at rectification of past wrongs. In chapters ten, eleven and twelve, improvement of human rights protection will be addressed. Chapters thirteen and fourteen will be devoted to laborers' rights and women's status, respectively. The last chapter will examine legal issues surrounding inter-Korean relations, a field that has emerged as a new discipline of law since the democratization process was set in motion.

Chapter1. Historical Review of Pre-1987 Politics and Law

Politics and Law in the Yi Dynasty

In order to further our understanding of the contemporary practice of politics and law, a brief review on pre-1987 practice is in order. Before Korea launched a democratic republic in 1948,the Korean Peninsula had been ruled by the Yi dynasty kingdom since the end of the 14th century until it was colonized by the neighboring country Japan early in the 20th century. The Yi court depended heavily on Neo-Confucianism and Neo-Confucian based institutions for its philosophy, government and legal system. Although Neo-Confucianism arose in China in the 12th century, it was during the Yi dynasty that it achieved its highest form of application and institutionalization. Neo-Confucianism was the supreme law governing the royal court and the bureaucracy, including their policies and procedures. It was a made-to-order weapon used to enable and justify the will of the upper class as it was enforced on its subjects.

A central theme in Neo-Confucianism is that human affairs are a reflection of Nature's workings. Therefore, striking a harmony between human affairs and Nature is essential if man is to live properly and the state is to be properly governed.[1] Yi Korea adopted Neo-Confucianism as its primary guideline for state administration, social regulation and all personal relations. Rather than a religion, Neo-Confucianism was a

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1) See Colin A. Ronan, *The Shorter Science and Civilization inChina: An Abridgement of Joseph Needham's Original Text*, Vol. 1 (Cambridge:Cambridge University Press, 1978), pp. 227-229.

philosophical ideology, and a set of social norms defining guidelines for effective integration and government of the people.

The centerpiece of Neo-Confucianism is its emphasis on hierarchy. From royalty, nobility, and bureaucracy, down to commoners of lowly status, the status of each and every individual was carefully defined in an elabor at ehier archical order. This refined bureaucratic system and recruitment into the bureaucracy was strongly tied with one's rank, which even determined the social status of one's spouse and immediate relatives. The concept of hierarchy prevailed in foreign relations, as well. A full commitment to Confucian teachings and institutions fostered attitudes of cultural and political submission to China. The Neo-Confucian ordained hierarchy greatly contributed to justifying the status quo and maintaining peace and order in Yi society.

The family was a basic unit in which Neo-Confucian ideology andvalue was practiced. The family hierarchy included extended family, and would range across several generations. The head of the family, generally the oldest male member, wielded undisputed authority and prerogatives over the rest of the family, while an individual never counted for much. Family solidarity and collective responsibility fostered a sense of security in individuals, but also had the undesirable effect of weakening the sense of independence and individual initiative. As the idea of family was expanded nationally, the state was considered a 'national' family with the king as father, or head of the family, and his subjects as children.

Korea had achieved a high degree of centralization by the end of the seventh century. As her centralization of administration had been reinforced on the basis of Neo-Confucianism, the central government exercised control over the whole country, and the smallness of the country inhabited by a people uniform in ethnic origin, language and culture greatly facilitated centralization of the national administration.

In such a Confucian society, the principal norms or guidelines for behavior were drawn from Neo-Confucian teaching or ethics. Confucian morality always favored virtue over law and institutions. Therefore, law was a secondary norm to enforce or compliment Confucian norms, and thus naturally assumed the form of penal and public law. Law functioned as a means to maintain the Confucian order of status quo. Law was a set of secular norms without any reference or link to spiritual or divine elements. The state was the single moral authority capable of dispensing justice.

Yi Korea's cherished dream to avoid external influence in order to maintain its complacent Confucian hierarchical order as long as possible faced a formidable challenge as Japan continued to relentlessly force inroads into Korea after 1876. Japan, which transformed its system of government into a western model of modernization a few decades earlier, exercised its muscle to expand its imperial interests on the Korean Peninsula. Finally, Japan succeeded in annexing Korea as a part of its colonial empire in 1910.

Politics and Law under Japanese Rule

Japanese colonial rule did not allow colonized Koreans to participate in politics in any meaningful sense. To the contrary, political activity was strictly banned. The colonized were subjected to the rules and policies imposed by the colonizer to promote the latter's goals, without being allowed any participation in the political or decision-making process. From the Japanese colonizer's viewpoint, law was the most important tool to transform Korea and abolish its traditional governance and norms in order to serve Japanese interests. A sophisticated western legal system was very effective in implementing Japanese policies in Korea. Law became a major means of ruling and integrating Korean society for colonial purposes. Japanese law modeled on German statist law was utilized to streng then colonial authority and suppress Korean resistance. Protection of individual rights or Korean participation in political processes was allowed only to the extent that it could promote Japanese interests. Law under these conditions definitely played the role of extending colonial rule and punishing dissention rather than enhancing the protection of Korean people, enhancing justice or redressing grievances. Law was reduced to a weapon in the hands of colonial rulers to effectively impose their will. If prominent individuals commanding wide respect were punished for political reasons, this only created renewed hostility. In the eyes of Koreans, violations of law sometimes meant resistance to Japanese rule, which was tantamount to patriotic activity.

The first introduction of the western legal system by Japan contributed to a distorted perception of the concept of modern law. Alien modern

laws imposed by colonial rulers against the wishes of local Koreans would bring about only resentment, regardless of their merit or possible benefit. In Korean eyes, these laws meant nothing other than Japanese rule itself. An opportunity to awaken Koreans to the virtue of modern law was missed. Instead, the negative attitude toward law was hardened even more. A lack of political legitimacy of colonial authority accelerated the dependency on coercive law and reinforced a distrust of state authority and law.

In function and nature, the law imposed by Japanese imperialist rule had a great deal in common with the law of Yi dynasty Korea. Under both dispensations, law was a potent instrument through which limitless state authority was invoked. However, the concept of benevolent rule that Confucian ethics required of rulers during the Yi dynasty was absent from the consciences of Japanese rulers. Politics of checks and balances between king and bureaucrats during the Yi dynasty was replaced by the relationship of domination and submission between victor and loser. With western laws came a streamlining of forms and procedures, in the shape of a modernization of the administrative system. However, Japanese colonial rule distorted the values of Korean people and estranged them from the concept of law in the name of modernization. These undesirable results of alien compulsion have been carried beyond the liberation.

New Beginning of the Democratic Republic in 1948

Korea's liberation from Japanese rule in 1945 was an epoch-making event in modern Korean history. The vacuum created upon Japanese

surrender and withdrawal was then replaced by the occupation of the Korean Peninsula by the Soviet and U.S. armies north and south of the thirty-eighth parallel, respectively. The separate occupation of two powers later led to the creation of two separate states on the peninsula, as their state of heightened confrontation prohibited them from reaching an agreement on creating one unified state. An interim government of the U.S. army ruled the southern portion of the peninsula until a new, independent Korean government could be launched. Finally, under the supervision of the UN, a general election to create an independent Korean government was held in May1948, but only in the south, as Pyongyang refused to participate. The newly created National Assembly adopted a constitution two months later, and on August 15, the first Korean government of the Republic of Korea was inaugurated, with Rhee Syngman as its first president.[2)]

The urgent task of the interim government was to maintain social order and stability while preparing for the creation of a new Korean government. Although colonial-era laws with political hues were discarded, many laws remained in force until specifically replaced by a new code at a later date.[3)] If necessary, orders by the interim government filled the legal vacuums and gaps. This three-year period of American rule from 1945 to

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2) In the north, one month later, the establishment of the Democratic People's Republic of Korea was proclaimed on September 9. For the process of state building in Korea after liberation, see Carter J. Eckert et al., *Korea Old and New: A History* (Seoul: Ilchokak, 1990), pp. 327-346; Gregg Brazinsky, *Nation Building in South Korea* (Chapel Hill: The University of North Carolina Press, 2007),pp.13-40.

3) The United States Military Army Government in Korea declared that, except for those ordered repealed, all Japanese laws would remain in force. See Military Order No. 11, Oct. 9, 1945.

1948 was a critical period for the American law and legal system to exert significant influence on Korea that would have lasting effects. Though U.S. military authority with the American concept of law was alien to Korean legal tradition and practices, it was an opportunity to learn about the democratic legal system that was slated for adoption by the new government, replacing the traditional Confucian legal system as well as the colonial one.

The first constitution, established in 1948, adopted a presidential system, taking after the American model on the demands of Rhee Syngman, who had studied and lived in the United States for a long period of time. The first draft of the constitution was prepared by legal scholars and was modeled after the bicameral parliamentary system found in Europe. However, Rhee, who was then an influential figure after he returned from the United States and recruited U.S. support,[4] forced it to be changed into a presidential system and unicameral legislature. This modified draft was introduced in the National Assembly, which passed it without serious objection, and became the first constitution of the Korean republic. Rhee was selected as the first president by the National Assembly, as was provided for in the constitution.

The personal influence of Rhee on the new constitutional system did not bode well for the future of Korean constitutionalism. The presidential system was neither a product of sincere consideration for the long-term

4) Under U.S.military government rule, those Koreans who could speak English could play animportant role in politics thanks to their communication edge and culturalunderstanding of America.Rhee was a typical example of such a Korean.

prospects of Korean constitutionalism, nor a system based on established principles. Instead, the first constitution to be adopted was one that had been distorted to serve personal political ambitions.

At the outset, the first constitution failed to accommodate the views of political forces favoring a government whose purpose would be the unification of the north and south halves of the Korean Peninsula. The Rhee Syngman faction advocating separate governments won the day. The utmost task for the smooth launch of a newly independent nation following liberation should have been the restoration of reconciliation and serious dialogue among various factions. Exclusion of other factions worsened the divide among them and negatively affected political stability.

Ebbs and Flows of Democracy Before 1987

Korean constitutional history testifies to the instability and vulnerability of her democracy. During four decades from 1948 to 1987, there were no fewer than nine constitutional amendments brought about by political turmoil or occasioned for abnormal extension of presidential terms.

The first government of Rhee Syngman in 1948 was the first legitimate democratic government in Korean history, in the sense of modern political theory. The first constitution entertained most of the essential components of democracy, including a bill of rights, the principle of separation of powers, regular elections, and judicial independence.

Koreans also tasted, for the first time, what democracy would like to be. Although incipient and ephemeral, this new experience of democracy reminded people of the hope and possibility of political development in an era of political hardships.

The first government, which started under democratic principles, was transformed into a dictatorship in just a few short years, as the leadership amended the constitution in order to extend and justify the regime's power. Rhee, whose government party failed to command a majority in the National Assembly, wanted to change the constitution for the sake of his reelection. According to the then-current constitution, the National Assembly had the authority to select the president, and thus, Rhee was unable to be successfully reelected. Therefore, he changed the procedures for electing the president from an indirect vote by the National Assembly to a popular direct vote through a constitutional amendment in 1952, which he pushed through at the height of a Korean civil war employing martial law and under terror and threats of criminal charges against National Assembly members. He could be elected through popular vote by mobilizing all the tools at his disposal, including money, media, public agencies, and gimmicks.

Rhee wanted to stay in power even longer, but the constitution at the time limited the president to only two terms. In order to run for a third term, he needed one more constitutional change in 1954. The new amendment allowed unlimited terms for the presidency only to the first president of there public. He could be the only beneficiary of this new amendment. This amendment was passed by the National Assembly in

spite of being one vote short of the required two-third majority, with the gross irregularity of simply manipulating the counting of valid votes for the amendment. President Rhee could serve as long as he was elected in the popular vote. He ran for a fourth term and was successful through systematically and egregiously rigged elections. This brought about nationwide popular protests, and in particular, a student revolution in April 1960. Rhee finally conceded his presidency before his fourth term and exiled to the United States.

Rhee tried to justify his extension of power through constitutional revisions and his dictatorial power was maintained through force and coercion under duress by mobilizing state institutions. Incipient Korean democracy was broken down by the very first president of the first republic. The success of the student revolution resulted in a new liberal political atmosphere, followed by another constitutional revision steering the government toward a parliamentary system in order to prevent the possibility of a future presidential dictatorship. The new democratic government was too weak to create a new order and too fragile to handle unbridled democracy after the end of strong-man rule. Only one year after Rhee forfeited his office, a military coup was carried out in 1961 on the pretense of national order and security. The interim military government, led by General Park Chung-hee, once again amended the constitution to provide astable government by again adopting the presidential system.

The new constitution created in 1962 was based on the principle of separation of powers. Although the president could exercise inordinate

powers, if he or she wanted, over other branches with orchestrated manipulation of other institutions, it is also true that the new constitutional system contributed to political stability, which provided favorable conditions for the government to pursue ongoing initiatives for economic development. Korea could, once again, enjoy a moderate democracy after she recovered from the previous dictatorship, and the ensuing chaos and coup.

The new constitution allowed the president to serve two terms. Park Chung-hee, the general-turned-politician, was successful in the popular election in consecutive terms. Indebted for his success with economic development during his term, he wanted to stay in power for a third term and successfully revised the constitution to allow for it in 1969, amid popular protest. After Park was successfully elected to his third term, he found that it would be very difficult for him to stay in power further under the existing constitutional system. Once again, he changed the constitution in 1972 to provide unlimited terms for the presidency, through indirect vote by an electoral college, whose members were selected after screening by the authorities and thus were supposed to be in support of the whims of the government. People lost their right to select their president directly. Furthermore, the new constitution renounced the principle of separation of powers by vesting unmatched prerogatives in the presidency. The president was far above any state institution. His dictatorship was justified by the constitution itself. This was the notorious "*yushin* (restoration) order."

As Park's dictatorship continued, popular resistance intensified. His dictatorship and the *yushin* order finally ended with his death by assassination in 1979. People believed that the disappearance of a strong dictator would bring about the recovery of democracy. Complacent hope turned into sour disappointment as Park's protégés in the military launched another coup and replaced Park's regime with one of their own. Ruthless suppression of protest and resistance led to bloodshed, particularly in the Gwangju City area, until imposed order was seemingly restored. The new regime revised the constitution by removing several undemocratic and unpopular provisions in order to justify its power in 1980. The most unique characteristic of this new constitution was the limited term for presidency. The president would serve only one seven-year term. He or she could neither serve a second term, nor could the constitution be amended to extend one's term. This was an important redeeming grace for the new military leadership, which lacked legitimacy, considering the public's disgust with extended dictatorships. However, they could not relinquish the system of indirectly voting for the presidency, since they knew that a direct vote might not secure it for them. As planned, Chun Doo-hwan, who masterminded the coup, was elected as President by the electoral college.

The indirect vote by way of the electoral college was vulnerable to manipulation under undemocratic political conditions. That was why the principal slogan of anti-government protests was a call for a constitutional amendment guaranteeing a popular vote for the presidency. Chun's rule was an extension of Park's dictatorship, also maintained through surveillance and forces mobilized by state institutions such as security

agencies. However, public resistance against dictatorships did not allow this system to last long. As protests against Chun's regime and constitutional system intensified across the country and throughout all walks of life, the government finally retreated. It was brought to a close in 1987 with the adoption of a new constitution opening the door for the rebirth of democracy.

Chapter 2. Paradigmatic Change of Politics and Law After 1987

The most prominent difference between authoritarianism and democracy is the quality of state authority. In an authoritarian society, public authority is utilized and mobilized for the sake of political power. Public institutions and bureaucrats are tasked with carrying out the wishes of the political leadership in power. In this case, law would be the principal means to justify the exercise of public authority through discretionary and convenient interpretation from the perspective of political power. Political motivation is pervasive in legal dealings. Law works at the mercy of political power when the issue at hand has political characteristics.

In a democratic society, on the other hand, political power has limited authority and finds difficulty with mobilizing public institutions and bureaucrats for political purposes. Law is neither a mere tool to realize political purposes, nor merely grounds to provide justification for their actions. Instead, law functions with its inherent role of restraining public authority within legitimate limitations.

As democratization has been consolidated in Korea since1987, it is very difficult for political power to manipulate the legal administration in favor of its political goals. People's perceptions of public authority and political power have dramatically changed. People are no longer at the mercy of the leadership, but are ready to protest impropriety or illegality of public authority. Public institutions are also responsive to citizens' demands.

All these changes have been followed by democratization and brought about a new perception regarding the source of power. Politicians have to heed voters and should respond to them. Otherwise, they will lose power in the next election. Political power now comes from the people, not from the military or any other source. Korea's contemporary democracy, based on representative politics, functions like that of other advanced countries.

1987 Constitution as the Basic Legal Framework for Democracy

The current 1987 Constitution is a watershed dividing Korean constitutional history into the authoritarian system of pre-1987 and the post-1987 democratic system. This constitution came into being not through unilateral imposition by the political powers that be in order to serve their own interests, but rather, through the strong demands of the people, and thus, it was designed to reflect these demands.

Since the first constitution was enacted in 1948, Korea had revised her constitution as many as eight times before 1987, all of which either resulted in the extension of the presidential term or were born out of political upheaval. There had been no peaceful transfer of power through existing constitutional processes until 1987.[1] However, the 1987 Constitution, the ninth overhaul of Korea's legal basis, opened a new road

1) For details on Korean constitutional amendments, see Dae-Kyu Yoon, *Law and Political Authority in South Korea* (Boulder: West view Press, 1990), pp. 96-108.

toward democracy by eliminating the defects built into previous constitutions. In this regard, the current constitution is the exception rather than the rule from the perspective of Korean constitutional history. Unlike previous constitutions, the current document has enjoyed full legitimacy. Although it has sometimes faced challenges from academics and journalists, these challenges arose not because of the constitution's political legitimacy, but rather, because of theoretical or functional defects. The constitution has been the backbone of political development and stability since 1987. Therefore, the 1987 Constitution has enjoyed the longest life of any of Korea's constitutions, and has survived so far without public resistance.

First Constitution Free from Questions of Legitimacy

Then, why has the current 1987 Constitution enjoyed such full legitimacy, unlike previous constitutions? First of all, it accommodated the people's demands for democracy. The keenest interest of the people under authoritarian rule had been the restoration of their right to choose and change the government. That is, to elect the president by direct vote in a free atmosphere. Under the previous constitution, the president was elected by an indirect vote through an electoral college, the members of which were carefully screened and manipulated in favor of those in power, even though they adopted a presidential system. Citizens intensely felt deprived of their basic right to select their president, who was their most important principal representative. That is why the most critical part of the people's demand at that time was that of recovering the right to

select a president by direct ballot. The direct vote for the presidency was perceived to be almost synonymous with democracy.

The military dictatorship succumbed to the people's demand to steer the constitution down a democratic path, including the right to a direct vote to select their president, the desire for which was so intense that the ruling political power could not but accept it. In particular, when they recalled the bloody Gwangju suppression of May 1980, they did not have the will to repeat such a horrific scene again, and so they retreated from their uncompromising position.[2)]

Secondly, the process differed from previous attempts. The process of constitutional revision had proceeded as provided by law with the participation of conflicting interest groups of both ruling and opposition parties. This kind of cooperation and compromise in drafting a new amendment was also a departure from previous processes for constitutional revisions, in which the ruling government parties used to initiate and unilaterally proceed against severe protest by opposition parties. In this regard, the 1987Constitution was, among all nine constitutional revisions, the first occasion in which political parties concerned, both ruling and opposition, reached a peaceful compromise through negotiation.

This new revision in 1987 transformed the constitution into the basic legal groundwork necessary to establish democracy by eliminating authoritarian

2) Then-Chairman of the ruling party, Roh Tae-woo finally announced that he would accept the demands of the opposition on June 29,1987. This is known as the June 29Declaration.

taints and adding new clauses in favor of human rights, as well as enhancing the principle of separation of powers. Unacceptable prerogatives of the presidential authority were eliminated or reduced to levels comparable to those seen in a constitution of a democratic presidential system based on the principle of checks and balances. For example, the president's authority to dissolve the legislature and to declare an extraordinary decree which would have the same legal effect as a legislative statute was abolished. Along with a direct vote in selecting the president, the presidential term was limited to one five-year term. A second term is impossible under the current 1987Constitution.[3] This is an important component of this revision, as it is a key mechanism in obstructing the reappearance of a dictatorship. At the same time, the legislative authority was strengthened in many aspects to balance against that of president, including the revival of its authority to inspect government agencies. The Bill of Rights in the constitution was also reinforced. Judicial independence was solidified. The Constitutional Court was established and proved to be functioning excellently as the final guardian of the constitution, as we will see later.

Constitution as a Justiciable Law

It would be naïve to say that the success of Korean democracy is simply thanks to the new constitution of 1987. Law on the book is one thing, and law in action is another. The best constitution from the

3) Articles 67(1) and 70. Furthermore, the constitution provides that extension of the presidential term shall not be effective for the incumbent President. See Article 128(2).

theoretical perspective does not always warrant the best practice of democracy. When political reality does not provide a favorable environment for the rule of law, however voluminous and detailed the legal code is, law often does not function as designed.

For example, judicial review systems under the previous constitutions in Korea had not functioned at all, not because of their defects or imperfectness, but because of the political reality of the time. The same law or legal system may function in a completely different manner, depending on the political situation. Law does not work of itself, but rather, it is enforced and functions only with mediation of people who are under the influence of the political environment at the time and place.

Although explicit expression of legal text should be consistent with the spirit of democracy, more importantly, it is how people operate (i.e., interpret, apply or enforce) law in practice that is a direct reflection of politics of a society. While people could operate less perfect law more perfectly, they could also operate more perfect law less perfectly. Therefore, the level of legal performance in reality, to a large extent, depends on the level of politics, which is the dynamic interplay of conflicting interest groups.

The Korean case is a relevant example. Conflicting political powers agreed upon a new way of politics in 1987: From confrontation based on naked power to compromise through negotiation; from antagonism between oppressor and the oppressed to dialogue among equal partners.

In this situation, law can play an important role in resolving political differences as well as legal disputes.

Thanks to this new political environment favorable for democracy, the constitution, which had been no more than a political manifesto or an abstractive window-dressing norm without legal effect in practice, has turned into a typical, though the highest, set of laws governing our ordinary life as well as the basis of law regarding cases with political implications. The 1987Constitution has proved to be a foundation for justiciable law. The constitution is now the supreme law of the state in Korea, in reality as well as in theory. The current abundance of decisions by the Constitutional Court results from this kind of Copernican shift regarding the perception and role of the constitution, based on democratic politics

Defectsin the 1987 Constitution

Although this 1987 Constitution has worked so well as a fundamental legal framework for democracy, it is not free from theoretical or functional defects. Above all, it is unusual in modern presidential systems for the president to be limited to one five-year term. It is true that the five-year one term restriction has, to some extent, contributed to frequent change of the president and prevention of reappearance of dictator. However, this single five-year term does not allow an opportunity for the president to be judged by the people and thus feel less burdened in his/her performance during office.

In order to understand this uncommon restriction, we have to recognize the peculiar political situation that existed at the time of the constitutional change.

During the process of drafting the new constitution after the June29, 1987 Declaration by Roh Tae-woo, chairman of the then-ruling party, the ruling power, an ex-military group with vested interests, had to deal with opposition democratic groups represented by two famous life-long activists for Korean democracy, Kim Young-sam and Kim Dae-jung. The two Kims had been archrivals for some time, fighting for hegemony in the democratic movement. It was almost inevitable that both of them would run in the presidential election race. However, none of the three prospective candidates for the presidency, two Kims and Roh Tae-woo, was a sure success. Therefore, they could reach a compromise that would minimize their risk of not gaining office by creating the five-year one term presidential system. As they wished, and as history speaks itself, the three of them were successful in serving the presidency in turn. In this regard, it could be said that the current 1987 Constitution is the product of compromise between the military dictatorship and the two Kims, rather than a proposal resulting from serious consideration of the long-term perspectives regarding the future of the country.

After the three of them completed their respective terms, the problem of the five-year one term mechanism has been more often criticized. Particularly, former President Roh Moo-hyun, who is from a later generation than the two Kims, openly called for constitutional change instituting

a four-year, two-term presidential system in March 2007, during his incumbency.[4] The argument goes: Since a five-year one-term president faces lame duck status as soon as he or she takes the presidency, it is very difficult to launch long-term projects; Different terms and election times of the president, National Assembly members, and local heads and councilors brings about frequent elections which require the expenditure of significant funds and energy. Public opinion was also in favor of the change.[5] Even though the opposition party at the time also sympathized, they were not brave enough to accept Roh's proposal and chose instead not to take the risk of breaking their favorable status quo before the upcoming presidential election in 2007. When the opposition won in the election, therefore, the same single five-year term applied to the new president, as well.

As matter of fact, 2007 was a perfect time to change the clause regarding a single term since the presidential and National Assembly elections would fall closely on the calendar for the first time in 20 years, requiring neither to sacrifice one's term. Since the term of National Assembly members is four years while that of the president is five years, presidential and National Assembly elections would be congruent every 20 years. However, that opportunity had already been missed, and thus the possibility of constitutional change became more difficult. In this sense, the issue of constitutional change would be dormant for a while, but it could revive as a hot issue at any time,

4) See http://www.finnews.com/view?ra=Comm0501p_01A&arcid=000009209...2008-10-30

5) However, the majority of citizens disliked the timing of Roh's proposal, since the presidential election was less than one year away and they were concerned about its impact in their disfavor on the upcoming election.

depending upon political circumstances. Any party can raise this issue again when they feel the need for their political purposes.[6]

Brief Review of the Democratization Process: 1987-2007

Korean democracy, which has been briskly unfolding since the adoption of the new constitution in 1987, is another example to the world of a Korean success story following her successful economic development, building a nation from scratch. Since then, Korean people have enjoyed full and uninterrupted freedom to choose and change their government through popular direct vote in free and fair elections as provided by the law.[7]Politicians are free to compete for political power while citizens enjoy full political freedoms such as free speech. The judiciary is independent and fair in securing the fundamental rights of citizens and in resolving political disputes. The law is no longer merely a paper with writing on it, but rather, now it is a most effective and binding norm to be abided by the political power.

Although the process to consolidate and solidify democracy is still underway, the peaceful transfer of political power has already become a routine practice without any questioning of the validity of elections, an

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6) As matter of fact, National Assembly members formed a forum to discuss constitutional change in June 2008, just after a new term kicked off following National Assembly elections in April 2008. As of October 6, 2008,more than half of the total members across the aisle took part in the forum.

7) Article 67 (1) provides that “The president shall be elected by universal, equal, direct and secret ballot by the people.”

issue directly related with the question of the legitimacy of power which had seriously affected Korean politics by bringing about public resistance and political instability before 1987.

A simple glimpse at the series of changes of political power over the last 20 years will suffice to warrant the above observation. Although incremental, political change has been dramatic. Restricting political leadership to only one five-year term in the 1987 Constitution has inevitably led to calls for a new president every five years.[8] This new system, by reducing the potential risk of reverting to authoritarianism, facilitated the people's inclination to take it for granted that they would have a new president every five years.

Since the president remains the center of political power even under the 1987 Constitution, as it maintains the presidential system, the change of president may amount to that of political power. Upon the new democratic constitution of 1987, which was a telling departure from the previous authoritarian constitution, ruling party leader Roh Tae-woo, a nex-military general-turned-politician, was elected through popular vote in the1987 presidential election. In the 1992 election, Kim Young-sam, of the same ruling party, who was a life-long political activist against military dictatorships, was chosen as president by the people, creating the first "civilian government" in Korea. In 1997, Kim Dae-jung, the symbol for and champion of the Korean democratic movement and another life-long political dissident, was elected as president from the opposition

8) Article 70 provides that "The term of office of the president shall be five years, and the president shall not be reelected."

party and thus, he was successful in bringing about the first-ever peaceful transfer of political power from ruling to opposition party in Korean history. In 2002, Roh Moo-hyun, another political activist and a human rights and labor lawyer, was elected to the presidency after success in an intra-party competition in the ruling party's primary election. In 2007, Lee Myung-bak of the opposition party, who was once a successful CEO of one of the major companies in Korea and the former mayor of Seoul Metropolitan City, was selected as president after a fierce primary battle within his party. Once again, political power moved to the opposition. This series of smooth transfers of power symbolically testifies to the peaceful transition of Korean politics toward democracy.

Since 1987, presidential elections and the ensuing transfers of political power have been conducted in peace. Failed parties have not challenged the validity of the election results. The legitimacy of political power has never been a serious issue in Korean politics under the current constitution. This signifies that free and fair competition for political power through the electoral process has become a routine political process since1987.

It is worthwhile to look into political agendas of the times along with changes in the nature of political power. Since the president has remained a focal figure in Korean politics who not only has enjoyed very broad authority granted by legal and presidential systems, but also has exercised tremendous influence in real politics, examining their political activity in light of the times is still the most effective way to examine the presidents' political background and their ultimate agenda.

Roh Tae-woo Government: 1988-1992

Roh Tae-woo was successfully elected in the first presidential election, in 1987, to be held under the current constitution, thanks to the split within the opposition between Kim Young-sam and Kim Dae-jung. In the presidential election of December 1987, Roh won with mere 36.6 percent of total ballets,[9] while opposition candidate Kim Young-sam received 28 percent, Kim Dae-jung 27percent,[10] and Kim Jong-pil 8 percent. He became president with far less than a majority. The National Assembly was ruled by opposition parties after the general election of April 1988.[11] Roh's minority government was very vulnerable and had great difficulties pushing through his policies.

On top of that, he had inherent circumscription due to his strong affiliation with previous authoritarian President Chun Doo-hwan. Roh was a key player during the 1979 military coup, just after the assassination of authoritarian President Park Chung-hee, masterminded by Chun as they were close comrades from the Military Academy. Therefore, Roh, designated as successor by Chun, could hardly disconnect his government from Chun's and had to bear its negative legacy. However, he could not ignore the people's demands and the political attacks from the opposition to punish Chun for military atrocities carried out during the Gwangju

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9) No run-off for the presidency is provided in the Korean constitution.

10) Two heroes of the Korean democratic movement failed in creating the first democratic government in the 1987 election on the heels of the 1987 Constitution because they split the supporters of the pro-democracy movement.

11) The government party secured only 125 seats out of total seats of 299.

Democratic Movement in May 1980. Finally, Roh gave in and exiled Chun to a remote temple in the mountains.

In order to overcome his political predicament, Roh resorted to unprecedented political maneuvering to secure majority support in the legislature by inviting conservative opposition parties. Finally, Roh's ruling party merged in January 1990 with two conservative opposition parties, led by Kim Young-sam and Kim Jong-pil, and, as a result, a huge ruling government party was created, holding 70 percent of total seats in the National Assembly.[12] Korean political groups then became largely divided into two groups, the conservative ruling party, and the progressive opposition party led by Kim Dae-jung. The former had a strong regional hold in the southeast, while the latter commanded popularity in the southwest of the Korean Peninsula.

Because of his involvement in the military coup and his close connection with the previous government, Roh faced difficulties initiating reform measures for political change. Instead, in the middle of *perestroika*, he did not miss the opportunity to expand diplomatic relations with former communist states, and in particular, the former Soviet Union and China. He also improved relations with North Korea by allowing inter-Korean business exchanges.[13] North and South Korea joined the United Nations in 1991 as separate members. Inter-Korean dialogue finally bore fruit in the historic agreement between the two

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12) "3-Party Merger in Seoul Fails to Resolve Deadlock," *The New York Times*, March 18, 1990.

13) It was announced in the declaration made by President Roh on July 7, 1988. For the details, see Chapter 15.

Koreas in 1991.[14] Roh's so-called "*Nordpolitik*" was a bold step and was perceived with surprise since his government was buttressed by anti-communist military and conservative support. His new policy initiative broke the ice for the thaw of the Cold War on the Korean Peninsula.

Kim Young-sam Government: 1993-1997

After the merge of three parties, intra-party power struggles intensified within the ruling party to secure the presidential candidacy in the coming election of 1992.[15] Kim Young-sam was successful in seizing the party leadership, and then in the presidential election, defeating Kim Dae-jung, his life-long rival. Kim Young-sam enjoyed much more legitimacy than his predecessor Roh Tae-woo since he had no association with Chun's military regime, while Roh had links to the military coup of 1979. That was why Kim called his government the "Civilian Government."He could draw a distinction from the previous government although he was elected from the same party. In spite of his party affiliation with Roh, Kim could have broad leeway since he had been a life-long dissident against authoritarian rule and thus was free from the previous government's negative legacy. This kind of background allowed him more political

14) The full title of this inter-Korean agreement is "Agreement on Reconciliation, Nonaggression, and Exchange and Cooperation between South and North Korea,"with 25 articles and signed by Prime Ministers of both sides. Although it provides details to improve relations, it has not yet been implemented.

15) It was reported that Roh and Kim agreed to change the constitution toward a parliamentary system when they merged. They seemed to have wanted to share power among factions thereafter. However, their agreement was not honored by the breach.

legitimacy with which he could carry out some political reforms to consolidate democratic development.

Therefore, in a sense, it could be said that a full-scale democratization was put into motion by the Kim Young-sam administration. The buzzwords during his government were ‘change’ and ‘reform’. As Kim named his government the “Civilian Government,” he tried to eliminate the remnants of previous military authoritarian regimes. The first thing he did was to establish civilian authority by, in a blitzkrieg, purging political officers in the military, members of a powerful military circle which had led the 1979 coup,[16] and who had dominated important positions in the military. Kim’s intuition, trained and acquired through his long challenge against military dictatorships, enabled him to conduct such a bold measure without hesitation. The military has been under the full control of civilian authorities since then. Now it is unthinkable for the military to be involved in politics or to compete for political power.

The momentum to accelerate his reform came with the accidental disclosure of the corruption of former presidents Chun Doo-hwan and Roh Tae-woo. Until the two ex-general presidents were found to have raked up huge slush funds reaching several billions of dollars, President Kim was, to some extent, reluctant to sever his relations with the previous government that was, in fact, the basis for his success. This was why Kim shied away from assigning them responsibility for the bloody massacre that was the Gwangju Incident of 1980, despite fierce

16) It was called Hana-hoe (Gathering of One), which was a famous faction in the military that led the 1979 coup surrounding Chun and Roh. Its members were composed of graduates of the Korean Military Academy.

demands from opposition and civic organizations, as well as from victims. He took full advantage of this opportunity and completely reversed his direction, going sofar as to indict them for organizing a military coup in addition to corruption. Huge amounts of slush funds testified to the seriousness of corruption at the top leadership positions and the intimate collusion between political power and big business. The two former presidents were given a life sentence and 25 yearsim prisonment, respectively. A dozen of other ex-generals and officers who played important roles in the 1979 coup were also sentenced to prison terms of3 to 8 years.[17)]

Another notable point of interest made by Kim was theim plementation of a "real name financial transaction system."[18)] Before this measure, a financial transaction was not required to be carried out using one's real name. For example, one could open bank accounts in other people's name or using a pseudonym. Rampant underground financial transactions were often attributed to this old system and thus it became a very effective means against illegal trade and corruption. The new system was, in fact, the first step toward creating a transparent society. On the basis of this new system, the government could launch financial sector reforms.

Amid the expansion of globalization after the collapse of the Socialist bloc and the rapid development of information technology, 'globalization'

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17) *JoongAng Daily*, April 18, 1997. Legal issues concerning the military coup will be handled later in Chapter 9.

18) In 1993, President Kim issued the "Emergency Order Concerning Real Name Financial Transactions and Protection of Secrecy," based on Article76(1) of the Constitution. This order was replaced by a legislative statute in1997 by Law No. 5493.

was another catch phrase of the Kim Young-sam administration, responsible for governing the heavily trade-dependent state of Korea. Globalization was utilized as a means to change and reform outdated practices prevailing in Korean society. Acquiring memberships in the WTO in 1995 and OECD in 1996 forced her to change relevant domestic laws and regulations to keep up with global standards, resulting in relaxed financial liberalization. The financial crisis and IMF bailout in 1997 was, in part, blamed on hasty reform of the financial system. Paradoxically, the IMF bailout became a watershed to expedite financial reform and to extend global standards and promote transparency in the ensuing government of Kim Dae-jung, who won the presidential election in December 1997,in the middle of the financial crisis.

Kim Dae-jung Government: 1998-2002

The financial crisis for which the Kim Young-sam government was responsible helped, in part, opposition candidate Kim Dae-jung to prevail in the presidential election of December 1997. The president-elect was busy attacking the financial crisis even before his inauguration. The highest priority was to overcome this crisis as soon as possible. The IMF bailout was not possible without cost. The IMF required substantive reform in the financial structure, business practices and other related areas such as labor relations in the name of ‘global standards,’ which was a buzzword for the Kim Dae-jung government. The crisis greatly contributed to enhancing transparency, in particular, in commercial activities. Though the IMF imposed some difficulties, the new government took advantage of it in a rapidly reforming Korean society.

The success of Kim Dae-jung in the 1997 presidential election was another boost of momentum for the development of Korea's democracy. For the first time in modern Korean history, peaceful transfer of political power from the ruling party to the opposition party took place. Although the president is to be replaced every five years, due to the five-year, single term constitutional restriction, transfer of power to an opposition party is a different issue. For the first time, political power elites were extensively replaced by those with progressive political ideas. The emergence of progressive leadership for the first time in South Korea dramatically changed the political environment.

The most notable change occurred in the new president's policy toward North Korea. His so-called "Sunshine Policy" was aimed at engaging North Korea through dialogue, exchange and cooperation instead of confrontation. At last, an inter-Korean summit was held in June 2000, the first time since the division of the two Koreas. North Korea was no longer the South's archenemy, but rather, now a partner with whom to work together toward unification. This new perception of North Korea brought about a conflict of ideology within South Korea. As far as inter-Korean relations were concerned, there had been tremendous change. To name but a few, various levels of inter-Korean official meetings including ministerial-level talks took place; divided families were given chances to meet separated bloodlines; inter-Korean economic cooperation was dramatically increased; a substantial amount of humanitarian aid was provided; even tourist visits to North Korea became available. This turnabout of government policy inevitably forced related laws to be

reviewed and changed.[19] However, North Korea's continuing high-handed attitude and brinkmanship tactics, which are an extraordinary departure from international norms, have often backfired, dousing South Korean sympathy for the North, and made Kim's softer policy more vulnerable.

Roh Moo-hyun Government: 2003-2007

After two consecutive terms served by two giant political heroes, the sudden advent of Roh Moo-hyun once again transformed Korean society in manyways. Roh, who was an active labor lawyer and an intransigent politician fighting against prevalent unprincipled political maneuvering by opportunistic politicians with vested interests and thus remained a political minority, was successful in the 2002 presidential election. As a candidate of the progressive government party, he defeated the conservative opposition challenger. He opened a new erain Korean politics after the two Kims, who had been tremendously influential in Korean politics over the last four decades and exercised almost abso luteauthority, in particular, on their factions based on regional strongholds. Roh did not have the type of charismatic leadership that the two Kims had commanded.

The two Kims had built up formidable fortresses and wielded unquestionable leadership through their vigorous and unintimidated life-long challenge against authoritarian leadership. In a sense, a strong adherent solidarity centered on these leaders was required in order to overcome authoritarian repression in this period of hardship, resulting in

19) For more details, see Chapter 15.

authoritarianism in opposition circles too. After each of them stepped down upon completion of their terms, the political landscape changed with the disappearance of such monolithic charismatic leaders. Therefore, major factions surrounding the two Kims had been divided and their coherence had been fragmented. This new kind of political environment has escalated the intra-party struggle, which, by default, entailed enhanced democracy within parties. That is why 'post-Kims' Korean politics has displayed a very distinctive picture that was unable to be seen during the Kim Young-sam and Kim Dae-jung eras.

With this new political environment, the progressive government party nominated its presidential candidate through a primary system similar to that in the United States that enabled a large number of ordinary party members to participate in the important political process. For the first time in Korean political history, a party candidate was chosen through public participation in the political process. This new democratic process by the government party gave a very fresh impression to citizens who were tired of faction leaders' authoritarian politics, and who were eager to see newly upgraded politics after the two Kims receded from power.[20)] The primary race was an unpredictable political drama that people had never experienced, and so it was highly successful at drawing public attention. Thanks, in part, to this new process, Roh won the election, in addition to his bold pledge to move the capital from Seoul to the Chungcheong region in order to correct excessive disparity between Seoul

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20) As a reaction, the major opposition conservative party also adopted a kind of primary selection process, but failed to draw broad public attention due to the fact that the initiative was belated and the competition was dull.

and outlying areas.[21] Roh named his government the "Participatory Government," predicting more expansion of citizens' participation in political processes.

Although Roh continued the Kim Dae-jung government policies in principle,[22] the character of his government was different. The mainstream of the new power elite group was made up politicians from the progressive young generation known as the "386 Generation."[23] Roh wanted to reform Korean society on the basis of "principle and common sense" by rectifying unprincipled privilege, unreasonable practices and irregularity by vested interest groups. The top priority of the Roh government was to remove diehard authoritarian elements prevalent in Korean society. He wanted to transform Korean politics into a more principled affair and to overcome serious regionalism burdening Korean politics. He also tried to alleviate over-concentration in the Seoul metropolitan area and facilitate development of local areas through what helabeled his "Balanced Development" policy. Capital movement was devised in this regard.[24] In addition, approximately 180 major public

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21) About Roh's campaign platforms, see *Yonhap Yearbook 2003*, pp. 191~193; http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid=10... 2008-10-30

22) For example, the Roh government also emphasized equity and distribution, and continued the Sunshine Policy. Roh held the second inter-Korean summit in October 2007, just before the end of his term.

23) This generation implied that those who were in their 30s(hence "3"), and attended universities in the 1980s (hence "8"), and were born in the 1960s (hence "6"). They are the first generation of Koreans in their childhood and youth to grow up in a relatively affluent society through rapid economic success. In particular, in their 20s in 1980s, they played a decisive role as the force of student power in the peaceful uprising which ended decades of dictatorial rule in 1987. Andrei Lankov, "Fiasco of 386 Generation," *The Korea Times*, February 5, 2008. See http://www.koreatimes.co.kr/www/news/special/2008/10/180_18529.html

enterprises and agencies were slated to be moved to various regions throughout the country. However, the new Lee Myung-bak government seems to have a different idea regarding this issue and plans to modify it.[25]

Although Roh had been criticized for his ideological policies and for employing too many young progressive elements, he managed to make a significant contribution to political reform. One example was the reform of the election law that prevented money from driving election results. Measures were also carried out to rectify past wrongs under authoritarian rule. Many important measures to reform law and institutions for democratic development were carried out during his time in office.

Roh's effort to dismantle authoritarian remnants seemed to damage even legitimate authority. After authoritarian political heroes faded out of politics, some degree of disorder was predictable. Lack of orderly alignment within the ruling government party due to fragmented factions and lax solidarity appeared irresponsible as the government party. Roh's attachment to "principle and common sense" appeared inflexible and his nationalistic view led to criticism of him as being an apparent ideologue sticking to nominal causes at the cost of pragmatic solutions.

As a result, in the December 2007 presidential election, people chose former CEO and former Mayor of Seoul Metropolitan City Lee Myung-bak, who emphasizes economic growth and market economics. He pursues

24) In fact, he became the first president to retreat to his hometown in the countryside. He was known to have planned to engage in civic activity for environmental protection as well as for efforts to vitalize regional development.

25) *Yonhapnews*, April28, 2008.

"small government and big market." His business friendly pro-enterprise policy naturally gives weight to efficiency and competitiveness. The most prominent platform during his campaign was to build a 500 km-long canal from Seoul to Busan. His ambitious project has faced strong opposition. Whether he can implement his pledge to construct this Grand Canal and how he will resolve the issues surrounding this matter will be a major test for his leadership.[26] His government's concept is "pragmatism." He promised to swing the pendulum that had been tilted leftward for the last ten years back to the right. We have to wait and see what kind of results his government will be able to accomplish.

This brief introduction of the last five governments since 1987has displayed a very normal process of political development of Korea: Gradual consolidation of the legitimacy of political power; Move from authoritarian to democratic politics; peaceful change of political power from conservative to progressive camps, from left to right. Political activities have abided by the law and stayed within the existing legal framework. The future political process is also expected to unfold within the existing legal process.

At this moment, regression to authoritarianism is unthinkable as well as impossible. Before Korea successfully passed Huntington's so-called "two-turnover test"[27] through the opposition party's second victory in the 2007 election, she had already crossed the bridge of no-return, thanks to

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26) It was not listed among 100 policy agendas of Lee government announced recently. http://news.khan.co.kr/kh_news/art_print.html?artid=200810071830455 2008-10-31

27) See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1993), pp. 266-67.

people's perception, commitment and support for democracy that has grown through resistance against authoritarian rule during the last several decades and the regular change of presidents every five years. Furthermore, Korea's economic status is not compatible with that of authoritarian rule, which obstructs development of liberal and creative thinking that the modern era of Korea's knowledge-based economy requires.[28)]

28) When we look at the correlation between economic development and democracy, Korea's current level of wealth would appear not to allow regression to authoritarianism. *Ibid*., pp. 59-72.

Chapter 3. Reform for Fair Elections

Since sovereign power resides with the people in a democratic society, it is very important for citizens to have an outlet through which to express their views, opinions or critiques of the political process. How citizens participate in the important political decision-making processes, such as elections, is one of the most important indicators of the level of democracy,

Expansion of citizen participation in the political process has been reinforced since political change in 1987. In particular, the last government of Roh Moo-hyun, at the start, named his government the "Participatory Government", and tried to facilitate and broaden more participation by citizens in the public process. He also emphasized such participation in the form of the duty of a responsible citizen in order to maintain and improve the quality of democracy.[1]

As matter of fact, Korean modern political history itself has testified to the importance of citizen participation for democratic development. Authoritarian governments had been strongly challenged by citizens, and particularly students, who had played a critical role in toppling or reforming them. After changing the political landscape in 1987, those who had engaged in democratic movements turned their attention to strengthening citizen participation in the public process and monitoring

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1) After his retirement in February 2008, he showed his interestin continuing his political ideal of enhancing participatory democracy byopening a website for policy discussion on-line in September 2008. Seehttp://www.democracy2.kr

public power in various ways, such as *pro bono* service and participation in civic organizations(NGOs). Unless citizen power is balanced against public power, public power is liable to overstep its bounds at any time. Citizen participation is a *sine qua* non for democratic development. Democracy is dependent on the participation of an awakened citizenry in society.

Full-blossomed freedom of press and widespread information technology such as Internet have expedited the free flow of information, and thus greatly facilitated citizens' participation in the political process and public *affairs. Inter alia,* elections are the most basic and important mode of citizen participation in the political process.

In this regard, the most important mechanism enabling democracy to work and to hold representative governments accountable is to guarantee people the right to select their representatives and government regularly in a free and fair way, without interference. This is why elections are so important for democracy. Elections are the mechanism that enable politicians to compete for power with their platforms and policies, and thus to renew politics and make politics dynamic. Therefore, free and fair elections are of the utmost importance for democracy.

The people's demand for political change in Korea up until1987 had been centered on the right to choose their representatives and government. As described above, the key component of the 1987 Constitution was the restoration of citizens' right to elect a president directly in order to prevent distortion by indirect vote.

Equal Value of Vote Emphasized

Korean democratization has progressed, with improvements in the election system. Its democratization process has highlighted the importance of elections to improve the quality of democracy through landmark decisions by the Constitutional Court, which was established by the 1987 Constitution.

Under an authoritarian government that also controls the legislative body, electoral district demarcation often tends to be designed in favor of those in power. Korea was not an exception. However, this practice was challenged, and finally a Korean version of the Baker v. Carr decision was made in 1995, when the Constitutional Court ruled that excessive population disparities in the districts for the National Assembly election violated the constitutional principle of equality.[2)]

In the past, the ruling party commanded more support from rural areas than from urban areas. Since the 1980's, major parties recruited sweeping support in a respective region due to heightened regionalism. Therefore, the parties and incumbents tried to draw or maintain electoral districts in favor of their vested interests despite significant changes in their population. As a result, population disparity grew more serious as time went by. Such disparity might hurt the equality or value of a ballot.

On the basis of the equal protection principle of the constitution, the Constitutional Court took on the issue of population disparity by

2) 7-2 KCCR 760, 95 Hun-Ma 224, December 27, 1995.

reviewing the equality of the weight of a vote, ruling:

"When there is inequality in the weight of votes, the Court reviews the rationality behind such inequality as a product of discretion within the constitutional limits, and when it cannot be perceived as reasonable even in light of various non-population-related factors that the National Assembly may consider, it is deemed unconstitutional."[3)]

Thereby, by a majority decision of the Constitutional Court, a permissible maximum ratio between the most populous district and the least was set at 4:1, or equivalently set the permissible maximum deviation from the average district at 60 percent, that is, 160 percent to 40 percent. Since the average population per district was175,460, the most populous district could not have more than 280,736 votes and could have no less than 70,184.[4)]

This decision prevented the give-and-take practice among politicians surrounding electoral redistricting and placed a cap on the legislative discretion. Thus, the legislature had to revise the relevant law[5)] in order to abide by the decision. Over-populated districts were partitioned while under-populated districts were combined or re-partitioned.

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3) The Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court*(Seoul: The Constitutional Court of Korea, 2001), p. 178.

4) *Ibid*., 178. The minority opinion was supported by a ratio of 3:1,which was adopted five years later.

5) The governing law on this matter is the Official Election Act(March 16, 1994, Law No. 4739).

Five years later, the Constitutional Court again scrutinized this issue and changed its decision, ruling that the ratio between the most populous and the least should not exceed 3:1,that is, the maximum deviation from average electorate should stay within 50percent.[6] The legislature honored the Court's decision by revising the law and also created a special committee to readjust electoral redistricting before the next regular general election for National Assembly members.

Change in Election System for National Assembly Seats of Proportional Representation

The Korean National Assembly is comprised of two types of members: members selected by constituencies and members earning seats through proportional representation. Before the Constitutional Court intervened in 2001, seats for proportional representation had been allocated in proportion to the total number of ballots that each party received in the general election for National Assembly constituencies. Each electorate had only one vote for a candidate for its constituency, but did not have a separate vote for a party or a roll for proportional candidates recommended by a party. This old system identified the vote for a candidate with the vote for that candidate's party in allocating proportional seats.

The Constitutional Court decided that this type of proportional representation system by one ballot for the constituency was unconstitutional on the basis of democratic principles of direct election and

6) 13-2 KCCR 502, 2000 Hun-Ma 92, etc., (consolidated), October25, 2001.

equal protection in election. This was because it would not allow a separate vote for the party even though the list for proportional candidates was selected by the party.[7] Furthermore, the 'one person one vote' principle could not reflect voters' will in favor of independent candidates as long as the selection of proportional seats was based on constituents' choice for representative. Votes in favor of independent candidates could not be counted for proportional seats based on party affiliation.

The National Assembly thereby revised the pertinent law, allowing a separate vote for preferred party, which would be used as grounds for allocation of proportional seats. Therefore, one registered citizen can now exercise two votes, one for preferred candidate, and another for preferred party, in what is known as a combined-independent system. This 'one person, two votes' system is extended to elections for council members of local governments, as well.[8] As for proportional seats for the National Assembly, no less than 3 percent of all the ballots for the party or no less than 5 seats from constituencies are required in order to have allocation of the quota, while for councilors of local governments, no less than 5 percent of all the counted ballots for the party is required.[9]

This new system was adopted for the first time in the general election of 2004. A relatively small party could win assembly seats through this proportional system as long as it secured at least 3 percent of the total

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7) 13-2 KCCR 77, 2000 Hun-Ma 91, etc., (consolidated), July 19,2001.
8) See the Act on Official Election, article 146(2).
9) *Ibid*., articles 189(1), 190-2(1).

ballots for the party throughout the country. This system greatly contributed to the ascension of a leftist-leaning progressive party in the National Assembly as a visible force for the first time in Korean constitutional history. The Democratic-Labor Party won only two seats out of a total of 243seats from the constituency ballots. However, it secured eight out of 56 seats of proportional seats with commanding 13 percent of ballots in favor of the party. This means that many voters cast split ballots in their choice of district representative and proportionally representative party. A similar trend was visible in the 2008 general election, bringing in eight unexpected seats from proportional ballots to a party that earned six seats from direct balloting for constituency representative, although the party was formed in haste just one month before the election, and was made up of those who failed to get nominated by Lee Myung-bak's Grand National Party.[10)]

It goes without saying that this new system will contribute to reducing the distortion of voters' will and preventing the loss of ballots for proportional seats. However, this new system cannot go so far as to improve democracy within a party. The list of names for proportional candidates has been provided, in general, by the leadership of each party, without first seeking appropriate consensus from the party. A party leadership may select proportional candidates while taking into consideration

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10) This is the story of Pro-Park Solidarity which was formed quickly just one month before the general election, with supporters professing that their party was launched for Park Geun-hye, who competed against Lee Myung-bak in the party primary. This party was made up of those who failed tobe nominated as candidates for the Grand National Party, which had become the ruling party through the success of Lee Myung-bak in the presidential election a month earlier.

many factors, such as their professional expertise, representation of important social groups or regions, or their contribution to the party. However, this proportional system has often been utilized as a means to collect money secretly in the name of political donations. In other words, proportional seats have often been sold clandestinely at a high price by the party leadership who needs money for election or for the management of the party.[11] In spite of the merits of a proportional representative system, it has been misused and has led to distrust of politics as well as the system. In this regard, intra-party democracy and transparency in the selection process is very important for the development of the proportional system.[12]

Equal Treatment for National Assembly Candidacy Deposits

According to the relevant law at the time,[13] candidates for National Assembly seats were required to deposit substantial amounts of money to the Local Election Commission that was created to prevent an over-abundance of injudicious candidates from running and to ensure a clean and fair election.

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11) Scandals of money politics surrounding selection of proportional seats were, once again, disclosed after the general election in2008, and were subsequently investigated and prosecuted. For the details, see http://english.donga.com/srv/service.php3?bicode=050000&biid=200... 2008-10-09

12) The issue of intra-party democracy will be discussed, in part, in the next chapter.

13) The Election of National Assembly Members Act (revised by Law No. 4003, March 17, 1988), articles 33 and 34 were at issue. This Act was integrated into the comprehensive election law for public officials. That is “the Act on the Election of Public Officials” (Law No. 4739, March 16, 1994), which has also been frequently revised since then.

Independent candidates were required to deposit two times more than those who earned party nominations. The deposit amount for an independent was twenty million won (about U.S. $ 20,000), while that for a party nominee was ten million won. Furthermore, the deposits, minus some expenses, were to be forfeited in the event that a candidate resigned, nullified their registration, or failed to gain one third of the votes.

Presumably, these kinds of discriminatory policies requiring differing amounts of deposits and requiring its forfeiture in the event a candidate did not continue had a significant chilling effect on prospective candidates. The laws were challenged, and the Constitutional Court took the case. The Court ruled that the laws at issue violated the basic principles of people's sovereignty and of free democracy in relation to their right to equality(Article 11), right to vote (Article 24), right to hold public office (Article25), and equal elections (Article 41) protected by the Constitution.[14)]

The Court concluded that the amount of the deposit required is excessive in consideration of the average income and savings of ordinary citizens, and in particular, those in their twenties or thirties, that discriminatory deposit practices give independent candidates substantial competitive disadvantages and suppresses their candidacy, and that forfeiting of the deposit by candidates who fail to gain one third of the ballots is too stringent and unprecedented in comparative legal perspectives.

14) 1 KCCR 199, 88 Hun-Ka 6, September 8, 1989.

However, the Court did not pronounce the provisions at issue unconstitutional *per se*, but rather, found them to be inconsistent with, or nonconforming to, the constitution. Therefore, the ruling was not immediately effective upon announcement of the decision.[15] Instead, the legislature had a political obligation to change the law at issue in accordance with the decision. The National Assembly later enacted a substitute law,[16] which required an equal deposit of ten million won from independents as well, and relaxed the conditions of forfeiture.[17]

The new law was challenged 10 years later, after it increased the amount of deposit to twenty million won in consideration of growing living standards and inflation in 2000. The Constitutional Court again ruled that the deposit of twenty million won was excessive and thus unconstitutional.[18] Therefore, the legislature revised the provision, lowering the deposit requirement to fifteen million won. This, too, was challenged, but the Court ruled that fifteen million won was not an exorbitant amount, and it was deemed constitutional.[19]

As we have seen above, the legislature has often behaved in ways that work to advance the vested interests of incumbents or party politics,

15) Dissenting minority opinion argued the provisions at issue were unconstitutional and thus the ruling should become immediately effective.

16) It was the Act on the Election of Public Officials and the Prevention of Election Malpractices (Law No. 4739, March 16, 1994), which was later, in 2005, replaced by an Act with the new title, The Official Election Act (Law No. 7681, August 4, 2004).

17) Article 56(1) of Law No. 4739.

18) 13-2 KCCR 77, 2000 Hun-Ma 91, etc., July 19, 2001.

19) Constitutional Court Official Billet in 84-42, 2001 Hun-Ma 687,etc., August 21, 2003. For the amount of deposits for different candidacies, see the Official Election Act, article 56.

ignoring public interest and basic legal principles. The president's authority to veto may not be an effective means to contain arbitrary legislature, when, in particular, the ruling and opposition parties collude. The Constitutional Court is practically the only and the last body able to rectify unreasonable discretionary actions of the legislature in Korea. The Court has not hesitated to deal with these kinds of political issues since its launch in 1988.[20]

Reform of Election Law for Clean Politics

Election law is one of the areas that have faced the most drastic changes since democratization. Under authoritarian rule, rigged elections or gerrymandering facilitated the government party's win in elections and its command of majority in the legislature. Even public agencies were mobilized in favor of the powers-that-be. At the same time, election campaigns had been strictly regulated, with restrictions on political freedoms such as free speech. However, since the top and basic priority of democracy is a fair competition for political power through elections, the election law to secure a free and fair election became of the utmost importance. It goes without saying that democratization brought about changes in election laws, lowering restrictions on campaign activities while strengthening regulations on money politics. Another aspect of the problems related to elections was that election-related law used to be soft on violators, particularly when incumbent National Assembly members were concerned. Since they had the authority to make election law, they

20) For details of the Constitutional Court activities, see Chapter 8.

enacted legislation that favored their vested interest in maintaining their position.

Although some change was made in 1991, before National Assembly elections took place in 1992, under the catch-phrase of "tying money, untying mouths," more drastic change was made in 1994, after the presidential election of 1992. A more liberal atmosphere since 1987 paradoxically exacerbated a more undisciplined election, enabling irregularities on money campaigns to run rampant. Citizens called for grave reflection on dirty, underhanded elections and demanded reform for clean elections through strict guidelines to prevent irregularities.[21)]

A new law on elections was enacted in 1994 by incorporating all the separate laws concerning elections, such as the presidential election law, National Assembly election law, local government councilor election law, and local government head election law, into one comprehensive law known as "The Act on Official Elections and Prevention of Election Irregularities."[22)] The most important characteristic of this new law was to expand the public burden of expense in order to reduce money politics.[23)] In addition, election dates were prescribed by the law in order

21) Kim Young-sam, who won the 1992 presidential election, looked back on the huge amount of money he used for the election in his memoir, saying that "the state will be ruined due to elections." Kim Young-sam, *Kim Young-sam hoegorok [Memoir of President Kim Young-sam],*Vol. 1 (Chosun-ilbosa, 2001), p. 249.

22) Law No. 4739, March 16, 1994. The title of this law was changed to the 'Official Election Act' in 2005.

23) Since the 1962 Constitution, the constitution has provided legal grounds for borrowing election expenses from the national treasury by prescribing that "Except as otherwise prescribed by statute, expenditures for elections shall not be imposed on political parties or candidates." See 1987 Constitution, article 116 (2).

to prevent arbitrary decisions on dates based on political considerations.[24)]

Still, elections needed huge amounts of money due to the need to mobilize masses of people. Ahead of the 1997 presidential election, TV debates and TV advertisements were adopted in order to obstruct the politics of demagoguery incurring mass mobilization and to facilitate policy-oriented campaigns. The difficulty in getting rid of money politics was once again highlighted when it was disclosed that the aides of a presidential candidate were to have received a truckload of cash during the 2002 presidential election campaign. A similar scandal happened in the previous presidential election of 1997.[25)]

With this backdrop of ugly slush fund cases for elections, there form-minded Roh Moo-hyun government revised the election law to impose more concrete restrictions on the handling of campaign expenses, such as transparent transactions through bank accounts, while allowing more freedom of campaign activities. Above all, two measures have proved most effective: 1) An election shall be invalidated if a candidate is fined one million won (about a thousand U.S. dollars) or more, or if a candidate's family member or close assistant is fined three million won or more[26)]; 2)Very high monetary rewards and fines shall be given. For example, an informer of election irregularities can receive up to 50 million won (about 50 thousand U.S. dollars), while an electorate who

24) The Official Election Act, article 34 (revised March 12,2004).

25) For the 1997 election, high officials of national tax office were mobilized to collect money from businesses. See http://www.chosun.com/svc/news/www/printArticle.html 2009-11-01

26) The Official Election Act, articles 263~265.

has received money or monetary treatment shall be fined 50 times the amount received.[27] A scourts and the Election Commissions strictly enforced these election provisions, citizens as well as candidates were very much concerned about violations. This new mechanism greatly contributed to making elections cleaner.[28] Some praised that it brought about, to some extent, an election revolution by making money lose strength. In this regard, elections since 2004 have been a departure from the previous style of election politics and significant improvements have been made toward ensuring cleaner elections.

Campaign methods also underwent significant change to enhance fairness. First of all, mobilization or intervention of officials or affiliated people to help the ruling party had been drastically reduced since democratization and has almost disappeared now. Candidates from the ruling and opposition parties can, to a large extent, compete fairly. As mass mobilization was not allowed from 1997, debates on TV and Internet campaigns have become more important.

No doubt, making distortion of popular will through money politics, official interference, and mass manipulation more difficult has greatly facilitated the peaceful transfer of political power. While the ruling government party had always commanded a majority in the legislature under authoritarian rule, since democratization, it has no longer been

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27) *Ibid*., articles261~262-3.

28) The number of cases challenging validation of election due to violations on election laws was significantly decreased to 39 cases in the 2008general election in comparison to 62 cases of the 2004 general election and 68cases of the 2000 general election. See Supreme Court of Korea, *bodo-jaryo [Press Release]*, October 20, 2008, p.2.

taken for granted that the ruling party can maintain the majority of National Assembly seats.[29] Elections in Korea have functioned as the quintessential mechanism calling for accountability of the government and representatives as practiced in an advanced democratic society.

However, one of the major obstacles blocking the way toward the development of democracy in Korea, where race and religion have not been raised as serious social issues, is regionalism. The dominance in a particular region by a particular party has prevented people from calling for responsibility and accountability of political powers due to their provision of blind support without consideration of other factors such as party policy or the quality of candidates. Politicians have exploited this emotional regionalism in election campaigns.

Former military leaders of authoritarian rule were from Gyungsang Province, in the southeast, and they discriminated against the Cholla Province, in the southwest, which had been a stronghold for Kim Dae-jung. Kim Dae-jung was successful in the 1997 presidential election thanks to overwhelming support from southwestern voters as well as progressives. On the other hand, Kim Young-sam was from the southeast

29) The government party secured 125 seats out of total 299 seats in the 1988 general election, while 149 seats in 1992, and 139 seats in 1996.Under the Kim Dae-jung's government, the ruling party got 133 seats out of total seats of 273 in the 2000 general elect on. However, the Rho Moo-hyun's government party successfully exceeded more than half with 152 seats out of 299 total seats. For the first time in 16 years, the government party commanded majority in the legislature through the 2004 general election. In the latest general election in 2008, the ruling party of Lee Myung-bak government was once again successful in securing majority with 153 seats out of 299 seats.

and took over the conservative group of authoritarian leadership through a party merger in 1989. Roh Moo-hyun, who was from Kim Dae-jung's party, also received overwhelming support from the southwest in the 2002 election, while Lee Myung-bak, from Kim Young-sam's party, commanded one-sided support from the southeast in the 2007 election. The same disparity has been evidenced in the elections for congressional members. The political party that enjoys a stronghold in the southeast of the peninsula can hardly secure seats in the districts of the southwest, and vice versa. Therefore, the real battlefield for the campaign is in and around the large metropolitan area of Seoul.

This kind of strong political affiliation with a particular region has hindered the reasonable judgment of voters and instead enforced blind emotional choice based upon locality. This trend has survived into the post-Kims era. Overcoming this undesirable regionalism is an important task ahead for Korean society. One of the suggestions for ameliorating the negative effect of regionalism on democratic development has been to adopt a multi-representation system, selecting several National Assembly members from one constituency. This would give more opportunity to the candidates from non-dominant parties to be selected. However, vested interests of incumbents have obstructed the adoption of such a plan. Such system would contribute to promoting accountability of political party.

Chapter 4. Task Against Corruption Prioritized

Government measures against corruption had been an important agenda item even before the 1987 democratic revolution. However, the government's approach to this matter is contradictory. Under authoritarian rule, corruption tended to be systemic, since it was a structural matter. In particular, collaboration between political power and business was closely intertwined. Therefore, the proclaimed war against corruption was likely never to climb above the lower echelons of bureaucratic functionaries, or was taken advantage of for political purposes. This is because critical public scrutiny, including free press, was negligible, and legal mechanisms needed to attack corruption effectively were lacking.

On the other hand, democratic governments after 1987 had to handle this matter seriously, since political power should respond to the people's demands as people have the right, *de facto* as well as *de jure*, to choose their government and representatives. Since government in a democratic society sustains itself through garnishing popular support in regular elections and thus has to respond to public opinion and expectations, corruption that undermines its legitimacy is one of its most worrisome enemies. Therefore, corruption has become a very important social issue with strong emotional components. Reinforced public scrutiny by free press and citizens' active complaints, in tandem with the expansion of information technology such as Internet has contributed to challenging this matter more effectively and openly.

Handling Corruption of Political Powers

A meaningful crackdown against the corruption of politicians and high-ranking officials was not possible until the first 'civilian' government of Kim Young-sam (1993-1997). The government of Roh Tae-woo, although the first government put into power by the 1987 Constitution, was still, to some extent, an extension of the military, and carried over vestiges of the previous military authoritarian government. His government relied on the power base of the previous government even though he was elected by direct popular ballot, and thus was in an awkward position to enforce bold policy and undermine vested interest groups. However, the Kim Young-sam government, though it succeeded Roh's government party, felt fewer burdens from implementing reform measures thanks to his political background. For example, the disclosure of assets of high-ranking officials was enforced by law for the first time in 1993.[1) This system has been very useful in bringing about a chilling effect against official corruption. It is not rare for a high-ranking official to resign due to property speculation or dubious real estate dealings. Ordinary citizens are very sensitive to this matter as a reflection of enmity against privileged groups. In combination with adoption of parliamentary hearings for confirmation of appointment of high officials,

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1) For the precise law concerned, see the Official's Ethics Act(Law No. 3520, December 31, 1981), which has been frequently revised to heighten and reinforce the standard of official ethics. The Kim Young-sam government revised this law to promote transparency of accumulation of assets of public officials on July 11, 1993 as Law No. 4566. The scope of assets of high-ranking officials who should register assets was expanded. In particular, the assets registration of higher officials should be open to the public.

public disclosure of their assets has been found a very effective deterrent against official corruption.[2)]

Like pre-1987 politics, unfortunately, the transitional period of democratization after 1987 proved to be a plutocracy. Before 1987, buying votes had been prevalent as the government turned to authoritarian tactics and attempted to justify its legitimacy with support in the election. However, along with liberalization after 1987, competitive campaigning for power in a freer atmosphere was accompanied by less disciplined compliance with relevant laws. Naturally, an election required a huge amount of money. Money politics had been carried over and remained a routine practice for some time, and thus dies hard even more than 20 years after 1987 democratic revolution.

Political leaders, regardless of belonging to ruling or opposition groups, needed money to keep their factions in line. The degree of influence wielded by the political leadership was in proportion to their ability to raise and mobilize money. The most prospective contributors were businesses, which not only had money, but also needed politicians' help to further their business interests. Politicians received money from business circles in return for their collusion. This symbiotic relationship between politics and business has lasted several decades.[3)]

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2) This problem has been carefully screened and challenged in the National Assembly's hearings for appointment of high-ranking officials such as the prime minister, cabinet ministers, and justices, who sometimes failed to pass scrutiny.

3) It was proven that former Presidents Chun and Roh racked up huge slush funds.

The murky relationship between business and political worlds was most active when funding a presidential election, which would require an astronomical amount of money in order to mobilize people and to buy votes. Paradoxically, democratization contributed to the increase in the cost of politics since authoritarian coercion was removed. Fierce power competition through elections in a liberal atmosphere demanded more money. The ability to mobilize money was critical to success in an election. Illegal fund raising for the presidential elections of 1997 and 2002 were finally investigated and the results were publicly disclosed.[4)] This kind of disclosure was possible since the society has become more transparent after 1987. Since 1987, the press and citizens have enjoyed full freedom of expression while unrestrained authoritarian state power has been sublimated and the reach of the government has been limited by the rule of law. A more important reason was that political power was transferred to the opposition party and placed in the hands of a progressive group that emphasized moral supremacy, and did not have as close of a relationship with business as the opposition conservative party, which had been in power for quite a long time until the Kim Young-sam government relinquished power to the opposition through the 1997 election. The election camp illegally collected money from business circles. It went so far as to utilize government bureaucrats who were in office to wield public authority over businesses who, in return for funds,

4) The disclosure of presidential election slush funds and the ensuing investigation was closely related to the change of political power. A brother of the candidate from the ruling government party was found guilty and given a prison term after the party failed in the 1997 election. For the 2002 election, the conservative opposition candidate’s campaign camp, which had an amicable relationship with business, was found to have collected a significant amount of money from major businesses, and even received a truckload of cash from an undisclosed business.

had ambitions to prosper based on favors from the incoming government. Of course, no one believed that this was the first case of its kind. This was the first case that was publicly disclosed and faced with a full-scale investigation by state authorities. This was a direct result of democratization. Democracy has a strong affinity for, and even accelerates, disclosure, openness and transparency.

Those who were close to the core of the power were frequently involved in bribery scandals for their own private interests or, presumably, as surrogates for the center of power. Relatives of presidents, including their sons, were also in the vortex of corruption scandals. For example, President Kim Young-sam's son was involved in politics and wielded significant power.[5] He was indicted, found guilty during his father's term.[6] The children of President Kim Dae-jung were also no exception, with his two sons found guilty during his service.[7]

However, this kind of ugly situation has been greatly improved as transparency has been reinforced over time. In particular, the situation has dramatically improved since the inauguration of the Roh Moo-hyun government. Roh had strong desire to reform old undesirable practices in Korean politics and put an end to unlawful privileges of the vested interests. He tried to solve this problem by inviting more participation by

5) He was called "Small President". He influenced the appointment of many of his acquaintances to important positions, such as cabinet members.

6) http://english.chosun.com/cgi-bin/printNews?id=199705170357 2008-10-30

7) http://english.chosun.com/cgi-bin/printNews?id=200211110004 2008-10-30
http://english.chosun.com/cgi-bin/printNews?id=200305300005 2008-10-30
http://english.chosun.com/cgi-bin/printNews?id=200306260014 2008-10-30

citizens in the political process and opening the public domain as much as possible. The electronic government pursued by the Roh administration was also a part of these efforts. Many laws were revised and enacted to reduce corruption and to enhance transparency. Clean elections are one of the most prominent achievements of the Roh government, as discussed. Unlike his predecessors, President Roh Moo-hyun did not have any of his family members behind bars. Since 1987, in the beginning, former Presidents Chun and Roh themselves were accused of corruption, and then, both President Kims' sons were jailed, but none of President Roh Moo-Hyun's family was even indicted. This symbolically displays the gradual improvement in cleanness of Korean politics.

Creation of an Anti-corruption Agency

As a new mechanism to face corruption effectively, the National Assembly enacted the Anti-Corruption Act in 2001,[8)] which led to the creation of the Korea Independent Commission Against Corruption (KICAC) the following year. This was the outcome of six years of campaigning by NGOs that had been consistently demanding action since 1995 and the bill giving mandate to the KICAC that was proposed by the opposition party ruled by Kim Dae-jung in 1996.

Originally, civic organizations and the leading opposition party demanded a special prosecutorial system be set up as a permanent standing office. However, what resulted was this anti-corruption agency, which emphasized

8) Law No. 6494, July 24, 2001.

its role as a policy-oriented agency rather than an office for the investigation of concrete cases. It was established with a mandate to tackle corruption in public officialdom, and particularly, to look into high-ranking officials with political clout. Despite the existence of this agency, a special prosecutor similar to the U.S. independent counsel could be appointed anytime on an *ad hoc* basis to look into a specific case if the National Assembly were to decide it is necessary.

The commission was formed under the supervision of the president, but was an independent agency.[9] The president appointed all nine members, of whom the National Assembly and the Supreme Court recommended three persons each.[10] The commission was obliged to conduct a field survey and evaluation of the government's anti-corruption measures and policy as well as education regarding, publicity on and support for them. It was to collect information on corruption and protect and reward informants.[11] In particular, whistle-blowing was encouraged. Whistle-blowers were strictly protected and rewarded.[12] The law gave ordinary citizens the right to file a request for investigation to the Board of Audit and Inspection.[13] Its most important role was to encourage and facilitate investigation and punishment of corruption and irregularity by high-ranking officials, and to facilitate whistle-blowing.

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9) Anti-Corruption Act, article 15.
10) Anti-Corruption Act, article 12.
11) *Ibid*., articles 11,25~39.
12) *Ibid*., in particular, article 32.
13) *Ibid*., articles 40~48.

However, the commission did not have independent authority to conduct investigations on its own. It needed to file a complaint to the prosecutor if it felt an investigation was necessary. If the prosecutor did not indict those against whom the commission filed a complaint, a request for review could be submitted to the high prosecutor's office.[14] Its principal role was not to investigate and punish officials but to be a standing commission working at all times to monitor corruption as watchdog and to improve the system.

Since its creation of 2002 to the end of 2007, the commission has received about twelve thousands of reports, among which about six hundreds were reports on corruption. In cases of corruption report, the commission forwarded them to the prosecutors, police or the Board of Audit and Inspection for investigation or inspection.[15] In addition to protecting informers and whistle-blowers, it also rewarded them with substantial sums of money.

The creation of the independent agency for anti-corruption was recognized by the international community as a positive measure to enhance transparency in Korea. Transparency International announced that Korea's transparency index was also there by improved.[16]

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14) *Ibid*., articles 29,31.

15) Anti-Corruption &Civil Rights Commission, *2007 nyundo cheongryum-baekseo [2007 Annual Report],* pp.273~290.

16) http://news.naver.com/print_form.php?office_id=078&article_id=0000... 2008-10-30

As recently as February 2008, just after the kick-off of the new Lee Myung-bak government, the Korea Independent Commission Against Corruption was merged with the Ombudsman of Korea and the Administrative Appeals Commission to form the new Anti-Corruption and Civil Rights Commission.[17]

The creation of this new consolidated agency seemed to be an expression of the new president's pragmatism and drive for efficiency. However, there is a significant difference in the role and scope of the old and new corruption agencies. While the members of the previous anti-corruption commission were overseen by a system of checks and balances since three branches of government each recommended three commission members, the majority of the new commission is appointed by the president. In addition, the former was overseen by the president's office, while the latter is under that of the prime minister.[18] This weakened status and independence may undermine the role of the anti-corruption agency as an independent and impartial watchdog for a clean and transparent society.[19]

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17) The governing law for the new agency, "Law for the Creation and Management for Anti-Corruption and Civil Rights Commission," was enacted on February 29, 2008 as Law No. 8878.

18) See *ibid*., articles13, 16.

19) Transparency International also publicized a statement against this new change. http://www.Transparency.org/layout/set/print/news_room/latest_news/ (visited March 13, 2008)

Adoption of a Special Prosecutorial System on an *ad hoc* Basis

The adoption of a ‘special prosecutorial system’ had been consistently demanded by progressive NGOs and the opposition party of Kim Dae-jung, who had distrusted ordinary prosecutors in the bureaucratic hierarchy on the grounds that the office had been abused for political gains as a trusty and effective tool to maintain and strengthen authoritarian rule. Their insistence intensified during the Kim Young-sam government after the prosecutor decided not to indict those who were involved in the military coup of December1979 and the massacre in Gwangju during the democratic movement of May 1980.

The Kim Dae-jung government, which was, for the first time in Korean history, put into office through the peaceful transfer of power from the ruling party of Kim Young-sam, promised to adopt the special prosecutorial system, but, in the end, failed to do so. Kim’s government created an anti-corruption agency instead of a special prosecutor’s system. Although the special prosecutorial system was not employed as a standing organ, however, it could be activated at any time on an *ad hoc* basis as long as the legislature passed the relevant law. The authority to create a special prosecutor resides with the National Assembly, which has the power to legislate governing laws for government action.

During the Kim Dae-jung government, the opposition, which held the majority of seats in the National Assembly, demanded a special prosecutor be assigned to the investigation into corruption and irregularities with

political implications. The opposition was finally successful in getting the government to give in to their demands, and in September 1999, the National Assembly enacted, for the first time, a special law to enable the special prosecutor to investigate a designated specific case within a limited time frame. The first order of business was to probe "the inducement of the strike by the Korea Mint Corporation labor union scandal and the scandal involving the lobby of the prosecutor general's wife with gifts of clothes." Since then, the legislature has approved the use of a special prosecutor again in November 2001 to look into a financial scandal under the Kim Dae-jung government, in February 2003 to reveal "the secret remittance to North Korea in connection with the inter-Korean summit,"in December 2003 to inquire into "irregularities by close aides of President Roh Moo-hyun," and in July 2005 to probe the "Korea Rail Corporation's involvement in oil exploration in Sakhalin" under the Roh government. In most cases involving the use of a special prosecutor, top political powers, including the president, were concerned.

Near the end of President Roh's term, just before the presidential election of December 25, 2007, two more laws were enacted to appoint prosecutors: in December 2007, to investigate a "slush fund scandal of the Samsung Group," and to uncover "the scandal of stock price manipulation by opposition party presidential candidate Lee Myung-bak." During the last eighty ears, from 1999 to 2007, eight special prosecutors, based on seven special statutes, were appointed. In most cases, the will of the majority party ruling the legislature prevailed in introducing a special prosecutor by passing the pertinent legislation.

According to the laws concerning special prosecutors, with the exception of the last instance concerning Lee Myung-bak, the president shall appoint as a special prosecutor one of two candidates recommended by the president of the Korean Bar Association. Most of the appointed special prosecutors were practicing lawyers who had completed their public service as a senior judge or prosecutor. The special prosecutor would enjoy the same authority for investigation and indictment as an ordinary prosecutor, although independent from the ordinary prosecutors' office. The special prosecutor would enjoy the necessary support seconded from relevant agencies such as the prosecutors' office, police, and the tax administration. The time-frame for investigation has been limited to 40 days, with the possibility of a 20-day extension.

In Lee Myung-bak's case, however, the law provided that the Chief Justice of the Supreme Court, instead of the president, would appoint a special prosecutor among two candidates recommended by the president of the Korean Bar Association. This departure from previous practices was opposed by several members of the National Assembly who challenged the bill in the Constitutional Courton the grounds that it went against the principle of separation of powers. However, the Court ruled that the appointment was constitutional.[20)]

In consideration of past practices to date, the adoption of a special prosecutor has often been used to command political advantage over the opposing party for political maneuvering to strengthen one's political

20) The special prosecutor concluded Lee Myung-bak not-guilty and so did not indict him. *The Chosun Ilbo Daily*, February 22, 2008.

position or to recruit favorable public support, rather than to investigate and reveal the truth of any given scandal. It also involves a considerable financial burden. As a matter of fact, special prosecutors often failed to uncover new facts which would have been missed by ordinary prosecutors, leading to many criticisms on the effectiveness of the system.[21] However, the existence of the possibility of adoption of a special prosecutor may work as an effective tool to pressure the ordinary prosecutor's office into being more impartial and fair in handling politically sensitive cases in order to avoid reinvestigation by the special prosecutor. In particular, considering the almost unlimited ambit enjoyed by Korean prosecutors concerning investigation and indictment, its efficacy is still legitimate.[22] It can be evoked at any time when urgent necessity justifies and relevant legislation is passed. A special prosecutor with independence and impartiality may be put into action to prevent political influence from interfering with ordinary prosecutorial authority. In this regard, the current special prosecutorial system employed on an *ad hoc* basis is not in conflict with the current ordinary prosecutorial system, but rather, serves as a complementary support system. In order to prevent politically motivated inconsistencies and abuse of power, there is a need for a governing general law detailing the requirements and process to allow for the use of a special prosecutor on an *ad hoc* basis.

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21) A typical example was a statement made by Special Prosecutor Jun-woong Cho, who investigated the Samsung Group scandal case and expressed that the current special prosecutor's system was undesirable and inconsistent with the existing legal system. *The Munhwa Ilbo Daily*, April 18, 2008.

22) For details on the unique aspect of Korean prosecutors, see Dae-Kyu Yoon, *Law and Political Authority in South Korea*, pp.122~26.

Chapter 5. Enhanced Transparency in the Political Process

One of the most significant differences between authoritarian and democratic societies is transparency. External restraint and public scrutiny of authority is feeble in an authoritarian society. An authoritarian government is very reluctant to open its activities and strictly controls what information is disseminated to the public. Citizens' rights and access to information are very limited. Where transparency is lacking, corruption and irregularity are flourishing, but this is rarely unveiled due to the flimsy protection of free press and citizens' rights. However, democratization started to shed light on the dark and obscure side of public domain. Irregularities and malpractices have been more openly revealed to the public through citizens' complaints, mass media, and even public agencies themselves. Citizens' scrutiny of public activities has been dramatically strengthened. What had once been taken for granted in favor of public authority is no more. Law has become an impregnable criterion by which to judge the transparency of public agencies. If an existing law is not appropriate for governing a matter at issue, the public demands change. If a relevant law does not exist, it needs to be drafted. New laws and systems have been created to enhance transparency as Korean society has democratized.

Enhanced Transparency in Selecting Party Candidates

One of the most important tasks of a political party is to select party candidates for election, and in particular, presidential and congressional

elections. Democratization has changed the process of nominating party candidates for elections. During the authoritarian period, the ruling party had been subordinate to the authoritarian leader. Before 1987, selection within the ruling party was not a serious issue since authoritarian leaders with power had been presidential candidates. Their grip on the government party had been tight and thus their influence had been decisive in the selection of congressional candidates.

On the other hand, the opposition parties had some room for political activity, although very limited under authoritarianism. They led anti-authoritarian government activity and movements in and outside of the National Assembly and maintained a strong aggressive tradition, which greatly contributed to democratization. Hence, the nomination process within the opposition parties was different. They selected their presidential candidates by ballot within the party congress in the case of a direct popular vote for the president, and thus competition within party was fierce.[1] However, selection of candidates for the National Assembly elections had been made, to a large extent, through bargaining among faction leaders within a party in order to protect their respective share of vested interest, although the party charter called for selection of the candidates through a democratic process. Party nomination was a critical factor for the success in an election since it was very difficult for an independent to be elected. Faction leaders took maximum advantage of their authority and influence over party nominations to sustain and

1) During the period of indirect presidential elections(1972-1987), an opposition candidate could not run for the presidency since he/she could not get required number of recommendations from electoral college members.

control their leadership in the party as well as in the factions.

The history of political parties in Korea is similar to that of the constitution in the sense that there have been frequent rise and fall of parties. Even after the 1987 Constitution, new parties have come into being or replaced existing ones as new leaderships have wanted to create or renew their authority. Since 1987, most presidents formed a new party during his term. This phenomenon signifies that Korean political parties have been formed on the basis of the personal charisma of leaders rather than on the basis of policy or cause.

The democratic revolution inspired by the 1987 Constitution has dramatically changed this party nomination process, as authoritarian leaders with absolute political power have disappeared and now a system of direct popular vote for presidency has been reestablished. The ruling party as well as opposition parties started to choose presidential candidates through intra-party competition based on the party charter and bylaws.

In particular, post-Kims politics lacked political heroes of the stature seen in previous elections, and this brought in a new chapter in the nomination process by introducing an open primary similar to that in the United States. The presidential election of 2002 had a special meaning in two regards: 1) It was the first post-Kims presidential election; and 2) presidential candidates from the major parties were selected through an intra-party primary in which party members and ordinary citizens took part.

For the presidential elections in 2002 and 2007, major parties adopted a similar primary system with some variations. In addition to party members, ordinary citizens could also vote in the primary. Public opinion polls were also incorporated to some extent.[2)]

After the two Kims receded from their active service in the office, how to fill the political vacuum was a matter of concern as well as interest. The bipolar political structure surrounding the two political heroes was now faced with a multi-polar factional struggle. Factional cohesion also loosened considerably. In the absence of an apparent successor, Kim Dae-jung's government party decided to hold a primary to nominate a presidential candidate for their party, inviting the participation of party members for the first time and making a series of tours throughout the country. All in all, the scene was quite similar to the American version of a primary stump. This new selection process was very fresh and succeeded in drawing public attention. It provided a fair forum for competing candidates by allowing the participation of party members. The primary was the first event of its kind and was an exciting drama for the voters who were tired of old-fashioned dirty politics brewed up behind closed doors. Participants could have a strengthened feeling of ownership in their party that proved to be a powerful fountainhead for victory in the 2002 presidential election.[3)]

2) In the 2002 presidential election, however, the final round of the ruling party nomination between Roh Moo-hyun and Chung Mong-jun was determined by an opinion poll only two weeks before election day.

3) The principal reason the primary was successful was the riseof new blood, maverick politician Roh Moo-hyun, who commanded popular support due to his intransigently

Although the opposition party also followed suit with a primary system similar to that of the ruling party, it was neither as dramatic nor tantalizing as the ruling party primary due to the guaranteed choice for candidate that was easy to discern.

However, the primaries of the two major parties were transformed into open primaries for the 2007 presidential election by allowing participation by non-member citizens. Presidential candidates from the two major parties were selected based on a combination of party member votes and the voice of ordinary citizens, as public opinion polls were also reflected when tallying the vote. Since the size of the party membership was relatively small and public support was a *sine quo non* for the party's success in the main contest, they wanted to expand public awareness in order to gain backers. Along with the development of new technology, distance balloting through mobile phone was also employed in primary races in 2007.[4)]

The primary election system was also used for selecting party candidates in the following National Assembly elections in 2004, as well. When Kim Dae-jung and Kim Yong-sam were active in politics, they had wielded decisive influence over nominations of their party candidates as head of their party or as incumbent president. However, for the April 2004 congressional election during the rule of President Roh Moo-hyun, major

principled, clean, and faction-free politics throughout his political career. His reform-minded anti-regionalism fascinated those who were fed up with corrupted factional politicians who had exploited blind regionalism.

4) The ruling party adopted this method in 2007 presidential primary.

parties adopted an open primary system to nominate party candidates based on the 2002 primary for the presidential election, although not in the all constituencies. For the first time ever, a grass-roots, bottom-up process was adopted as a manifestation of democracy, replacing the former top-down hierarchy. Each constituency held primary elections to select a candidate from the list provided by the central party leadership. This kind of process not only corresponded to grass-roots democracy, but it also greatly contributed to clean politics and intra-party democracy.[5)]

However, four years later, during the April 2008 general election, a completely revamped process was introduced for the selection of candidates. Two major ruling and opposition parties created a special committee that had full authority over the nomination of candidates. Majority members of this nomination committee did not have membership in the party they worked for.[6)] A lack of time following the presidential election in December 2007 was said to be responsible for this unusual process, in addition to efforts in securing fairness. Another reason to delegate full authority to a separate and independent committee was to overcome over-polarized intra-party conflicts between factions. This new process seems to fly in the face of grass-roots democracy, divesting party members and constituents of the right to select their candidates.

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5) The primary system was also employed in selecting some party candidates for the 2006 election of local government heads.

6) The ruling United Democratic Party's nomination committee consisted of eight members while the opposition Grand National Party, ten members. Chairmen of both committees were respected lawyers.

The nomination of candidates by a major party is a critical decision for success in an election due to strong regional affiliation in Korea. For example, nomination of a candidate with a strong affiliation with the Southwest Cholla region will almost assuredly mean a win within the constituencies throughout Cholla Province, while the same is true of selecting a nominee from a party affiliated with the Southeast Kyungsang region. Thanks to this bipolar regionalism, the nomination of a candidate in these two regions was almost tantamount to guaranteed success in the election. What is more important is party nomination, not individual candidate's ability. This is why the nomination process of the party was so important for political aspirants vying for congressional seats. At the same time, from the viewpoint of leadership, intra-party struggles surrounding candidacy nominations are important because the composition of congressional representatives is directly related to party hegemony. That is why the aftermath of nominations has often been so serious.

It is quite natural for the party leadership to take advantage of this authority to influence nominations in order to raise money for party management as well as to expand their influence within party. In particular, as was mentioned earlier, candidacies for proportional seats have been often sold. The latest scandal concerning a donation by candidates demonstrated the high possibility of such trade.[7] Nomination of party candidates for congressional seats, particularly for proportional seats, has been used as a conduit for fundraising. These money politics reinforced cynicism toward politics and has prevented capable new blood from entering politics.

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7) See Chapter 3.

Although party leadership still commands dominant influence in the nomination of a candidate, this influence has weakened since the two Kims receded from the political scene. Political democratization and the fading away of the two Kims from the political limelight has provided milieu for political reform, and anti-plutocracy and intra-party democracy in particular. Reform of election laws under the Roh Moo-hyun government was one example of this.

The primary system opened a new chapter in intra-party democracy. Political parties were previously dominated by the party leadership, such as the president of the ruling party or the two Kims during their time in the reins. At best, party politics was controlled by a party oligarchy. Political parties in Korea used to be organizations of political candidates without a foundation of mass membership of ordinary citizens. Therefore, democracy within a party was almost negligible until after the two Kims left politics. In this regard, the primary was a very useful alternative used to mobilize the general public and to expand popular support by giving them an opportunity to take part in the political process as a means to pursue their political cause.[8] One ofthe most successful examples of

8) One thing to be mentioned at this juncture is the episode in which one unified candidate was selected as the ruling party candidate to contend with a strong opposition candidate. As the popularity of Roh was declining while independent candidate Chung Mong-joon was rising as a dark-horse, the leadership of the ruling party put pressure on Roh to have a contest with Chung to determine the candidate for a unified liberal front. Finally, Roh, who had already been nominated through the official primary process, had to swallow a bitter pill and accept the party’s request to compete with Chung. The showdown between the two was decided through an opinion poll due to the imminent presidential election. Roh narrowly won over Chung and became the final candidate. However, he faced a crisis once again as Chung withdrew his support for Roh in breach of their showdown. Despite these rough and difficult

intra-party democracy has been the most progressive left-wing party, the Democratic Labor Party, which has its base in labor. This party has been managed with the dues of approximately 80,000members. Dues are required for party members, who are only allowed to take part in voting in the primary as well as other important decision making process of the party. Therefore, the scope of participation of party members is broader than that of other parties governed by party leadership or elites.

Information Disclosure Act Enacted

It is very important for a citizen to have access to public information in order to be able to watch and oversee public officials and agencies, as well as to protect their legitimate rights and interests. Needless to say, the right of access to public information contributes to transparency and citizens' participation in public processes. The degree of openness of public activity is proportionate to the degree of democracy found in a society. One of the first changes seen following democratization in 1987 was made in this area.

Before Korea had its own version of the U.S. "Freedom of Information Act," which grants citizens the right to request information held by public agencies, the Constitutional Court made a significant decision to allow such access to information based on its constitutional interpretation,

challenges, Roh defeated the opposition candidate Lee Hoe-chang in the final election and won the presidency. This episode symbolically testifies that Korean democracy still has a long way to go as far as intra-party democracy is concerned.

despite the lack of explicit constitutional or statutory grounds. This case was filed in 1988, less than one year after the 1987Constitution made such a move possible.

A citizen who requested that a local government office inspect and duplicate old title records of forests and other similar documents and failed to receive a corresponding response filed a constitutional petition. The complainant argued that the inaction violated his rights. The Constitutional Court plainly recognized "the right to know" on the basis of Article of 21 of the Constitution guaranteeing freedom of speech and press, and thus held that the agency's inaction on the petitioner's request for inspection and duplication violated petitioner's 'right to know' protected by the constitution. The 'right to know' is effectively granted directly by the constitution without needing any further legislative grounds.[9)]

The Court's decision was as follows

"The freedom of speech and press guaranteed by Article 21 of the constitution envisages free expression and communication of ideas and opinions that require free formation of ideas as a precondition. Free formation of ideas is in turn made possible by guaranteeing access to sufficient information. Right to access, collection and processing of information, namely the right to know, is therefore covered by the freedom of expression. The core of the right to know is the people's right to know with respect to information held by the government, that is, the general

9) 1 KCCR 176, 88 Hun-Ma 22, September 4, 1989.

right to request disclosure of information from the government."[10]

Of course, the court recognized that the right to know was not absolute, but that it should be reasonably restricted. The limit on the extent of restriction should be drawn by balancing the interest secured by there striction and the infringement on the right to know. Generally, the right to know must be broadly protected for a person making a request as long as it poses no threat to the public interest. Disclosure, at least to a person with direct interest, is mandatory.[11]

This is a typical example of the results of democratization. The constitution, which was once no more than a political manifesto, began to function as a justiciable law. The Court was very constructive, to go so far as to invent a new right by inference from the spirit or tenor of implicit constitutional rights without statutory grounds. This decision was extremely welcome and praised as an expression of the Court's commitment to active protection and promotion of citizens' rights and freedoms.

As the Court handed down a series of decisions to reconfirm the right to know,[12] it awakened the public to the importance of this right.[13]

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10) The Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court,* p. 133.

11) *Ibid*.

12) 90 Hun-Ma 133, May 13, 1991; 4 KCCR 64, 89 Hun-Ga 104,February 25, 1992; 93 Hun-Ma 174, August 31, 1994

13) In the same vein, Cheongju City Council passed a municipal ordinance to allow disclosure of information of the city in 1991. Although the city mayor challenged the

NGOs gained encouragement and demanded further legislation supporting the right, which also became integrated into the platforms of the major political parties in the 1992 presidential election. The new government of Kim Young-sam first issued an administrative guide for the disclosure of public information as a prime minister's directive in 1994. The government then finally proposed a bill governing this matter, which was subsequently passed by the National Assembly in 1996. Finally, the Korean version of the Freedom of Information Act was enacted under the name, "The Act on Disclosure of Information by Public Agencies."[14] Now the 'right to know' is institutionalized and protected by statutory law under a constitutional mandate. The Constitutional Court's decision became a decisive motivator for institutional reform of the issues concerned. Among Asian countries, Korea is the first one to pass such of law, and was the 13th nation in world to do so.

In spite of detailed provisions, however, the law has not been working as intended since public agencies were very reluctant to disclose requested information and interpreted vague provisions or discretion in favor of nondisclosure. The inherent nature of bureaucrats to hide their activities dies hard. Bureaucrats still tended to regard citizen requests for disclosure not as the 'right' but as a 'petition'. The Roh government that had emphasized the importance of citizen participation and government transparency drastically revised the law to facilitate disclosure in 2003.[15]

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move, the Supreme Court held its ground. Supreme Court Decision of June 23, 1992 (1992 Chu 17).Afterwards, many municipalities followed suit.

14) Law No. 5242, December 31, 1996, effective January 1, 1998. The law consisted of 27 articles.

15) Law No. 7127, January 19, 2004.

The Court's decision was as follows:

For example, the revised law shortened the time period for deciding whether or not to disclose from 15 days to 10. The appeal system was improved upon regarding non-disclosure decisions, and an information disclosure commission was created under the president. Public agencies are required to disclose certain relevant information on a regular basis, and an on-line disclosure system was adopted.

Another contribution of democratization concerning this issue was the institutionalization of systematic management of public records, without which the decision to disclose information would be hollow. Keeping public records is very important as a precondition of disclosure. By enacting a law on public document management in 1999,[16] for example, the number of public agencies that are obliged to keep archives has been greatly expanded, from five in 2002 to 321 in 2005.

In fact, public agencies often could not respond to requests for disclosure of information since they simply did not have the requested documents.[17] Effective management of public records, including increased disclosure of information, was an important agenda item for Roh's government. In addition to revision of the law on disclosure, it revised the 2000 law on public record management in 2006 in order to enhance

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16) The Act Concerning Record Management of Public Agencies, Law No. 5709, January 29, 1999.

17) For example, in 568 of a total of 1,347 disclosure requests in1998, the public agencies concerned decided not to disclose simply due to alack of relevant information. In 1999, 1139 out of 2899 faced the same fate. Jin-han Jeon, "Study on the Information Disclosure Policy of the Participatory Government," (Master's thesis, Myongji University, 2007), p. 16.

transparency and accountability of public agencies and to further safe preservation and effective use.[18] Following adoption of the new on-line system, the decision-making process is now recorded on the central government level. This is a great improvement on the information disclosure policy.

Another important contribution of this law is to define presidential records as public records. Although presidents have played a very important role in Korea's presidential system, management of presidential office records had been very poor, with change of administration leading to the loss of important materials, which were often regarded as private records. Therefore, the records on the process of policy making in the office most vital to national interests had not been maintained. In spite of their importance, the highly political nature of delicate issues might deter maintenance of records in consideration of future unfavorable side effects, such as political retaliation. Now many records of the presidential office are maintained and disclosed in due process.[19]

Furthermore, in consideration of the political nature of presidential records and possible difficulty in handling them, the Roh government proposed in 2006 a separate law dealing with presidential records to enhance the efficacy and transparency of the office, and the bill was passed by the National Assembly the following year.[20] This law defines

18) Article 1 of the revision, which was renamed, 'Act Concerning Public Record Management' (Law No. 8025, October 4, 2006).

19) Jeon, *supra* note 17, pp. 57-65.

20) The Act Concerning Presidential Record Management, Law No.8395, April 27, 2007.

the scope of presidential records and outlines public disclosure principles and process.

In this regard, the Roh government's failed effort to enact a law governing national secrets deserves our attention. Under the authoritarian government that faced off with a hostile North Korea, national security had been a convenient pretext to control state information classified as secret. Accordingly, the scope of secret information was determined in favor of expediency and discretion of the government. Governing law on this matter was a presidential order, not a statute passed by the legislature. Therefore, citizen rights to information had been significantly restricted. The Roh government tried to replace the order with a new legislative statute, and proposed a bill in 2006 to adjust to the new democratic environment by limiting the scope of secret information, but the bill died in the National Assembly.

Reform of Administrative Procedure

As democratization changed perception on public authority, administrative agencies should give consideration from citizens' perspective when they make administrative acts, and shift their priority from administrative convenience or discretion to citizens' interest. Although public officials were mandated to exercise their authority according to laws and bylaws, and administrative acts went through a similar process, there was no general law to govern the process such as America's Administrative Procedure Act. What was demanded of the officials was, therefore, their

moral or internal restriction rather than legal procedure stipulated by the law, except when individually provided by the respective law concerning a particular act. Violation of internal procedural regulations could not be redressed by an administrative lawsuit. Although Korea enacted the Administrative Lawsuit Act as early as in 1951 to provide superior status in favor of public agencies and exceptional procedures to the ordinary civil suit,[21] the law to govern administrative process was not made until the advent ofdemocratic government after 1987. In principle, administrative agencies had broad discretion over their procedures and activities. However, this practice changed after the democratic shift of 1987.

In 1989, the government started with the Prime Minister's directive, not with legislative statute, for the administrative procedure to protect citizens' right and interest, which provided the general process for administrative acts, including hearings.[22] Finally, in 1996, during Kim Young-sam's government, the government enacted the Korean version of the Administrative Procedure Act,[23] which is a general law to govern the process of an administrative act. The purpose of this law is, through prescribing a general and common process for an administrative act, to promote citizens' participation in the process and thus to secure fairness and transparency of public administration and to protect rights and interests of

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21) Therefore, the Administrative Lawsuit Act (ALA) is a special law to the Civil Procedure Code. Since the first enactment of ALA (Law No. 213, August 24, 1951), it has been changed according to changes in Korean society. A sweeping revision was made on December 15, 1984 as Law No. 3754. The latest comprehensive revision took place on January 26, 2002, as Law No. 6627.

22) Prime Minister's Directive No. 235, November 14, 1989.

23) Law No. 5241, December 31, 1996. It came into force in January1, 1998.

the people.[24] The key component of the law is to guarantee interested parties' participation in the administrative process at hand through advance notice, hearings for interested parties, and public hearings with participation of experts and ordinary citizens, as well as parties concerned. As a result, citizens' right to be heard is protected by this law. The Supreme Court confirmed that an administrative act in violation of the provided procedure was unlawful.[25] In this regard, the Administrative Procedure Act greatly contributed to the democratization of public administration. Several rounds of revisions were made to expand citizens' participation and enhance protection of citizens' interest.[26] With the consolidation of the democracy, observation of the administrative procedure is taken for granted. As citizens' right to be heard is better protected, citizens' trust in the public administration is more reinforced.

IMF Bailout Accelerated Transparency

One of the major obstacles impeding transparency had been the financial system and practices. As buttress for the state-initiated rapide conomic development, financial institutions including banks were under the control of the state with the primary goal of supporting exporting enterprises. Under authoritarian rule, big businesses enjoyed favorable financial treatment from the government in comparison with small businesses, and their collaboration with political power was reinforced. The growth of big

24) Article 1.

25) Supreme Court Decision of April 13, 2001 (2000 Du 3337).

26) The latest revision was made on February 29, 2008, as Law No. 8852.

business surpassed that of the Korean economy, resulting in a wider gap between big businesses and small-medium businesses.

Democratization since 1987 changed government policy, including finance. In order to respond to the voice of the majority in society, government started to place more emphasis on social equity and distribution, and expand more support for small-medium businesses, along with mitigating excessive concentration of economic power on big businesses. Financial reform in a meaningful sense was made under the Kim Young-sam government. President Kim understood the extreme difficulty of implementing a real name financial transaction system, going against Korea's deeply rooted, long standing practice of allowing unnamed entities to conduct financial business, although it was *sine quo non* for financial transparency and, furthermore, realization of economic justice. Therefore, instead of an ordinary legal process, he resorted to emergency measures provided by the constitution to deal with grave financial or economic crises[27] by issuing a presidential order announcing financial and economic emergency in1993.[28] By this measure, out of the blue, all the financial transactions were required to be made under one's real name and, thus, drawing out deposits under a false name or pseudonym

27) See Constitution, article 76(1).

28) President Kim issued the "Emergency Order Concerning Real Name Financial Transactions and Protection of Secrecy," on August 12, 1993, after business hours. The order was in force from 8:00 pm the same day, in order not to allow time for evasion and weakening of effectiveness of the measure. Therefore, all the financial transactions from the following morning were regulated under the order. The Constitutional Court upheld the order's constitutionality (Decision of February 26,1996, 93 Hun-Ma186). As the new measure settled down, this order was replaced by a legislative statute in 1997 by Law No. 5493.

was not allowed, while confidential protection for financial transactions was secured. His bold measure became the cornerstone for ensuing financial reform and momentum for financial transparency. A key component of financial reform was financial liberalization to promote competition in financial market, which turned out to be a disaster rather than a blessing in the competitive global financial market.

Easing regulations on bank loans and an increasing number of bad loans became vulnerable to aggressive global funds as well as economic stagnancy, resulting in a failure to overcome financial liquidity. Financial crisis struck in 1997 and became one of the most important watersheds in transforming the economic structure of Korea. Korea received a bailout package of about $60 billion from international communities including the U.S. and IMF on the condition that it carry out strict policy reform on finance and banking, expansion of market opening and restructuring of enterprises and banks. Rapid and comprehensive economic reform followed to overcome the unprecedented financial crisis. A bulk of laws concerning the financial system, management of enterprise, commercial activity, labor relations, and other sectors of the finance and business realms faced significant changes as a part of the reform. Among other things, measures to enhance the transparency of business management were adopted, such as the strengthening of the rights of minority shareholders and the independence of auditors. In order to reinforce oversight of the financial system, competent authorities were reorganized. Global standards were imposed across the board, resulting in a higher degree of transparency in the economic systems. The Korean economy was further incorporated into the global economy.

Chapter 6. Normalization of the Separation of Powers Principle

Under the pre-1987 constitutional system, the president had disproportionate control, *de jure* as well as *de facto*, over the legislature and the judiciary. The first step necessary in order to restore democracy was to curtail the president's prerogative and unbalanced authority to within a rational scope seen and practiced in a normal democracy, while at the same time strengthening the authority of the legislature and securing the independence of the judiciary. A constitutional revision was carried out in1987 in an attempt to erect just such a power structure.

Presidential Authority Restrained and Readjusted

As Park Chung-hee changed the constitution on two different occasions in order to maintain and tighten his reigns on power, he became an authoritarian dictator under the pretext of sustained economic development and national security. While the first constitutional revision in 1969 was made in order to justify his third term in office, the second revision, made in 1972, was of a new form, in that it endowed the president with unprecedented and unparalleled authority over the other branches of government. The president was elected by an indirect vote of the electoral college; the president could serve unlimited terms; the president appointed one third of the National Assembly members; the president possessed the authority to issue emergency measures free from legislative restraint; the National Assembly was divested of its annual authority to inspect affairs

of the state; the president was granted the authority to appoint judges, including Supreme Court Justices; and protection of human rights was downgraded and vulnerable to infringement.

The presidential authority was not on par with that of other branches of government, but above them. State power was concentrated in the presidency by the constitution. In other words, the president's dominance over other branches of government was constitutionally protected. Although there was mechanism to check the powers of the president, such as impeachment, it was impossible to think of employing such a system under the undisputable authority of a strong dictator with the solid support of the military. Human rights were frequently abused and infringed upon. Political activity was heavily restricted. Presidential decrees of emergency measures unconstrained by the National Assembly were routinely issued in order to suppress opposition and resistance.

However, the 1972 system could not last long. Park was killed by the chief of the national intelligence office in 1979 as popular protest spread throughout the country. The stranglehold of the strongman rule was once again interrupted by a military coup that put Korea back on the path of democratic transformation. After the violent suppression of the popular uprising in May 1980, the new military leadership changed the constitution to divest the overwhelming authority of the president to appease public sentiment. However, the government chose to continue to employ an indirect vote for the selection of president in order to secure their power. Asa compromise, the president was limited to serving only one term of seven years.

However, this system soon faced challenges, as well, as it was imposed on the populace against their will. In 1987, the people's cry for democracy was finally heard, and a new constitution was drawn up, setting up the basis for democracy. Along with the return to direct popular vote for the president and a limit of one five-year term of office, the president's dominance was reigned in by a system of 'checks and balances' among the other branches of government. The legislature was empowered, bringing it up to a level equal to that of the president's executive branch, while the judiciary was able to enjoy full independence. In addition, the Constitutional Court replaced the Constitutional Committee, which had been almost dormant under authoritarian rule.

Conflict Between the Legislature and the Executive Branch

Under the authoritarian political system, conflict between two political branches was not an issue since the president controlled the legislative majority. The government party always commanded the majority in the National Assembly and provided unconditional support for the president. Since the president was also the chief of the government party, he played a decisive role in its management. The role of the legislative body governed by a government party majority was to justify the exercise of executive authority by providing legal grounds rather than restraining it. The voice of the minority of opposition parties was not respected at all. However, democratization has changed this complacently stable structure.

A government majority could not be always secured. The liberal atmosphere of politics in South Korea dramatically reduced unfairness and irregularities in the election process while it also enhanced the political consciousness of the citizens. The rule of fair play was practiced, for the most part, and has been improved. Inconsistency in the election dates of the president, legislative members, and chiefs of local governments has worked as a*de facto* mid-term election in favor of checks and balances. It is inevitable for the reins of a five-year, one term president to become weaker. Loosening the president's grip on the party also reinforced intra-party conflict. Frequent break-offs of political parties resulted.

When the government party commands a majority, politics can be relatively stable. Otherwise, it is likely to be unstable. From the beginning of the first government to follow the 1987 constitution, the government party failed to acquire the majority in the National Assembly. The president was in a bind and had great difficulty carrying out his policies due to the uncooperative opposition of the legislature. On the other hand, the opposition majority could pass bills as it saw fit, and put significant pressure on the president in a number of ways.[1] This is why President Roh Tae-woo decided to merge his government party with conservative opposition parties to overcome political deadlock.

In Korea, where democracy had been attained through severe protest and resistance against an authoritarian government, dialogue and negotiation were not regarded as desirable since they were often understood as

1) For example, the opposition demanded President Roh Tae-woo send former President Chun into exile at a remote mountain temple, and he had to give in.

unprincipled compromise with or defection to the authoritarian dictatorship. Opposition for the sake of opposition was an effective means of realizing their goal of protesting the authoritarian government. Opposition to government policy was the *raison d'etre* of opposition parties. The legislature was sharply divided into the government party, which was strongly aligned with the executive branch, and the opposition parties. Therefore, it was impossible to think of the legislature as a separate government branch designed to keep the president in check. Opposition had to confront the ruling government party as well as the executive branch.

This kind of polarization in the legislature between the government and opposition parties has continued even since the moves toward democratization in 1987. Bipartisan compromise on important issues, in particular, has been the rare exception. What is more commonly found are physical scuffles among lawmakers in the National Assembly and street demonstrations outside of it. The productivity of the National Assembly has been frequently challenged in this regard. The relevant role of the legislature in Korean democracy is currently a very serious issue. Frequent demonstrations by the general public are attributed, in part, to the lack of capacity of the legislature to resolve social conflicts through political process. Representative democracy is often in peril of being replaced by popular protest as people are actively participating in political confrontation with the president without mediation or filtering processes through a representative body.[2] If this situation continues to worsen, politics without political parties will prevail.

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2) The candlelight demonstrations against beef imports from the U.S. in May and June 2008 are one example.

Korea's unique environment reinforces popular democracy. Authoritarian politics and the ensuing political bickering and unproductive polarization during the process of democratization has strengthened public apathy and cynicism, and distrust of politics. The liberal political environment has empowered citizens with full political freedoms. They find available alternative access to political participation to express their views rather than relying on existing processes or politicians. Cutting edge information technology such as Internet and mobile phone services provide excellent milieu in connecting individuals and sharing information. On-line protests are often regarded as digital democracy. Citizens with political cons-ciousness take best advantage of these high tech communication channels. The driving force behind the success of Roh Moo-hyun, a minority underdog within transigent principles, was a collective of citizens connected on-line competing against the vested interest groups off-line. New 'netizens' defeated old citizens in the election. They are proud of their direct participation as an expression of direct democracy. In this situation, citizens will often take to the street to express their opposition to government policy or its incompetence, while the political mechanisms of representative democracy are not working or, worse, despised. It is urgently necessary for there presentative body of the legislature to restore public trust as the most legitimate and effective democratic body to resolve social conflicts. Otherwise, people will increasingly, and often directly, challenge political power rather than foster representative democracy.

A cohesive relationship between the president and the government weakens as the presidential term approaches its end. The president's influen

ceover the party is dramatically reduced,[3] and the president tends to stay aloof and neutral from party management. As a matter of fact, presidents tend to become lame ducks earlier in the five-year one term presidential system. In particular, if an incumbent president is unpopular, this becomes burdensome for the members of the government party who have to prepare for the coming congressional election, and often, party leaders try to distance themselves from the president. During the last four governments, without exception, presidents had to resign their party membership as well as party leadership in order not to damage their parties.[4]

Strengthening Legislative Arms

It is important to bestow relevant authority to the legislature in order to balance that of the president. However, it is also important to provide congressional members with the logistical support necessary to enable them to exercise their legislative authority. In this regard, it is note worthy that the National Assembly created two separate bodies within the secretariat to strengthen assistance to legislative activity. One body is the National Assembly Budget Office (NABO), which was launched in 2003.[5]

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3) When the president's leadership was based upon a strong regional power, his influence would remain longer. Kim Young-sam and Kim Dae-jung were such cases.

4) For example, President Roh Tae-woo broke with the party in his fourth year as the president. President Kim Young-sam, who was in trouble in his fourth year as president due to his son's corruption issue, resigned from his party. President Kim Dae-jung followed the same path due to his three sons'irregular actions. President Roh Moo-hyun, who allowed more autonomy to his party, also followed suit thanks to his unpopularity.

5) This agency was created by the National Assembly Budget Office Act, Law No. 6931,

The other is the National Assembly Research Service (NARS), which came online in 2007.[6] The role of the former is to support the legislature by analyzing and evaluating issues related to the national budget, funds and fiscal operations.[7] The latter is an expansion of the Legislative Information Service under the National Assembly Library put to use in order to strengthen support for legislative works of congressional members and their committees.[8]

As the status and importance of the representative body was enhanced along with the growth of the democratization movement, the public began to demand a more active role and greater legislative initiative. Although the legislature commands legitimate legal authority as the representative body on par with the executive branch, its duty to check and balance the other branches would be hollow if appropriate logistical support is not provided. Among other things, budgeting and law-making are the most important and basic duties of the National Assembly. In this regard, the NABO and NARS will work as very useful tools for congressional members to employ as they conduct their activities.

This expansion of legislative powers was made following the U.S. model. In the United States, the three arms of the Government Accountability Office, Congressional Budget Office and Congressional Research Service are supporting legislative activity and helping the

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July 18, 2003.

6) For the creation of this agency, the National Assembly Research Act was enacted as Law No.8263, January 24, 2007.

7) For further details, see http://korea.nabo.go.kr/

8) For further details, see http://www.nars.go.kr/eng/index.jsp

legislature play out its role to make law and to check and oversee the activity of the executive branch. However, in Korea, no audit office exists in the legislature. Instead, the authority to audit resides in the Board of Audit and Inspection (BAI), an independent body under the president, specifically prescribed by the constitution.[9] Although the National Assembly has the authority to deliberate and vote on the national budget bill,[10] the authority to inspect and examine the settlement or execution of the revenues and expenditures of the state, and the accounts of state agencies, is vested with the Board of Audit and Inspection.[11] This means that the authority of *ex post facto* supervision on budget and fiscal management belongs to BAI instead of the National Assembly. Instead, the BAI should report the results of its inspections to the legislature.[12]

There is an on-going debate as to whether the BAI inspection authority noted above should be transferred to the National Assembly. It seem sreasonable that execution of the budget by the executive agencies should be reviewed by the legislative body, which has the authority to deliberate and decide on the national budget. On the other hand, it is arguable that the multi-voiced and fractured political body of the Korean legislature is not the appropriate venue, or rather, is as of yet too immature, to guarantee anon-partisan, fair audit.[13] The majority of National Assembly

9) Constitution, articles 97~100.
10) Constitution, article 54.
11) Constitution, article 97.
12) The National Assembly Act, article 99.
13) For the detailed discussion on this issue, see Korean Public Law Association, g*ughoe-ui jaejeong-tongjegwon ganghwa-rul uihan yungu [Study on Strengthening National Assembly's*

members supported the idea of strengthening the assembly's authority, in following with the American model. However, since the BAI's authority is prescribed by the constitution, transfer of the authority requires constitutional revision. This could be an issue if constitutional change is discussed in the future.

Congressional Authority to Hold Hearings for High Officials

The law on hearings regarding high officials was enacted in June2000.[14] Before enactment of this law, the National Assembly had revised the National Assembly Act to create a special committee for hearings on those who needed legislative consent for their appointment or those whom the legislature had the authority to select, as provided by the constitution.[15] This included, among others, those whom the president has appointed with the consent of the National Assembly. These positions include the Chief Justice of the Supreme Court, the Chief of the Constitutional Court, the Prime Minister, the Chairman of the Board of Audit and Inspection, Justices of the Supreme Court, and those who are selected by the National Assembly, such as three of the nine Justices of the Constitutional Court, and three members of the National Election Committee.[16] This law was originally prepared to govern the procedure and management of the above congressional hearings in order to

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Authority on Fiscal Regulation] (Research Report) (October2007).

14) Personnel Hearing Act, Law No. 6271, June 23, 2000.

15) National Assembly Act articles 46-3, 65-2, revised as law No. 6266, February 16, 2000.

16) Constitution, articles 86, 98, 104, 111, 114.

substantiate congressional authority to consent to or select high officials. After enactment of the law, the congressional consent or selection is to be made after a hearing. The National Assembly should complete the hearing process within 20 days.[17] The hearing committee is supposed to work within the 15 day time limit, including 3 days of hearings since the consent bill is sent over to the committee from the Speaker of the National Assembly, and then report the results of hearings to the Speaker.[18]

This congressional hearing system was adopted during the Kim Dae-Jung government. During Kim's time in office, his ruling party was a minority party in the legislature, while the main opposition party commanded the National Assembly. The majority opposition party wanted to tighten the reins on the executive branch on this matter and could achieve this through the adoption of this hearing law. As matter of fact, President Kim failed two times in 2002 to get National Assembly consent for his nominees for Prime Minister after members of the opposition party bombarded them during hearings for their previous ethical lapses.[19] Duringthe Roh Moo-hyun government, his nominee for the Chief Justice of the Constitutional Court had to excuse herself from the nomination after she faced serious criticism during her hearing. Although Roh's government party had a solid majority in the legislature, members of his party joined in opposing his nomination.[20]

17) Personnel Hearing Act, Article 6(2)

18) Personnel Hearing Act, article 9.

19) http://www.hani.co.kr/section-003100001/2002/07/p0031000012002... 2008-10-31; http://www.chosun.com/svc/news/www/printArticle.html 2008-10-31

20) For the legal issue concerning this nomination of the Chief Justice, see http://english.

The outcome of hearings has often been the result of partisan or factional feuding. When the government party is the minority in the legislature, this hearing process could be very burdensome. The two times the Kim Dae-Jung administration failed to appoint a prime minister were, in part, due to the lack of influence of the government party. Roh's failure to appoint his first nominee for the Chief Justice of the Constitutional Court was also partially due to the factional feuding in his government party as his popularity declined.

As the legislative authority to hold hearings was perceived and functioned as an effective means to restrain the executive branch's powers, the scope of those who need to pass through the hearing process has been expanded beyond that which was originally spelled out in the constitution. The opposition majority carried through the inclusion of powerful, high-level officials such as the chief of the state intelligence agency, the head of the state tax authority, the prosecutor general, and the chief of the national police.[21] Since they are the most powerful government agencies with the authority to investigate others, they have often been criticized as being utilized and mobilized for the sake of executive power. In particular, they had been faithful instruments for the implementation of the will of the government under authoritarian rule. It is still premature to conclude that they have been consistently independent and free from political power since 1987, although their

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donga.com/srv/k2srv.php3?biid=2006111537478

21) National Assembly Act (Law No. 4010, June 15, 1988), Article65-2(2). Revised on February 4, 2003 as Law No. 6855.

independence has been greatly improved. Hearings for them are carried out by standing committees dealing with each respective jurisdiction, not by the special hearing committee. However, the president is not bound by the outcome of a legislative hearing, although the hearing is a procedural requirement for appointment. Since the authority to appoint these high-level officials of the government is a presidential prerogative, it might be unconstitutional for a law calling for legislative consent for appointments.

The scope was further expanded under the Roh government, which emphasized participatory democracy and transparency. Since his ruling party held the majority in the legislature, the effort to extend the scope of appointment hearings to include members of the State Council, that is, all the ministers of the government, faced no significant opposition. Six Justices of the Constitutional Court and six members of the National Election Committee who are not appointed by the National Assembly were also included.[22] Furthermore, the chairman of the Chiefs of Staff of the Korean Army is also subject to a hearing in accordance with a separate legal revision.[23]

Hearings for them will be held by the respective standing committee of the National Assembly. The outcomes of legislative hearings on these high-level officials of the executive branch are not binding, and the president retains the authority to appoint. Although president has this

22) *Ibid*. Revised on July 28, 2005 as Law No. 7614.
23) *Ibid*. Revised on December 14, 2007 as Law No. 8685.

prerogative, it will remain politically burdensome to ignore the recommendations of the committees. The president should be very prudent when appointing high-level officials who are subject to the hearing process, for the process can be often utilized to attack the morality and competence of the government. In fact, three nominees for ministers of the Lee Myung-bak government excused themselves during the hearing process in the early phase of his government in2008. Now, legislative authority to hold hearings on high-level nominees for positions in the executive has become one of the most visible and effective tools to restrict the executive power. .

Nominees' morality as well as competency was broadly challenged and scrutinized during these hearings. Their past academic and professional careers, properties, taxes, criminal records and more are put under the microscope.[24] The keenest issues for the public have been, for example, real estate deals, military service and other events that could lead one to question a nominee's devotion to public service. If they are found to have been involved in realestate speculation or dodged military service, it would deal a critical blow to their chances of appointment. In addition to the records submitted to the committee, since Korea is a small country and connected by an excellent off-line and on-line network, a flood of information flows in to the media as well as to authorities. It is inevitable that nominees must sacrifice their privacy to some extent. This means that those who have integrity have a better possibility of passing successfully through the hearing scrutiny, pressuring those who want to

24) Personnel Hearing Act, article 5.

work as high-level officials to keep their hands clean. The impact of the adoption of this hearing system is not limited to those who are subject to the hearings. The hearing system also elevated the public's expectations regarding the quality of high-level officials, such as chief secretaries of the president. Such high-level officials who are not subject to official hearings are also under strict public scrutiny through media and civic organizations. Therefore, the adoption of this hearing system for high-ranking officials has greatly contributed to the enhancement of ethical standards and transparency in government.

The law on these hearings was once again amended as recently as2007 during the adjustment to the new government of Lee Myung-bak, in order for the president-elect to be able to request a hearing. According to existing law, the president-elect should wait until after inauguration in order to request a hearing to appoint a prime minister or other high-ranking officials, since only the president was able to make such a request. Now, the president-elect can advance the hearing process before inauguration and prepare a cabinet before taking office.[25] It is desirable for an incoming government to be able to save time and expedite the formation of a cabinet in order to start work as soon as possible after inauguration.

25) National Assembly Act, article 65-2(2)(revised on December 14,2007 as Law No. 8685). Personnel Hearing Act, articles 2, 6 (revised on December 14, 2007 as Law No. 8686).

Local Autonomy Finally Started

Along with the separation of powers in the central government, the division of powers between national government and local governments is very important for the success of democracy. Unlike the United States or federal Germany, Korea is not a federal state. To the contrary, the historic legacy of strong centralism had impeded development of local governments.

From a historical perspective, Korea had been a very centralized society, going back as far as the 7th century. A neo-Confucian emphasis on hierarchy had reinforced centralization.[26] Old Korea did not experience feudal decentralization as was seen in the West or Japan. Following liberation from Japanese colonial rule, when the modern state of Korea was formed in 1948, local autonomy was taken for granted and thus included in the constitution, taking after the western democratic model.

Every Korean constitution, going all the way back to the first document adopted in 1948, has provided local autonomy. In consideration of the importance of local autonomy that enables grass-roots democracy, provisions were included in each constitution without exception. However, in spite of such an explicit expression of local autonomy in the constitutions, for a number of reasons, it had not been implemented in practice until democratization of the new constitutional system of 1987.

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26) On Korea's unique aspect of intensive centralization, see Gregory Henderson, *Korea: The Politics of Vortex*(Cambridge: Harvard University Press, 1968).

As Korean governments turned to authoritarian rule, political powers did not want to allow local autonomy out of fear that lax control over the populace and the impact of citizens' excessive participation could influence the political process. Those in power regarded such autonomy as inefficient and counter-productive to quick economic development, as well. Therefore, governing laws stipulating local autonomy provided in the constitution had not been enforced prior to 1988.[27] Under the new political environment created by the 1987 constitutional system, the new National Assembly revised the Local Autonomy Act in 1988 to make local autonomy a reality. For the first time, local councils and legislative bodies of local governments were formed through direct vote by local residents in1991, while the election of the heads of local governments such as governors, mayors, and county or ward magistrates was postponed.[28] Finally, in 1995, the heads of local governments as well as council members were elected at the same time, and thus the organization of local autonomy was completed nationwide. These local officials are elected for four-year terms.

Local governments are not accountable to the central government but rather to respective local electorates. The power of the national government

27) The authoritarian government went so far as to include a provision to postpone local autonomy until unification in the 1972 Constitution itself. See its Addenda, article 10.

28) Following the presidential measure to postpone the first election for local government heads, petitioners who were planning to run or vote in the election filed a constitutional complaint claiming that their right to run for public offices was violated. However, as the National Assembly revised the Local Autonomy Act to postpone the election until June 30, 1995while the case was pending, the Constitutional Court dismissed it on the grounds that the change in the relevant statute during their constitutional review extinguished the legally protected interests related to its postponement. 6-2 KCCR 176,92Hun-Ma1 26, August 31, 1994.

is now divided into central and local governments, although the latter heavily depend upon financial subsidies of the former. It stands to reason that local governments would do well to respond to local demands if they wish to maintain their offices. In spite of the many pros and cons, local autonomy has taken root rapidly, and has already become an integral part of Korean democracy.

The recent adoption of a recall system in local governments deserves our attention in this regard. In order to reinforce accountability of elected local government officials by strengthening residents' ability to oversee the management of local governments, the law on recall was enacted in2006,[29] and enforcement regulations were provided in 2007.[30] Upon completion of necessary governing laws for recall, citizens of Hanam City, near Seoul, wanted to recall their mayor in the same year, marking the first time in Korea's history of local autonomy that the recall measure was put to the test. However, local residents failed to oust him.[31] The recall vote failed to command even the required quorum, a third of eligible voters in the referendum. Residents in other localities are following suit and recalling their representatives for various reasons including incompetence and corruption.

29) The Law on Residents' Recall (Law No. 7958, May 24, 2006).

30) The Enforcement Order for the Law on Residents' Recall(Presidential Order No. 20065). The Central Election Commission also enacted the governing regulation for recall (Central Election Commission Regulation No.278).

31) This recall was initiated by the mayor's political rivals and environmental activists due to his policy to construct a large-scale crematorium in a green belt zone of the city's suburb. The recall also targeted three city councilors at the same time, and two of them were removed. See http://www.kinds.or.kr/main/search/popupcontent.php?docid= 031001.(Accessed 2008-02-29)

The recall system is a very effective mechanism for making local officials more responsible to their constituents and realizing the spirit of democracy. On the other hand, however, it can be abused for political purpose. For this reason, the recall system has not yet been adopted at the national level, for use against National Assembly members, although there is a strong voice in favor of its adoption.

Local autonomy has not, however, been helpful in alleviating the gap between Seoul and regional cities. Instead, excessive concentration in the Seoul Metropolitan Area has intensified. Various government policies to mitigate such concentration have not worked effectively. Roh Moo-hyun had ambitious plans to reverse the aggravating over-concentration in Seoul through the so-called “balanced development policy” he endorsed as part of his presidential campaign platform.

The highlight of his plan was to move the administrative capital to the Chungcheong area, in Korea’s midwest region. This was the key promise of his campaign and brought about severe controversy. He was very successful in commanding support in the midwest, and won the election in December 2002. Roh’s administration proposed a bill to the National Assembly outlining a special law that would provide the legal grounds necessary to move the capital.[32] The National Assembly passed the bill after heated debate and compromise inconsideration of political interests of respective parties, and the special law was promulgated on January 16, 2004.

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32) The title was the Special Act on the Establishment of the New Administrative Capital. According to this bill, the Presidential Office and executive ministries were to move, while the legislature and the judiciary would not.

Subsequently, citizens who opposed the move of the capital filed a complaint with the Constitutional Court, claiming that the special law was unconstitutional in its entirety as it was an attempt to relocate the nation’s capital without revision of the constitution, and that it violated the right to vote on referendums and the rights of taxpayers.

The Constitutional Court, in an eight-to-one decision, judged that the law was unconstitutional.[33] The Court employed the concept of ‘customary constitutional law’ to justify its finding. The reasoning behind the decision was as follows:

“There is no express provision in our constitution that states ‘Seoul is the capital.’ However, that Seoul is the capital of our nation has been a continuing norm in the national realm for a period of over six hundred years, since the Chosun Dynasty period. Such a practice should be deemed to be a fundamental matter to the nation that has achieved national consensus from its uninterrupted continuance over a long period of time. Therefore, that Seoul is the capital is a constitutional custom that has traditionally existed since even prior to the establishment of our written constitution, and a norm that is clear in itself and a premise upon which the constitution is based, although not stated expressly. As such, it is part of the unwritten constitution established in the form of a constitutional custom.”[34]

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33) 16-2(B) KCCR 1, 2004 Hun-Ma 554, etc.,(consolidated), October21, 2004.

34) The Constitutional Court of Korea, *Constitutional Court Decisions*, Volume 1 (1998-2004), p. 353.

That is, the Court held that although the constitution does not have any explicit provision defining the location of the capital, Seoul being the capital is a part of the unwritten constitution. Therefore, in order to move the capital from Seoul to any other area, a constitutional revision would be required, not just a legislative statute. At the very least, the citizenry should have an opportunity to express its opinion on this matter through a national referendum, which is a requirement for a constitutional revision.[35] The special law without this process is unconstitutional.

A separate concurring opinion of one justice found the grounds for the decision in another constitutional provision, rather than based on constitutional customs. Article 72 provides that the president has discretionary authority to submit important policies to a national referendum. Since the move of the capital falls within such a category, the process lacking a national referendum is an abuse of discretion in violation of Article 72.[36]

This decision on the move of the capital was severely criticized. The concept and scope of 'customary constitutional law' is very vague and fluid, and not in line with a system based on a written constitution. Roh was elected on the pledge to move the capital. As long as the constitution does not carry an explicit provision regarding the capital, it should be a matter of policy whether or not to move the capital. This decision is a typical expression of judicial activism.

35) Constitution, article 130(2).

36) The Constitutional Court of Korea, *Constitutional Court Decisions*, Volume 1, p. 354.

The president had no option but to respect the decision of the Constitutional Court, but he found an alternative as a compromise. Instead of moving the whole executive body, he suggested moving the majority of ministries, excluding several ministries related to diplomacy and national security and the Blue House, which represents the administrative capital. The new bill was proposed and passed by the National Assembly.[37] This new law was also challenged in the Constitutional Court and successfully passed its scrutiny on the grounds that such a move does not amount to relocation of the capital.[38]

In addition, the Roh Moo-hyun government, which had placed unprecedented emphasis on decentralization, enacted another special law to facilitate development of local areas.[39] For example, as many as 187 major public agencies have been moved to local areas, local universities will be provided with more financial support, and enterprises which move to local areas will be given more incentives.

However, whether such a policy of the Roh government would be respected by the current government of Lee Myung-bak is unclear. The Lee government has a different policy on this matter and revised the

37) The Special Act on Establishment of Yeongi-Gongju Area Administrative Complex for the Follow-up of New Administrative Capital (Law No.7391, March 18, 2005).

38) Decision of November 24 (2005 Hun-Ma 579, 763).

39) The Special Act on Local Decentralization (Law No. 7060,January 16, 2004). This law is a sunset law with effect of only five years.

above special law,[40] looking into the possibility of revising Roh's policy on this matter. To what extent Lee will modify or change Roh's plan to move the capital is as much apolitical issue as a policy issue.

40) The Special Act Concerning Promotion of Local Decentralization(Law No. 8865, February 29, 2008), which expires on June 1, 2013 with 5 years in force.

Chapter 7. Independent Judiciary and Judicial Reform

The status and activity of the judiciary is an excellent indicator for measuring the democratic tendencies of a given state. As Korea transformed from an authoritarian system into a more democratic style of government by enacting a new constitution in 1987, the judiciary faced a dramatic change. Under authoritarian rule, the role and activity of the judiciary had not been that which was in a position to restrain other political branches as an equal branch of the government. When the courts handled politically charged cases, they tended to be restrained in order to appease the powers that be. They were reluctant to confront the executive branch, while their independence was maintained in ruling over ordinary cases without political implications. Political democracy increased the voice for reform of the judiciary beyond passive and defensive judicial independence.

Since adoption of the first constitution in 1948, judicial functions have been divided into two institutions; ordinary courts under the Supreme Court, and constitutional review agencies such as the Constitutional Committee and the Constitutional Court.[1] The current 1987 Constitution adopted the Constitutional Court system, abandoning the Constitutional Committee system employed by previous constitutions. Although ordinary cases, regardless of whether they are civil, commercial, criminal or

1) One exception was during the Third Republic(1962-1972) when the Supreme Court exercised the authority of constitutional review along with its other duties, without creating separate agency such as constitutional committee or constitutional court.

administrative in nature, are finally reviewed by the Supreme Court. When the constitutionality of a law is at issue, the authority to review its constitutionality is shared between the Supreme Court and the Constitutional Court according to the subject matter. While the Constitutional Court has the authority to review the constitutionality of a statutory legislation, that is, a law which has been duly passed by the legislature,[2] the Supreme Court has the final authority to review the constitutionality of other, lower laws, such as presidential decrees, executive orders, ordinances, and regulations.[3] When the constitutionality of a legislative law is at issue in a trial, the court at hand should request a review by the Constitutional Court.[4] In this regard, ordinary courts, including the Supreme Court, have played a considerable role in constitutional adjudication, although constitutional review on legislation since 1987 has been under the authority of the Constitutional Court,

Unquestionable Judicial Independence

Judicial independence, a basic and critical requirement of a democratic government, has no longer been in question since the constitutional change of 1987. In appearance, constitutional provisions concerning the appointment of judges or their period of tenure seem very similar regardless of the nature of the government.[5] On the whole, the appointment of

2) Constitution Article 53 proscribes the process of legislati velaw. Therefore, 'lower law' is any law not prescribed in Article 53.

3) Constitution, articles 107, 111.

4) Constitution, article 107(1).

5) Under authoritarian rule, with the supremacy of the president, the president had and exercised substantive power in appointing judges.

Justices of the Supreme Court, including the Chief Justice, has been a presidential prerogative, while judges have been appointed by the Chief Justice or by a conference of Justices. The term of judges has set at been 10 years, while that of Justices is 6 years. Korea has not adopted a lifetime appointment system.

However, the practice has differed drastically depending on the nature of the government. The court's autonomy in appointing judges or securing their status was preserved under the democratic government, while the authoritarian executive exercised influence over appointments and tenure in order to influence cases with political implications or to exclude uncooperative or hostile judges.[6] The authoritarian governments tried to carryout their political agendas by intervening in judicial affairs as they did with the affairs of other state organs.

However, such undesirable practices have disappeared as a democratic government was launched in 1988, despite the fact that there were not many changes in the provisions concerned. The courts have since enjoyed full autonomy in every respect. This Korean experience testifies to the fact that political reality overrides legal specifics. The authoritarian government may have perverted and distorted the spirit as well as the letter of the law, but the democratic government conducts activities in accordance with the law, both in spirit and in purpose. Executive interference with the judiciary seems something of the past. Now, the judiciary enjoys full independence. Under the current democratic government,

6) For details on executive interference in judicial independence, see Dae-Kyu Yoon, *Law and Political Authority in South Korea*, pp. 139-147.

the judiciary faces a new challenge. As citizens raise their voices and actively take part in the political process in a variety of ways, what the court is now really concerned with is not the influence of the executive branch but rather that of public opinion. Now, citizens are very active in making their voices heard in the management of public affairs. Judicial affairs are no exception. The public may hold demonstrations in front of the courthouse if they feel the need, as they enjoy the freedom of expression. According to the constitution, judges should rule independently and abide only by their conscience and law.[7] The new task of the court, therefore, is how to overcome the pressure of public opinion, which might be often capricious or changeable or even contrary to the law, and maintain one's conscience and the principle of law. If judges think the existing law is inconsistent with their conscience and the spirit of constitution, they can request a review of the constitutionality of the law by the Constitutional Court,[8] and should rule on the case at hand based on its decision.

Ideological Diversity and Confrontation on the Supreme Court Bench

The Supreme Court, which had been one of the most conservative institutions in Korea, has recently been undergoing transformation ever since the reform-minded Roh Moo-hyun government. The Korean court organization has maintained a strict ranking system. For example, a

7) Constitution, article 103.
8) Constitutional Court Act, article 41(1).

freshly appointed judge has to be promoted up through more than a dozen consecutive grades before being named a Justice of the Supreme Court. Although the independence of a judge's ruling is legally guaranteed, in reality, judges have to climb a promotion ladder as a government official. As one advances upward in the hierarchy, the opportunity for promotion dwindles.[9] When one fails to achieve a timely promotion, peer competition often pressures the judge to resign and seek private practice. Seniority is one of the most important factors in consideration of promotion.

Under this kind of hierarchical promotion system within the judiciary, it is very difficult for an unconventional judge to be promoted into the higher echelon. This system has greatly contributed to conservatism and reinforces bureaucratic attitudes over time. However, Roh wanted to change this long lasting judicial conservatism by bringing in new blood to the Supreme Court. He was lucky enough to have the opportunity to exercise his presidential authority to appoint the Chief Justice of the Supreme Court before too late in his term. Since the Chief Justice has the authority to recommend potential justices to the president for appointment to the Supreme Court,[10] this influence over appointments is critical under the current democracy in which the judiciary enjoys full independence. President Roh appointed a senior lawyer, Lee Young-hoon, with a progressive outlook, as the Chief Justice of the Supreme Court in 2005, with the consent of the National Assembly.[11] The Chief Justice

9) For further details of the judicial ranking system, see Dae-Kyu Yoon, *supra* note 6, pp.120-22.

10) Constitution article 104(2).

transformed the composition of the Supreme Court from an exclusively conservative panel of justices to a more diverse makeup of judges by recommending liberal and progressive lawyers whose appointment might have been impossible before.[12] On top of that, since Roh's progressive government held the majority in the legislature, congressional consent and committee hearings did not serve as obstacles. The Chief Justice had the opportunity to recommend eight among a total of thirteen justices upon completion of the sitting justices' six-year term.[13] He did not stick to conventional seniority or hierarchical order when selecting these justices. For example, he recruited to the Supreme Court bench a maverick lawyer who used to make decisions against the authoritarian power while he was a judge,[14] and for the first time, two Supreme Court justices are female. After democratization, when there is a vacancy on the Supreme Court bench, a prospective candidate can be recommended for public scrutiny by media and civic organizations as well as legal organizations. The Chief Justice and president cannot ignore public opinion although they are not legally bound to adhere to it. As the progressive party held power for the last ten years, from 1998 to2007, the progressive voice was reflected in the composition of the Supreme Court as well.

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11) Constitution article 104(1).

12) Although the president has the authority to appoint justices to the Supreme Court, he/she should do so upon the recommendation of the Chief Justice. Since the Chief Justice was appointed by President Roh, he presumably might have respected the wishes of the president when he recommended justices.

13) Although four other justices were recommended by the previous Chief Justice, all were appointed by President Roh. This means that the current bench of the Supreme Court as of October 2008 was composed entirely of Roh's appointees.

14) Justice Park Si-hwan used to decide in favor of demonstrators during authoritarian rule, and later he resigned from his judgeship.

The Chief Justice's unconventional recommendation of justices changed the generally conservative color of the Supreme Court into a more diverse composition. The spectrum of ideology of the justices spans from very liberal to staunch conservative, as is often found in the composition of the U.S. Supreme Court. Some are ideologically in the middle, with a record of swing votes. It is not difficult to tell the propensity of respective justices and predict the direction of their votes, for example, in ideological cases with confrontation of progressive and conservative forces. The Supreme Court is no more a single, colorless voice, but a place where different and various perspectives and ideologies compete with one another, dividing majority and minority opinions, in particular, in politically charged cases. This kind of composition is quite natural in a democratic society where diverse ideas and interests coexist since it should reflect such societal diversity.

In principle, the Supreme Court decides a case amongst a board consisting of four justices.[15] When they cannot reach an agreement, however, the case should be delivered to the bench *en masse*. As democracy has enhanced judicial independence, the justices feel less of a burden when disclosing their individual decisions. The recent transformation in the Supreme Court has reinforced this trend. The number of cases decided by the full bench of thirteen justices[16] has increased, with each

15) The Court Organization Act, Article 7(1). Important decisions such as the unconstitutionality of an order or regulation, or change of precedent are handled by the full bench from the beginning of the hearing.

16) The total number of justices, including the Chief Justice, rose from 13 to 14 with the increase of one justice through a revision on December 27, 2007 (Law No. 8794). See the Court Organization Act, articles4(2), 68(1).

justice expressing different views and their respective opinions.[17] This kind of change is conducive to strengthening the judicial role of keeping other branches of government in check and increasing judicial activism. The Supreme Court is no longer reluctant to deliver decisions on politically or socially delicate issues. In fact, the Supreme Court passed down decisions on delicate issues regarding the environment with significant social repercussions, and they were respected by the society as the last voice on social conflict.[18] The Supreme Court, next to the Constitutional Court, was ranked in a questionnaire as the most influential as well as reliable public institution in Korea.[19] People recognize the power of decisions of the highest court.

Judicial Reform

The judiciary is a passive agency by nature, and Korean courts had been very conservative and reluctant to take the initiative to reform in response to social change.[20] Even after the democratic revolution of 1987, the Supreme Court remained satisfactorily independent of the

17) The number of cases decided by the full bench in 2003 was seven, while that of 2007 was eighteen. The total number of cases reviewed by the Supreme Court in 2003 was 18,888, while in 2007, that was 27,017. Supreme Court, *sabeop-yeongam 2007 [Judicial Yearbook 2007]*, p.4.

18) Two famous cases were Mt. Cheonseong Tunnel Construction case(Supreme Court Decision of June 2, 2006, 2004 Ma 1148, 1149) and Saemangum Reclamation Project case (Supreme Court Decision March 16, 2006, 2006 Du 330). In both decisions, the Supreme Court finally ruled in favor of the constructions.

19) *JoongAng Daily*, June14, 2008.

20) Regarding the problem of Korean court, see Dae-Kyu Yoon, *supra* note 6, pp. 120-122.

executive branch. This defensive and complacent attitude disappointed citizens who believed there are so many reforms to be made in the judicial system, in parallel with democratic reform in other areas. Though the Supreme Court was expected to initiate more significant reform on its own according to the new democratic shift, its response was disappointing. When it made changes, it often ended up affecting only minor procedural matters, without bringing in substantive issues. Accordingly, the major movement for judicial reform was initiated from the presidential office.

Since democratic political leaders well understood the importance and necessity of judicial reform, based upon their experiences under authoritarian rule, they wanted to implement these changes when they finally took power. President Kim Young-sam formed the Committee for Judicial System Development in 1993, the first year of his office, and then created the Globalization Drive Committee in 1995 to bring in more overall transformation, including judicial reform to produce globally competitive legal professionals on the occasion of Korea'sentry to the World Trade Organization.[21] The next president, Kim Dae-jung, also launched the Judicial Reform Promotion Committee in 1999. Although they tried to make the judiciary more democratized, professionalized, rationalized, transparent, and globalized, the outcome was far short of the expectations, due, in part, to the conservative attitude of legal professionals, including prosecutors and lawyers as well as judges. In spite of many debates, suggestions, and efforts for reform, conflicting interests and the lack of follow-up enforcement measures barely produced any visible

21) Korea became a member of the WTO in December 1995.

results, other than the increase of lawyers. One of the key agenda items of judicial reform in Korea has been the reform of legal education and the lawyer recruiting system. However, reform on this issue has been very difficult since it is directly involved with vested interests of existing legal professionals. The Kim Young-sam government fared well with the increase of the quota of the bar(judicial) examination. That is, the annual number of those who pass the judicial examination would be gradually increased until it reached up to 1,000in 2002, from 300 in 1995.[22]For amore serious effort at judicial reform, we had to wait until the next government of reform-minded Roh Moo-hyun.

President Roh, who was once a judge and later became a human rights lawyer, began his government with a firm will for judicial reform. He initiated judicial reform in 2003, the first year of his term, and later the Supreme Court agreed to support the president's initiatives. The Supreme Court enacted the Rule for the Judicial Reform Committee to establish legal grounds, and created the Judicial Reform Committee under the Court.[23] The committee began working, and carried out its duties for fourteen months, until the end of 2004. It was made up of 21 members, including representatives from various walks of life, including legal professionals. The committee also had supporting technical experts.

The basic direction of the judicial reform was to improve the judicial system, which promotes the rule of law, enhances democratic legitimacy

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22) Dae-Kyu Yoon, "The paralysis of legal education in Korea," in Tom Ginsburg ed., *Legal Reform in Korea* (London and New York: RoutledgeCurzon, 2004), pp.39-40.

23) Promulgated on October 24, 2003.

and public trust, provides easy access and fairness, strengthens human rights, and produces qualitative and globally competitive legal professionals.[24)] In other words, the judicial system should be transformed in parallel with the democratization of politics. Therefore, the scope of deliberations was very broad. Suggested topics for deliberation were as follows: How to readjust the role of the Supreme Court and diversify the composition of its bench; How to recruit judges; How to produce legal professionals; How to make citizens participate in judicial processes, such as jury participation; How to enhance human rights in the criminal process; and How to improve judicial service. The committee tirelessly and intensively wrangled over these issues and prepared solutions relevant to the Korean milieu.[25)] Upon completion of its activity, the committee submitted a proposal to the president. President Roh wasted no time in finding a way to implement them. In January 2005, he created the Committee for Judicial System Reform Drive[26)] as a presidential advisory organ to carry through the proposals suggested by the Judicial Reform Committee.

The new committee was composed of 20 members. The composition of its members reflected the importance and weight of this committee. The prime minister became, *ex officio*, co-chairperson, while seven ministers, chief secretaries of the presidential and prime minister's offices, and the

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24) Rule for the Judicial Reform Committee, article 2.

25) The committee held meetings every two weeks. In addition, division meetings, seminars, hearings, field surveys, poll, and so on were also extensively conducted. For details of its activities, see its white paper, *kookmin-gwa hamgge-hanen sabeop kaehyuk[Judicial Reform with People]* (Judicial Reform Committee, 2005).

26) For the legal grounds of the committee, the presidential ordinance, Regulation for Judicial System Reform Drive Committee (Presidential Order No. 18599, December 15, 2004), was enacted.

minister of administration for the Supreme Court also became, *ex officio*, members of the committee.[27] The secretary of the committee was assigned to the secretary in charge of judicial reform for the presidential office. The president's will to carry out judicial reform could not have been more prominently displayed. The committee set up supporting bodies consisting of academics, professionals, and public officials for efficiency in achieving desirable outcomes. The committee aimed to transform the old judicial system into an advanced judiciary for the good of people across the board. Creation of a law school system modeled on that found in the United States, adoption of a means for citizen participation in criminal trials, creation of an appeals division in the high court,[28] improvement of the state-designated attorney system, improvement of the *habeas corpus* system, establishment of a trial centered system, adoption of the principle of speedy process for misdemeanor cases, expansion of appeals to the court on non-indictment decisions made by the prosecutors, reinforced protection of crime victims, reform of the court martial system, establishment of legal ethics, improvement of the sentencing system, and expanded disclosure of court records. In order to implement these changes, relevant laws needed to be revised or enacted. During two years of hard work,[29] the committee drafted 25 bills, most of which had already been realized by legislation after being passed through the National Assembly. This time, far-reaching and sincere judicial reform

27) Regulation for Judicial System Reform Drive Committee, article3(2).

28) The High Court in Korea is the second-tier court, below the Supreme Court and above the District Court.

29) For details on its activities, see the white paper, *sabeop seonjinhwa-lel wihan gaehyuk [Reformfor Judicial Advancement]* (Judicial System Reform Promotion Committee, December, 2006).

took place. Roh's will and effort for judicial reform should not be underestimated. While more details will be introduced in other parts of this book, the most notable two new systems will be handled hereafter; citizen participation in the judicial process and the adoption of a U.S.-modeled law school system.

Adoption of a Korean Version of Jury Trial

A Korean version of jury trial was launched and has been in practice since 2008. This is a landmark shift in the Korean judicial system, which has been dominated by legal professionals since the inception of its modern judicial system in 1895. Lay persons were not allowed to take part in judicial decisions, as Korea had not adopted either a jury or a lay judge system.[30] Citizen participation in the judicial process has been called for by academics and progressive NGOs since democratization as an important part of judicial reform, since it would contribute to enhancing the democratic legitimacy of the judicial system and improving the transparency and fairness of verdicts, as well as human rights. Before the Roh government's full-scale execution of judicial reform, the Kim Dae-Jung government's committee for judicial reform also suggested the positive role of citizen participation in judicial proceedings. The final report of the Judicial Reform Committee under the Roh government proposed that the first step to be taken is to create and implement a means for citizen participation in the judicial process before a more

30) Even the Korean Constitution provides the right to be tried by judges as a fundamental right of a citizen. See article 27(1).

complete system suitable to the Korean environment is to be finalized in 2012,on the basis of empirical analysis.[31] That is, instead of adopting a foreign system, the final model will be molded in2012 after several years of trials on a pilot basis. The Roh government submitted the bill in 2005, and it was finally passed by the National Assembly under the name, ‘Law on Citizens’ Participation in Criminal Trials’ in 2007.This law has been in force from January 1, 2008.[32]

The current Korean system is different from the U.S.-style jury system and the German type of lay judge system. The scope of a Korean jury’s authority is narrower and the effect of their decision is more limited inconsideration of the fact that this is the very first adoption of a system not previously found in the Korean judicial experience. The jury’s decision is not binding on judges but has an advisory effect.[33] However, a judge should explain the reasoning behind the rendering of a judgment different from the verdict of the jury.[34] In this regard, it would not be easy for a judge to ignore a jury’s verdict. Although citizen participation is limited to criminal trials, participatory trials are confined to felony cases such as murder, robbery, rape, bribery, and other cases that are subject to heavy sentences.[35] A jury trial is only conducted at the request of the defendant.[36]

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31) *Judicial Reform with People*, p. 182.
32) Law No. 8495 (July 1, 2007)
33) The Law on Citizens’ Participation in Criminal Trials, article 46(5).
34) *Ibid*., article 48(4).
35) *Ibid*., article 5(1)
36) *Ibid.*, article 5(2).

The jury will deliver a unanimous verdict of guilty or not-guilty after listening to the judge's instructions on important elements of the legal process, such as the essentials of the charges, laws at issue, points of arguments made by the accused and council, and the effectiveness of the evidence presented. The jury can hear the opinion of the judge in charge upon the request of a majority of jurors.[37] When the jury is unable to reach a unanimous verdict, a majority decision will be allowed only after hearing the opinion of the presiding judge. In this case, of course, the judge cannot take part in verdict.[38] If a guilty verdict is returned, jurors should discuss sentencing with the judge and present their opinions. The judge should explain the scope of punishment and conditions of sentencing to jurors beforehand.[39]

A judge's role is pronounced in a Korean jury trial. This most likely resulted from the lack of confidence in the competence of jurors and their capacity to understand the complexities of the judicial process and legal terms, and a lack of experience in the new system. Ordinary jurors can easily be influenced by judges. Furthermore, they may be aptly shaken and swayed by leading members of a jury. It is an important task for the success of the new system to ensure a process in which unreasonable influence will be prevented from damaging an otherwise sound verdict reached on the basis of common sense.

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37) *Ibid.*, article 46(2).
38) *Ibid.*, article 46(3).
39) *Ibid.*, article 46(4).

The qualification and selection process of jurors is similar to that of other countries. Korean citizens aged 20 or older are eligible. Those who are excluded from selection are enumerated in the law; For example, legally incompetent persons, persons under criminal sanctions, representative officials, lawyers, law enforcement officials, soldiers, victims, and the relatives of the accused are ineligible for jury duty.[40] Then umber of jurors differs depending upon the seriousness of the crime involved. For cases subject to capital punishment or a life sentence, the jury consists of nine jurors, while, for other cases, there are seven jurors. In a case where the accused has admitted to an important component of the charge, a five-member jury can be drawn.[41] Jurors will be selected on the day of the trial from candidates randomly chosen from registered, eligible citizens in the jurisdiction. The court will select jurors in consideration of various factors such as gender, age, or occupation through a screening process designed to exclude those who are perceived to have prejudice or are likely to render an unfair decision. Prosecutors and defense lawyers can question candidates during the screening process.[42] Anyone who fails to carry out jury duty will be fined up to two million won.[43]

The first jury trial was requested by the accused in a robbery case at the District Court of Daegu, a southeastern city, on January 10, and was held on February 12. For the selection of jurors, the court sent letters to230 citizens on January 21. Among them, 87 candidates, about 37

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40) *Ibid*., articles 16-20.
41) *Ibid*., article 13.
42) For the selection process, see *ibid*., articles 22-31.
43) *Ibid*., article 60. However, it is not likely that this penalty will be strictly enforced.

percent, appeared at the trial. Through the screening process, nine jurors and three substitutes were selected. The jury delivered a unanimous verdict on the same day, and the court rendered its ruling according to the jury's verdict.[44] Since this first jury trial in the Daegu court, jury trials have been requested in other district courts, as well, although the number is small. At the end of August 2008, the total number of requested jury trials during the first 8months of the year was 158, among which the courts ruled in 35 cases.[45] In one case, a jury with seven members unanimously delivered, for the first time, a not-guilty verdict in an injury resulting in death case on the grounds that witness' statements were inconsistent, and the court, accordingly, made a 'not-guilty'decision.[46] This not-guilty decision by the district court was later overruled by the high court, which sentenced the convicted to two years imprisonment.[47]

It is too early to evaluate this new system. It will take more time to identify its pros and cons, and create a better picture for a more desirable Korean model. However, adoption of this jury system has inevitably changed the trial process. The process in which a jury trial takes place becomes much more important. As evidence is to be concentrated at this trial, the importance of a review on records will be reduced. The previous preference for lawyers who have served on the bench or as prosecutors,[48] or who have some other intangible influence

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44) *JoongAng Daily*, February 13, 2008.
45) Supreme Court of Korea, *bodo-jaryo[Report Release]*, September 9, 2008.
46) *JoongAng Daily*, March 25, 2008.
47) *JoongAng Daily*, July 5, 2008.
48) Regarding 'preferred treatment' in Korea,see Dae-Kyu Yoon, "Unfair and Irregular Practices" in Dae-Kyu Yoon ed., *the Korean Legal Profession in Recent Tansformations in Korean*

due to their former professional background, may become less important as the ability to persuade individual jurors grows as a factor.

American-style Law School System Adopted

How to produce lawyers has been a contentious issue from since judicial reform began to be discussed in the 1980s until a new system of American-style legal education was adopted in its current form in 2007. It was particularly difficult because the vested interests of current lawyers were at stake, and they persistently opposed any change that might threaten the *status quo*. In fact, there had been nobar examination in Korea[49] but rather, just the 'judicial' examination which was to recruit judges and prosecutors only, not practicing private attorneys, until 1980. Private practice law was an occupation practiced by former judges and prosecutors after they retired or stepped down from their public offices. Therefore, several dozen, or about one hundred, were recruited for vacancies on the bench and inthe prosecutor's office. This structure inevitably resulted in a small bar, and thus the vested interests involved were unprecedented. The total number of practicing lawyers in 1980 was 940, less than 1,000 for a population of 37.5million, or practically only one lawyer for 40,000 people.[50] The scarcity of lawyers resulted in unusually high legal fees and thus, practicing law has been one of the most lucrative jobs, a virtual oligarchic monopoly at the cost of the

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Law and Society(Seoul: Seoul National University Press, 2000), pp. 397-398.

49) In general, the bar examination is the examination that is taken to grant a license to practice law as private attorneys.

50) For statistics, see Dae-Kyu Yoon, *supra* note 6, pp. 128-29.

general public. Therefore, the interests at stake were in unison for legal professionals such as judges, prosecutors, and private attorneys. This kind of abnormal process for turning out lawyers had become an obstacle for sustained economic development as the size of the Korean economy has grown rapidly, particularly in the global market.

The most serious problem is the lack of a linkage between institutional legal education in universities and the judicial examination. Since there was no restriction to the qualifications required to sit the examination, anyone, regardless of educational background, law department[51] or other experience, could apply for the examination. Even a citizen without any institutional education record could take the examination.[52] President Roh became more famous since he passed the examination with only a high school education.[53] Since the examination does not test practical knowledge and professional technique required for practicing law, but rather, examines legal theory and doctrine, which applicants are required to memorize, institutional education is not required. The subjects tested are limited to six major, traditional codes of law, ignoring new fields. Students need not expand their interests to subjects other than those tested. There was also no limit on the number of times an applicant could sit the examination, although the examination is offered only once a year. Therefore, an aspiring applicant could prepare for the examination

51) For reference, law departments of all the universities in Korea recruited about 7,000 students every year in the middle of 80s, and about 13,000 in 2006.

52) In order to resolve this problem, an applicant has been required to take no less than 35 credits on legal subjects since 2006. This means that an applicant now should register with college or university to take such credits.

53) However, Roh is an exceptional case. Graduates of prestigious universities have made up the majority of successful candidates.

without attending university. Attending private cram schools may actually be more efficient. In fact, cram schools for the legal exam have become quite popular. This situation makes the judicial examination the most competitive of any civil service exams. Although many thousands of young aspirants apply every year, only a handful of them are successful. This system resulted in a huge loss of human resources, considering that the vast majority of applicants were destined to fail in spite of their long-term strenuous efforts. Lack of a linkage between institutional education and the judicial examination has also paralyzed the university legal education system.

Another problem is training for those who were successful in such a difficult, 'bottleneck examination'. Since the judicial examination covers legal doctrines and exegesis of important legal subjects, successful applicants need extensive practical training. The Judicial Research and Training Institute(JRTI) under the Supreme Court is in charge of their professional legal training. Since the judicial examination was taken to recruit novice judges and prosecutors, JRTI naturally emphasized training for judgeships and prosecution. As we will see below, however, as the quota for the judicial examination was drastically increased, exceeding vacancies on the bench and in the prosecution office since 1981, the majority had to practice law soon after completing two years of training at JRTI without any opportunity to serve as judges or prosecutors. Only in this light could the 'judicial' examination be called the 'bar' examination. JRTI could be called, in fact, the only 'law school'[54] in

54) Here 'law school' means a professional school as seen in America.

Korea that provides professional legal training. In this regard, the judicial examination is, *de facto*, the entrance examination to JTRI. Furthermore, two years of intensive training in JRTI has significantly contributed to strengthening the sense of oneness and hovering guild mentality among trainees.

Therefore, in Korea, a lawyer is not produced through systematic legal education from the universities, but is selected through a state-run judicial examination process. Successful candidates have separate practical training at JRTI. The training course at JRTI has been mainly for prospective judges and prosecutors, with limited courses for practical training for private practice. This kind of archaic and obsolete system of recruiting training could not provide appropriate education suitable for the social change and complexity of the modern world. Modern society needs experts in a variety of new subjects; for example, human rights, the environment, labor, tax, international transactions, and so on. The current system could hardly produce competitive lawyers in specific fields, let alone those with perspectives and visions needed to master the legal ramifications of a rapidly changing and globalizing society. This unusual recruiting system is to blame for the poor competitiveness of Korean lawyers in the global market as well as poor services for Korean citizens.

The first change to this complacent *status quo* was made by another authoritarian government, that of Chun Doo-whan, who took power after a military coup in 1980. In order to compensate for its lack of popular

legitimacy, Chun's new government selected several measures to redress certain chronic social problems.[55] More than doubling the quota for the judicial examination from about 140 to 300possible vacancies on the bench and in the prosecutor's office without delving into the fundamental defects of the system was one of these measures. These measures were made possible by flatly ignoring any kind of relevant process that might have given other concerned parties the opportunity to be heard. Raising objections to these measures was not easy considering the menacing political atmosphere at that time.[56] Although Chun's measure greatly contributed to resolving the shortage of lawyers, the structural defects of the system were ignored. Open discussion on this matter was possible under the democratic government.

The first government to take this issue seriously was that of Kim Young-sam. As his government actively pursued a policy of globalization by creating the Committee for Globalization Drive in 1995, globalization of legal services education was one of its major tasks for globalization.[57] The key issue was how to overcome the serious problems found in the current system. Adoption of an American-style law school system is known to be the best method for producing globally competitive lawyers.

55) For example, a flat ban on private tutoring was made in order to lessen the economic burden of parents. The number of new students in universities increased to lower the threshold to enter and mitigate competition in the entrance examination.

56) Dae-Kyu Yoon, "The paralysis of legal education in Korea"in *Legal Reform in Korea*, pp. 37-39.

57) After the collapse the old Soviet Union and East European bloc of communist states, globalization has accelerated around the world. Korea, heavily dependent on trade, had to adjust itself to this new environment. President Kim initiated the so-called 'globalization policy' to keep up with this change. Korea got a membership of OECD in1996. However, hasty management of the policy resulted in the financial crisisin 1997.

It was, for the first time, seriously considered as the most effective means to cure the malfunctions of the Korean judicial system, and therefore it was favored by the reformers in the presidential office. However, practicing lawyers, including judges and prosecutors, strongly opposed this system, while academics were divided. Legal professionals were very concerned about the adoption of an American model of legal education since it might bring in a sharp increase in the number of lawyers. Debates on its pros and cons were very active across the board. Debates and media attention on this issue greatly contributed to enhancing public perception and understanding on the serious problems residing within the Korean judicial system, and alternatives such as American legal education. This was an excellent opportunity for ordinary citizens to be informed in detail on this issue.

In the end, however, an American model of law school was not adopted because compromise on the issue was premature, and more time was necessary for further discussion. Instead, the pass quota of the judicial exam was boosted from 300 to 1,000 between 1996 and 2002. At the same time, the curriculum of the Judicial Research and Training Institute was reorganized and diversified to adapt to the increased number of trainees and new social demands. Although the Kim Young-sam government could not bring in fundamental change to the system itself, such a sharp increase in the number of lawyers was commendable, considering the lasting and strong oligarch vested interests of incumbent lawyers. The increased number of lawyers may eventually increase competition in the legal market and undermine the sense of fraternity among lawyers, lowering opposition and paving the road for more

fundamental change in the near future. There had been some discussions and trials for change under the Kim Dae-jung government, as well, but to no avail. Fundamental change was made by the Roh Moo-hyun government, which carried out extensive judicial system reform.

The Judicial Reform Committee of the Roh government decided to adopt an American-style 3-year law school system in order to establish a new model for recruiting legal professionals. One unique aspect of an American law school is its graduate level. In principle, applicants to the law school should finish undergraduate courses, while qualification for the bar examination is limited to graduates of law school. After extensive discussions and debates, the committee concluded in 2004 that the American model is the best alternative for reforming fundamental defects residing in the current system.[58] Under the American law school system, the law school is responsible for the training of legal professionals, and the bar examination is rather a process to confirmand certify their successful pursuit of law school curricula. This is an exact reversal of the existing Korean system. The American law school system was favored by the majority across the board, with the exception of legal professionals. People believed that the new system would contribute to linking institutional legal education and the bar examination, improving legal services, respond to social demands, reduce bureaucratic attitude of legal professionals, and more.

Subsequently, the Committee for Judicial System Reform concluded, in May 2005, the adoption of an American-style law school system, after

58) *Judicial Reform with People*, p. 163.

extensive review and discussions based on opinions from other ministries and organizations concerned. Furthermore, the committee drafted the bill for the governing law for creating and operating law schools. On the basis of the committee's draft bill, after the ministry of education once again collected extensive opinions from all walks of life, polled interested groups and held public hearings, the bill was finalized. The government sent the bill to the National Assembly after the deliberation of the State Council in November 2005. Finally, the bill was passed into law by the legislature in July 2007. An enforcement ordinance followed soon.[59)]

In order to recruit students for an opening in Spring 2009, a series of processes should be carried out. The most delicate and difficult issue was the total number of students and the number and selection of prospective law schools among 91 existing law colleges or departments. The Legal Education Committee created by the above law[60)] finally agreed on a quota of 2,000 students, and began receiving applications.[61)] Twenty four universities applied to be selected for American-style legal education programs, and the committee selected 12, a half-dozen universities from the Seoul Metropolitan area, and six from various regions throughout the country. Each school would be assigned 40 to 150 law students, depending upon the conditions of each respective university. Although the universities that are allowed to create new law schools should close their existing law colleges or law departments, others that are not allowed to

59) The Law on Establishing and Operating a Legal Professional Graduate School, Law No. 8544, July 27, 2007. Subsequently, the government declared a presidential ordinance to enforce the law. Presidential Ordinance No. 20302, September 28, 2007.

60) Articles 10-15.

61) Detailed conditions to create law school, see articles 16-26.

open new law schools remain as they are. This means that in Korea, two types of institutions coexist for legal education; existing law colleges and departments with undergraduate and graduate level courses, and now the new professional legal graduate schools modeled after the American system, with only graduate level lectures. The new law schools should recruit students who have finished a 4-year undergraduate-level program. Students of existing law departments are free to apply for the new law schools, however more than one third of the students entering the new law schools should be non-law majors in order to recruit students with diverse academic backgrounds.[62] A Korean version of a law school admissions test, the Legal Education Eligibility Teat (LEET), was held for the first time in August 2008,[63] and each law school will have broader discretion in selecting students inconsideration of many factors of their own choosing in the future.

For the time being, the current judicial examination will coexist with the new bar examination when new law schools produce graduates. After an interim period for transition, the former exam system will be abolished, and JRTI will also be closed. Therefore, in the future, judges and prosecutors will be recruited from among practicing lawyers who have passed the new bar examination. For the new bar examination, only those who have completed law school can apply. A major element of one’s legal training should be conducted in the law school, complemented by practical training gained by working as an intern or trainee in a legal

62) Article 26(2).

63) About ten thousands applied for this LEET. http://news.chosun.com/svc/news/www/printContent.html?type= 2008-11-01

office. Those who have completed their law school education satisfactorily would not have difficulty passing the new bar examination, as its success rate is expected to be about 70-80 percent. While those who have not attended law school are not qualified to take the bar examination, the number of attempts one can make at passing the examination will also be limited to two or three tries. The eased burden of passing the examination will give more room for the students to develop their individual perspectives and visions and explore their talents and interests. This ensures that a close linkage between law school education and the bar examination will be secured, and that lawyers are produced through institutional legal education.

As we have seen, this new system of legal recruitment and education is very similar to its American counterpart. However, the legal milieu of Korea differs greatly from that of the United States. To name but a few, there are different legal traditions, perceptions on legal practice, the degree of vested interests at stake, and the initial conditions of the system's adoption, such as the existence of many law departments. Our task is to determine how to overcome new obstacles along the way and secure the intended goal. We will have to wait and see the impact and outcomes of the new system.

Chapter 8. Unprecedented Judicial Activism of the Constitutional Court

One of the most remarkable developments in Korean democratic growth since 1987 is the significant activity of the Constitutional Court. The last twenty years of its operation has testified to its important role in buttressing democracy and its far-reaching influence on the practice of the rule of law. It has altered public attitudes toward the constitution and law in general, and toward the constitutional discipline as well.[1] As there form and democratization process has accelerated since the inauguration of the first democratic government, followed by the new constitution in 1987, its activities have become more notable, on par with the consolidation of democracy. Understanding its activity not only based on the volume of cases handled but also on the weight of the cases at hand, judicial activism, which had not previously been found in the Korean judiciary, can be said to have manifested over time in the Constitutional Court.

The activity of the Constitutional Court in Korea has been so successful, and its role in honoring constitutionalism has been so prominent that it has commanded widespread public trust and support.[2] The political stability that Korea has experienced during its transformation from

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

2) According to a poll, the Constitutional Court was ranked highest in powerfulness and trustworthiness among public agencies. The Supreme Court followed, ranked second in trustworthiness, while the Prosecutors' Office was second in powerfulness. *JoongAng Daily*, June 14, 2008.

authoritarianism to democracy since 1987 is partly due to the active nature of the Court, since partisan political issues have frequently been resolved in its courtrooms. Politicians as well as citizens have turned to the Court when they could not reach a compromise or come to a solution, regardless of the nature of the case at hand. The Court is now perceived to be the final forum, having the final say on disputed issues of social importance.[3] The Court is also ready to deal with any cases filed. It has not been reluctant to rule based on merit even when a case was highly political in nature. It went so far as to review policy choices made by the legislative body.[4] In spite of criticism on a particular ruling from time to time, the Court's authority and reputation has never been damaged to the degree that its overall credibility was called into question. As long as Korean political branches are sharply divided and hardly function as effective bodies to resolve conflicting interests through political processes, the active role of the Court in settling political disputes will continue to be necessary.[5] This situation has resulted in the

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3) For example, the ban on private tutoring, which has inflicted significant economic burden on Korean households and thus been a chronic social problem, was deemed unconstitutional, ending the debate on this issue. 12-1 KCCR 427, 98 Hun-Ka 16, etc.,(consolidated), April 27, 2000. In another example where a constitutional petition was filed to challenge the decision of the president to dispatch the Korean army to Iraq, the Court dismissed the case as it was lacking legal prerequisites for the constitutional petition. 16-1 KCCR 601, 2003 Hun-Ma 814, April 29, 2004. The recent protest against beef importation from the U.S. was also brought before the Court.

4) For example, as to the special law to create a new administrative capital by relocating a number of ministries to outside of Seoul, the Court ruled that the law was unconstitutional on the grounds that since it is customary that Seoul is recognized as the capital of Korea, that is, Seoul as the national capital is part of an unwritten constitution. 16-2(B) KCCR 1, 2004 Hun-Ma 554, etc.,(consolidated), October 21, 2004. The Court's reasoning lacked persuasion and it was criticized for what some considered its far-fetched reasoning.

5) However, if filed as an expression of discontent or demonstration against state acts at

judicialization of politics and the politicization of the judiciary.[6] It is exactly what judicial activism is about. The low level of trust and abundance of cynicism regarding politics has strengthened this trend, which is not likely to change in the near future. In this regard, the Court's contribution to the stabilization and consolidation of the newly established democracy based on constitutionalism should not be underestimated.

Jurisdiction and Organization

The newly created Constitutional Court not only enjoys a broad jurisdiction but is also in a better position to exercise its authority since obstacles found in the process of previous judicial systems have been removed. Three articles of the constitution are devoted to the Constitutional Court. More detailed guidelines for the Court later materialized via implementation of legislation, the Constitutional Court Act (hereafter CCA) in particular.[7]

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

1. Questions of the constitutionality of laws upon request of the courts;

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issue, they are likely to be subject to dismissal during the screening process due to the lack of legal requirements similar to "cases and controversies" requirements of the U.S.

6) See Jongcheol Kim, "Constitutional Implications and Limits of the Judicialization of Politics," 33(3) *Public Law Review* 229-251(Korean Public Law Association, May 2005).

7) Law No. 4017 of August 5, 1988, entered into force September1, 1988. It has since been revised several times.

2. Impeachment;
3. Dissolution of political parties;
4. Competence disputes between state organs; and
5. Constitutional petitions.

Article 111 also details the procedure for appointing nine Justices of the Court and defines their necessary qualifications. Nominations are limited to persons qualified as judges, having successfully passed the state judicial (bar) examination.[8] Three branches of government work together to comprise the bench. Three Justices are nominated by the president, three by the National Assembly, and three by the Chief Justice of the Supreme Court. The Presiding Justice of the Court is designated by the president with the consent of the National Assembly.

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

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8) Justices are appointed from among eligible persons who are forty or more years of age and have been in any of the following position for fifteen or more years: (1) Judge, public prosecutor, or attorney; or (2) A person who is qualified as an attorney and has been engaged in legal affairs for or on behalf of a governmental agency, a national or public enterprise, a government-invested institution or other corporation; or (3) A person who is qualified as an attorney and has been in a position higher than assistant professor of jurisprudence in a recognized college or university. CCA, article5(1). The same qualification is required for the Justice of the Supreme Court. Court Organization Act (Law No. 3992 of December 4, 1987), article 42.

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

The current Constitutional Court system has been improved by removing the important legal obstacles found in the previous systems. The Constitutional petition (or constitutional complaint) was created within its jurisdiction to protect fundamental rights when existing laws do not afford remedies through ordinary court processes for unconstitutional state actions.[9] A more important improvement concerns the process of reviewing the constitutionality of legislation. Under the Constitutional Committee system contained in the previous constitutions of 1972 and 1980, the Committee could not exercise its reviewing authority unless an ordinary court requested *ex officio* or upon the parties' motion to review. Therefore, the ordinary courts had the authority to initiate a reviewing process. If the ordinary courts did not make this request, the Committee

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

had no chance to review at all. In fact, this was the case under the Constitutional Committee system during the fifteen-year period in which no requests were forwarded to the Committee; hence, no reviews were made by the Committee.[10)]

Under the current Constitutional Court system, however, the ordinary courts'authority to request a constitutional review is no longer an obstacle since the parties concerned can file a petition directly with the Constitutional Court when an ordinary court has rejected their request for review.[11)] The passive or reluctant attitude of ordinary courts can no longer stand in the way of the Constitutional Court exercising its reviewing authority.

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

10) Dae-Kyu Yoon, *Law and Political Authority in South Korea*, pp. 164-68.

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

At the time the Act was passed, the introduction of the distinction between standing and non-standing Justices seems to have lacked any rationale beyond the expectation that the number of cases referred to the Constitutional Court would not be so large as to require the full-time service of all nine Justices in consideration of the passivity and dormancy of previous organs. To the contrary, however, since its beginning, a substantial number of cases have been docketed in the Constitutional Court. Commentators called for the Act to be revised to provide all nine Justices with the same full-time status, and in November 1991, the National Assembly finally adopted such a revision, eliminating the "non-standing"status.[12)]

Although the Constitutional Court is supported by an administrative apparatus and a secretariat to carry out its role,[13)] the assistance of professional jurists is widely utilized. Therefore, the Constitutional Court has "constitutional research officers" on staff to assist the Justices.[14)] In addition, the Court can request other state institutions to lend the services of their staff to Constitutional Court research officers.[15)] In fact, the Court gets assistance from judges, prosecutors and law professors temporarily seconded from the courts, prosecutor's offices and universities. While in the early stage after its inauguration, the Court relied mainly on those lawyers seconded to it, and as time passed, it successfully recruited it sown permanent staff and continues to do so. For example, as of mid-

12) Amended on November 30, 1991 as Law No. 4408. This amendment also reinforced research staff. See CCA, article 19.

13) CCA, article 17-21.

14) CCA, articles 19 and 19-2.

15) CCA, article 19(9).

1991 the Court had a mere two permanent research officers but five judges, three prosecutors and one academic as seconded researchers. However, as of September2008, the number of full-time research officers has risen to thirty six while another twenty temporarily seconded researchers also serve to assist the Justices.[16) The unprecedented active role and prestige of the Court has brought about the increase in researchers and expedites the successful recruitment of competent jurists.

Activities of the Constitutional Court

As an organ for constitutional review, the Constitutional Court is more active than any system that Korea has employed so far. Many decisions on the constitutionality of laws highlight its activities.[17) Statistics provide a general picture of its activities thus far.

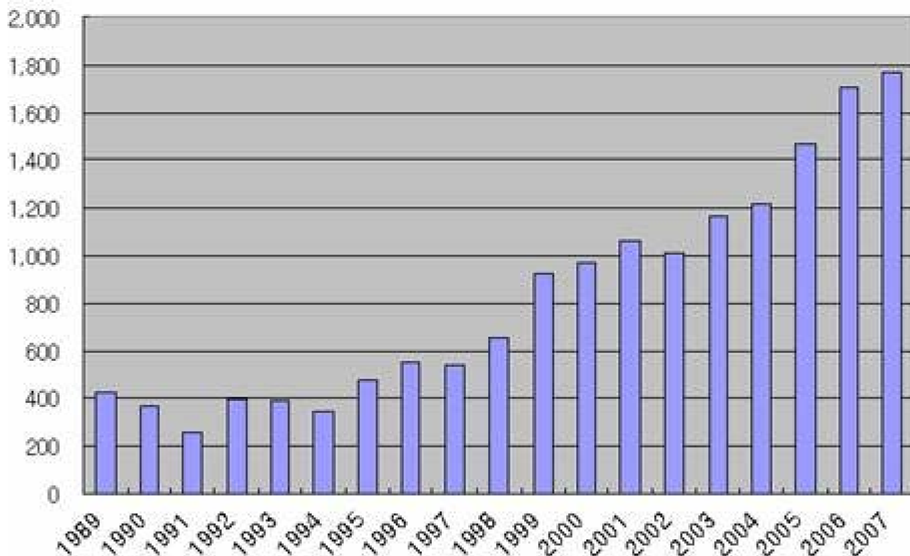
Since the Constitutional Court first opened its doors on September 19, 1988 up until June 30, 2008, it has received 16, 357cases and disposed of 15,535 of them, with 822 cases pending. Among the 15,535disposed cases, the Court ruled on 7,348 cases based on their merits, dismissing 7,645 cases in the screening process without reviewing their merits, and with another 542 being withdrawn by the parties concerned. The Court’s activities are primarily concerned with the review of the constitutionality of legislation and constitutional petition, which occupies the bulk of them as shown below. To date, only forty-eight cases of competence disputes

16) Among the twenty seconded researchers, sixteen are judges while three are prosecutors.

17) For important decisions of early periods, see West and Yoon, *supra* note 1, pp. 104-113.

have been filed, with one on impeachment and none on the dissolution of political parties. The annual number of cases filed has been increasing over the last twenty years. For example, about 300 cases were filed in the early 90s, while more than 1,000 cases were received in the 2000s. In 2008, the number of cases filed approached almost 1,800. The yearly average so far is about 825 cases.

Number of Cases Filed: Change by Year



Review of the Constitutionality of Legislation, 1988-2008

Review of the constitutionality of legislation is a core part of the jurisdiction of the Constitutional Court. Ever since the first constitution of 1948, Korean constitutions have divided judicial review into two categories: legislation, and lower laws other than legislation. Here,

legislation means statutes duly passed by the legislature, while lower laws include all government acts other than legislation (e.g., orders, decrees, ordinances, regulations, and dispositions). Although the Constitutional Court exercises final authority in reviewing the constitutionality of legislation, ordinary courts have consistently reviewed lower laws.[18)] When a constitution dictated the creation of a special body such as the Constitutional Court or Constitutional Committee, this kind of division of jurisdiction was taken for granted as a means to protect the ordinary courts from political interference.

However, such division is hardly straightforward. A decision of the Constitutional Court on the constitutionality of legislation can affect the interpretation of lower laws and *viceversa*. As long as such division remains a "horizontal" conception, conflict between the Constitutional Court and the Supreme Court over jurisdiction is inevitable.[19)] Since the same questions may be presented in diverse procedural contexts, distinctive "horizontal" division does not prevent a partial overlap of power when deciding constitutional questions.[20)] In several cases, this has led to "turf wars" between the two institutions.

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18) Constitution Article 107(2) provides that "the Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or dispositions, when their constitutionality or legality is a prerequisite for trial."

19) For example, the Constitutional Court decided that the constitutionality of the regulation of the Supreme Court was within the jurisdiction of the Constitutional Court categorized as a constitutional petition, as the regulation directly infringed upon the fundamental right of the petitioner. 2 KCCR 365, 89 Hun-Ma 178, October15, 1990.

20) West and Yoon, *supra* note 1, pp. 73-119.

As provided, the Constitutional Court adjudicates the constitutionality of a law only after receiving a request from the court with original jurisdiction over the case. Every court is constitutionally required to refer questions on the constitutionality of legislation to the Constitutional Court whenever resolution of such a question is a prerequisite for deciding a case.[21] The Korean Constitutional Court－unlike the German Federal Constitutional Court－cannot exercise “abstract judicial review.” Only when the determination of the constitutionality of a law is a prerequisite to a trial can the Court engage in review[22](i.e., a concrete case or controversy must have arisen in order to carry out a review).

Referral of constitutional questions to the Constitutional Court may be made by trial courts *ex officio* or at the request of a party. Such requests are denied if the court preliminarily determines that the law is constitutional despite appeals to the contrary by a party. When requests of this nature are denied, a party has two options for recourse: It may make a normal appeal of the case, and renew the constitutional argument in an appellate court, or the party may file a petition directly with the Constitutional Court under Article 68(2) of the Constitutional Court Act.[23] Under the previous constitution, this latter route of recourse was unavailable, leaving a party no other alternative once the court at hand declined to refer there quest to the Constitutional Committee. Absence of an option-granting mechanism resulted in the quiescent existence of constitutional adjudication.[24] Although a petition under Article 68(2) of the

21) Constitution, articles 107(1) and 111(1). CCA, Article 41(1).
22) CCA, article 41(1).
23) For article 68(2), see *supra* note 11.

CCA is categorized as a constitutional petition, it is no more than an initiation to review the constitutionality of law (i.e., the petition of Article 68(2) essentially amounts to review of the constitutionality of law rather than a constitutional petition).

When we consider past experiences under the previous constitutions, the number of cases concerning the constitutionality of legislation handled by the Constitutional Court is alarming. Between its inauguration on September 19, 1988 and June 30, 2008,excluding 233 pending cases, the Constitutional Court disposed 2,069 cases concerning judicial review of legislation. Among these disposed cases, the courts referred 542cases to the Constitutional Court *ex officio,* or upon the requests of the parties concerned, while the remaining 1,527 cases were referred to the Court in the form of constitutional petitions by the parties concerned, as provided by Article 68(2). This article allows courts to refer matters to the Constitutional Court even though the parties requested constitutional review. The dispositions on the constitutional review of legislation are tabulated as follows:

Dispositionsof Constitutional Review on Legislation

	Total	Withdrawn	Dismissed in Screening	Unconstitutional*	Constitutional
Total	2069	148	416	410 (20%)	1094
Referred by courts	542	106	30	182 (34%)	224

24) See Yoon, *supra* note 10, pp. 164-68.

	Total	Withdrawn	Dismissed in Screening	Unconstitutional*	Constitutional
Petition formed upon courts' refusal to request	1527**	42	386	228 (15%)	870

* The category of "unconstitutional" disposition includes all modes of unconstitutionality, such as "inconsistent with the constitution," "partly unconstitutional," "constitutional on the condition of proper interpretation,"as well as plain unconstitutional. The number of cases ruled to be plainly unconstitutional decisions is 258 among the 410.

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

Excluding 564 cases withdrawn and dismissed in the screening process, the Court rendered 1,505 judgments on their merits in cases challenging the constitutionality of legislation, among which 410 were deemed to be unconstitutional in one way or another. The proportion of judgments with review on their merits resulting in the invalidation or partial repudiation of legislation is very high, at about 20 percent.

One thing we have to pay attention to is the statistics on the petition form of a request through Article 68(2) of the CCA, which is used as away to the Court when the ordinary court at hand refuses to refer a case. The rate of unconstitutionality is still very high, as high as 15

percent. Even though the courts rejected appeals to refer cases to the Constitutional Court against the party's request, the parties concerned received a high rate of unconstitutionality judgments after directly petitioning the Court themselves.

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

The highlight of the activities of the Constitutional Court is the judgment of legislation as unconstitutional. The Court has been very active in supporting private economic rights overridden by the government or public institutions, and invalidating legal provisions bestowing discriminatory privileges on public institutions. In particular, various laws concerning taxation were ruled to be unconstitutional and in breach of equal protection. In the area of civil rights, though discreet sometimes, the Court invalidated many restrictive provisions on private citizens in the criminal process. Free expression was frequently upheld by repudiating many restrictive laws, while some labor-related laws were also held to be unconstitutional in favor of laborers. Many restrictions and infringements on individual freedoms for the sake of national security were eliminated.

Many unequal treatments against women were corrected. Many election-related laws were also held to be unconstitutional and in violation of equal protection or free expression.[25]

Constitutional Petitions, 1988-2008

Constitutional petitioning is anew system first adopted under the current 1987 constitution, and to date, a considerable number of petitions have been filed. Of the 16,357 cases filed, 14,006 cases, or about 86 percent, are constitutional petitions, excluding petitions under Article 68(2) of the CCA, which are, in fact, requests for constitutional review on legislation.

Petitions fall into two categories. First, Article 68(1) of the CCA provides that petition jurisdiction is available in situations where existing laws do not afford remedies through ordinary court processes for unconstitutional state action. It should be noted that the decisions of ordinary courts are not eligible for the petition.[26] A petition of this type may be filed only if all available administrative and judicial remedies have been exhausted. If no ordinary judicial review is available, then a direct petition is possible. An example is a challenge to a prosecutorial decision not to indict an accused, for in such a case, the ordinary courts have no jurisdiction over the matter.

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25) For the lists of laws held unconstitutional, see http://www.ccourt.go.kr/home/main/bpm/stat_c2_sub02.jsp

26) See CCA, article 68(1), *supra* note 9.

Second, a party who requests that a court refer a question on the constitutionality of legislation to the Constitutional Court and is refused may renew the claim of unconstitutionality by immediate petition to the Constitutional Court under Article 68(2) of the Act. If the claim alleges a constitutional defect in a law and is disallowed by the court, then an ordinary appeal is not the sole recourse, and an Article 68(2) petition may be immediately filed in the Constitutional Court to obtain a definitive ruling on the constitutionality of the law in question as explained above.[27] Therefore, this grants an alternative access for review of the constitutionality of legislation for those whose requests for referral to the Court have been rejected by the ordinary court at hand.

Thus, the two kinds of petition are quite distinct. An Article 68(1) petition, if granted, vindicates individual rights infringed upon by the state and involves fact-finding by the Constitutional Court itself. An Article 68(2) petition, if granted, stays ongoing litigation pending the Constitutional Court's judgment on the validity of a legislative act, but the finding of facts and the final disposition are made by the court of original jurisdiction, subject to the guidance of the Constitutional Court on the constitutional question.[28] An Article 68(2) petition is the alternative way to approach the Constitutional Court for the judicial review of legislation in cases where an ordinary court refuses to help and parties concerned

27) There is a time limit for this type of petition. A petitioner should file with the Constitutional Court within thirty days of the day a request for a referral to the Constitutional Court was rejected by an ordinary court. CCA, Article 69(2). A petition based on Article 68(1) must be filed within ninety days of the day the cause of the petition was known or within one year of the day the cause occurred. CCA, Article 69(1).

28) West and Yoon, *supra* note1, pp. 92-93.

are, otherwise, about to lose an opportunity to challenge the constitutionality of legislation at issue. Therefore, an Article68(2) petition has to be dealt with under the tabulation of judicial review of legislation as we have seen above.

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

However, the Constitutional Cour thas broadened the scope of remedy by accepting exhaustive exceptions. For example, when the ordinary judicial process places an unreasonable burden on a petitioner without adequate relief, or when it is almost impossible for a petitioner’s claim to be accepted in an ordinary court due to firmly established precedents, a petitioner can be immune from the exhaustion requirement.

As of June 30, 2008, a total of 14,006 petitions had been filed with the Constitutional Court under Article 68(1), and 13,427 of the cases were disposed, while 579 cases were still pending. Excluding 389 petitions withdrawn by the parties concerned, and 7,213 dismissed in the screening process,[29] the court reviewed 5,825 petitions on their merits. In

29) Article 72, CCA, provided a procedure for the review of petitions by a petit bench of the Constitutional Court composed of three Justices. If a petit bench fails to dismiss

373 petitions,[30] the Court found state actions unconstitutional. That is, about 6 percent of petitions reviewed on their merits were found to be unconstitutional. From the commencement of operations of the Court to June 30, 2008, the cumulative record is displayed in the table below.

Dispositionsof Constitutional Petitions

	Total#	(in Screening) Withdrawn	(in Screening) Rejected	Denied	Granted*	Unconstitutional**
Total	13,427	389	7,213	5,446	287	86
Against legislative act	1,566	73	1,086	332	1	72
Against executive act	10,697	292	5,009	5,094	286	12
Against judicial act	921	13	887	19		2
Others	243	11	231	1		

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

** Fifty-two state acts were pronounced plainly "unconstitutional." Among 86 "unconstitutional" decisions are included 23 decisions of "inconsistent with the constitution" and another 11 of "conditionally unconstitutional."

Inconsistency of the total is caused due to omission of several items negligible in volume.[31]

a petition within thirty days, it automatically passes to the grand bench for disposition.

30) This number consists of 287 granted and 86 unconstitutional decisions.

Among petitions disposed, about 80 percent were raised against executive acts, among which, about 85 percent were petitions contesting decisions by public prosecutors not to institute (or to suspend) criminal indictments, i.e., decisions of *nolle prosequi*. In other words, from the total number of petitions under Article 68(1), almost 68 percent were challenging the public prosecutors' decisions of non-indictment.

Another distinctive aspect is the high rate of dismissal in the screening process. More than half of the cases disposed by the Constitutional Court were rejected the opportunity to be reviewed on their merit. The grounds for dismissing a petition in the course of preleminary examination include failure to exhaust other available remedies, failure to satisfy the time limits for filing a petition,[32] and failure to submit the petition through a licensed attorney.[33] The high rate of dismissal in the screening process can be attributed to these grounds as well as to inability of the parties concerned.

These statistics indicate the apparent success of the newly adopted constitutional petition system by the current constitution. It redresses the legal vacuum that once stood outside legal protection before the constitutional petition was introduced. Infringements on property rights or

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31) For the details of statistics, see http://www.ccourt.go.kr/home/main/bpm/stat_c1_sub03.jsp

32) CCA, article 69. See *supra* note 29.

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

human rights by public acts have often been redressed by the constitutional petitions. Prisoners' rights, which tend to be far from public scrutiny, have sometimes been asserted through this process. In particular, a constitutional petition is the last means available to challenge prosecutors' broad discretion to indict and thus is frequently resorted to, as the above statistics display. However, the remedy by the Court is not so effective since prosecutors are to re-examine their decisions instead of being obliged to indict upon the Court's ruling on the unconstitutionality of non-indictment.

Impeachment

Inmost legal systems, impeachment has been regarded as a mechanism by which there presentative bodies can enforce the oaths that high-ranking officials undertake to execute their duties in accordance with the constitution and law. In Korea, however, only the National Assembly can initiate an impeachment case, while the Constitutional Court holds final authority to decide upon a National Assembly request.

The National Assembly may decide to bring charges against enumerated high-ranking officials (i.e., the president, cabinet ministers, judges, Central Election Management Committee members, members of the Board of Audit and Inspection, and others defined by statute).[34] Impeachment, however, is not the exclusive method for removing judges and other

34) Constitution, article 65; CCA, article 48. The President is subject to impeachment by a two-thirds majority vote of the National Assembly for violations of the Constitution or other laws. Other officials are subject to impeachment by a simple majority vote.

high-ranking officials. All officials are also subject to criminal sanction s,[35] judges not excluded.[36] This allows for the possibility of politically motivated abuses of prosecutorial discretion.

The Constitutional Court Act stipulates that the Court may suspend an impeachment proceeding if a criminal action is pending.[37] If the impeached resigns prior to judgment, the Court is obliged to dismiss the case as moot.[38] The Act also states that a judgment of impeachment "shall not exempt the accused person from civil or penal or other liabilities"[39](i.e., the double jeopardy clause is not applicable since impeachment is not regarded as a criminal prosecution).[40]

Under the current constitution, neither had the National Assembly requested any impeachment, nor had the Constitutional Court exercised such a decision until April 2004. The Korean legislature entered this uncharted territory when, in March 2004, it passed the unprecedented impeachment motion against the incumbent President Roh Moo-hyun on accounts of violation of election laws, corruption involving his aides, and incompetence. This impeachment process was proceeded by the initiative of opposition parties, which commanded more than a two-thirds majority

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35) One exception is the president. Article 84 of the Constitution provides that "The President shall not be charged with a criminal offense during his/her tenure of office except for insurrection or treason."

36) Constitution, articles 106(1) and 112(3).

37) CCA, article 51.

38) CCA, article 53(2).

39) CCA, article 54(1).

40) Article 13(1) of the constitution provides "No citizen shall be subject for the same crime to be twice put in jeopardy of punishment."

in the legislature, in spite of vehement opposition by the ruling party. It started as a political attack, rather than a legal claim, on the reform-minded political maverick who often expressed his resistance to existing politics, but proved to have a titanic impact on the ensuing congressional election.

However, the Constitutional Court overturned the National Assembly's motion to impeach the president in May and reinstated him, dismissing most of the charges. The Court did find that the president had violated election laws, but said the infraction was not serious enough to justify his unseating.[41)]

This episode created the momentum to turn public sentiment against overwhelming conservative opposition forces that had tried to realize irrational political demands using their majority power in the general election for congressional members in April. The minority ruling party with 49 seats dramatically increased its presence, becoming the majority party with 152 seats among a total of 299, while opposition parties had to bite the bullet.[42)] Once again, elections proved to be most effective and strongest means that citizens can exercise in order to hold politicians accountable in a democratic society.

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41) 16-1 KCCR 609, 2004 Hun-Na 1, May 14, 2004.

42) The major opposition party, the Grand National Party, lost 33seats in the election, dropping from 154 to 121. Thanks to unjustifiable attempt to impeach President and enormous backlash against it, the ruling party secured the majority in the legislature for the first time in 16 years.

Dissolution of Political Parties

The Constitutional Court is empowered to decide whether a political party is subject to dissolution on the grounds that the objectives or activities of the party in question run “contrary to the fundamental democratic order.”[43] The Court exercises this authority upon the request of the executive after resolution by the State Council.[44] The Constitutional Court has not exercised its power to dissolve political parties, and considering the reality of law and society in Korea,such may also be the case for the foreseeable future.

Registration of a political party with the Central Election Management Committee under the Political Party Act is required for it to be eligible for legal protection.[45] When a political party’s objectives or activities run contrary to constitutional order, the party is subject to criminal prosecution under the National Security Act, which outlaws “anti-state organizations” (whether or not constituted as political parties) and subjects individuals to severe criminal punishment for any form of association with or assistance provided to such outlawed organizations. Threat of prosecution under the National Security Act makes it difficult to imagine a situation where a registered political party would be subject to dissolution by judgment of the Constitutional Court. Consequently, no such case has of yet been filed.

43) Constitution, article 8(4); CCA, article 55.
44) Constitution, article 89(14).
45) CCA, article 58.

Competence Disputes between State Organs

The Constitutional Court has the power to make rulings on “competence disputes between organs of the State, between organs of the State and a local government, or between local governments.”[46] Although local autonomy has only been institutionalized since 1991, and since most local administrative functions remain under central government control, this jurisdiction may become more significant in the future as the broader powers of the central government transfer to local governments in tandem with democratic development.

Competence disputes concerning the existence or scope of competence on the national level are classified as those between or among the National Assembly, the executive, the courts, and the Central Election Management Committee.[47]

As to competence disputes, as of June 30, 2008, the Court had disposed 38 cases, among which five were upheld. The number of cases in this category is still small, and disputes of this nature among government organs tend to be resolved through political processes and administrative adjustment rather than through a judicial process. As the rule of law penetrates officialdom, and the attitude to resolve these disputes through law expands, the Court will have more opportunities to settle them.

46) CCA, articles 61(1) and 62(1).
47) CCA, article 62(1)(i).

The Constitutional Court's Contribution to Korean Democracy

The Constitutional Court system has greatly contributed to changing public and bureaucratic attitudes toward the constitution and public power. Public power is finally scrutinized based on the constitution. As the constitutional expression is abstract and generally simple, the task of interpreting the constitution and realizing the spirit of the constitution falls upon the judicial review agencies. This means that the activation of the Constitutional Court contributes to reducing the gap between theory and reality. The Court has maintained the balance and compromise between the principle of the constitution and the Zeitgeist. The constitution is neither a political manifesto, nor a legal justification for political power, but rather, it is "a justiciable law."However, this is not because the current constitution employed the Constitutional Court system itself, but because the political environment has removed many obstacles that had blocked the satisfactory function of the system. In this regard, Korean democracy paved the road for the active role of the current Constitutional Court, while the Court has contributed to consolidation and institutionalization of Korean democracy.

The active role of the Constitutional Court means the expansion of constitutionalism. Active discussions on constitutional questions have brought new vigor to the discipline of public law. Authoritarian politics and the lack of constitutional decisions forced constitutional scholarship to plod solely through the study of dogmas. The study of dogmas, however,

must be complemented by the examination of decisions made in the real world. Constitutional decisions have become one of the most important sources of law. Thus, the Constitutional Court system's active role has brought about a new chapter in the scholarship and teaching of public law in Korea.

Now, a public entity has to take into consideration the Constitutional Court's attitude and perspective when it exercises its authority. This means that the active role of the Court contributes to making public officials more judicious and discreet in the performance of their jobs. In addition, the ordinary citizen now takes for granted his/her constitutional right to recourse via the Court. The contributions of the Court are, in part, responsible for enhancing the "rights-consciousness" of Korean society.

Constitutional review is, in general, designed to resolve social conflicts in terms of law. That is, it is a judicialization of the political process on the condition that politics falls under the rule of law. When politics is not under legal control, constitutional review becomes no more than a meaningless tool to justify the wishes of political powers. Therefore, the independent exercise of authority from political powers is the *raison d'etre* of the constitutional review system. The current Constitutional Court system of Korea is an encouraging example of constitutional review concerning how and under what conditions a system is successfully rooted in a society. So far, the Korean choice can be said to be a great success.

Chapter 9. Rectifying Past Wrongs

The issue of transitional justice has been raised more than once as Korea has experienced dramatic political changes several times, moving from colonial rule to liberation and from authoritarian rule to a democratic government. How to hold anti-national and pro-Japanese collaborators or anti-democratic actors accountable was an urgent issue of the time after a period of political upheaval. Many atrocities accompanied by many casualties were also to be found as ideological confrontation intensified after the liberation of 1945, and, in particular, during the Korean civil war (1950-53). As democracy has been consolidated since 1987, the call for rectification of past wrongs has mounted. The unfinished tasks of transitional justice were taken on full-scale, as this was perceived as an obligation of a democratic government. Transitional justice is said to aim to serve; "establishing the truth, providing victims a public platform, holding perpetrators accountable, strengthening the rule of law, providing victims with compensation, effectuating institutional reform, promoting reconciliation, and promoting public deliberation."[1] Above all, in order to prevent a repetition of similar behavior in the future and to consolidate the legitimacy of the democratic government, those who are responsible must not go free with impunity.

Transitional Justice Before Democratization

The first occasion of transitional justice surfaced after the inauguration of the first South Korean government in 1948, following liberation from

1) http://en.wikipedia.org/wiki/Transitional_justice 2008-07-08.

Japanese colonial rule. At the time of the departure from colonial rule and at the height of the new spirit of independence, it was very important to firmly establish a national spirit of independence and justice, and to rectify the distorted values instilled under colonial rule. To bring pro-Japanese collaborators to justice was an inevitable step in the process of regaining sovereignty. However, political leaders who wanted to take advantage of those collaborators to strengthen their power base and the American military government, which emphasized law and order, were both very reluctant to carry out transitional justice. Although the first National Assembly enacted a law to punish anti-national acts committed by pro-Japanese collaborators, and subsequently created the special commission to investigate such acts, President Rhee Syngman colluded with those collaborators to obstruct such investigations under the pretext of the urgent need to cope with communist expansion in South Korea. Anti-communist groups criticized nationalists for their sympathetic attitude toward communists. Nationalist political leaders who supported transitional justice were persecuted or assassinated.[2] Efforts to carry out transitional justice ground to a halt as the Korean civil war broke out in 1950.

The second opportunity for transitional justice arose after the collapse of the authoritarian government of Rhee Syngman in the wake of a student revolution in April 1960. There was an overpowering outcry for the identification and punishment of those responsible for rigged elections, corruption and misappropriation of public property. The National Assembly responded by revising the constitution to provide constitutional grounds

2) For example, a famous independent movement leader Kim Koo, who served as president of the interim-government in exile, was assassinated in 1949.

for *ex post facto* penalties, and the creation of a special tribunal and special prosecutor,[3] and then enacted laws necessary to ensure these offices were afforded the powers they would require. However, the new government was very fragile and reluctant to proceed. It made little progress in its investigations. There were also strong demands to uncover the truth about civilian massacres committed during Rhee's rule, including during the Korean War. The ensuing military coup led by General Park Chung-hee in May 1961 broke off all the ongoing transitional justice processes. The new military government's reactionary response went sofar as to punish petitioners who demanded investigations into unlawful state atrocities.

Under the rule of Park Chung-hee, who masterminded the military coup, the issue of rectifying past wrongs was not officially raised due to the conservative and anti-communist character of his government, as well as his concern about the legality of the coup, which was resented by democratic intellectuals. As his government was later authoritarianized, prospects for handling transitional justice became even more remote. Earnest efforts to deal with past wrongs have only been possible since democratization in 1987.

3) This was the fourth revision of the constitution, made on November 29, 1960 by adding supplementary provisions. See Dae-Kyu Yoon, *Law and Political Authority in South Korea*, p. 100.

Transitional Justice After Democratization: Since 1987

Demands for transitional justice were overflowing after the successful democratic revolution in June 1987. The democratic legitimacy of the government commanding popular support enjoyed broader leeway in handling past wrongs. The Roh Tae-woo government, which was the first government to operate under the 1987 Constitution, was passive, since he had been an accomplice of to the military coup led by Chun Doo-hwan in December 1979. However, the following civilian governments were assertive in dealing with past wrongs. The first civilian government of Kim Young-sam brought justice to former Presidents Chun and Roh, in an effort to “right history”. The Kim Dae-jung government, which represented the first peaceful transfer of power to an opposition party, carried out transitional justice on a more systematic level. Human rights violations under authoritarian rule were investigated. The National Human Rights Commission was also created. A full-scale investigation to deal with past wrongs was conducted by the reform-minded Roh Moo-hyun government. The Roh government tried to address the most of important past wrongdoings committed by the state across the board, including the activities of pro-Japanese collaborators and even wrongs occurring before Japanese rule. Many new laws and related commissions were created. Fourteen commissions were in action at the end of the Roh government in early 2008. The transitional commission for the new conservative government of Lee Myung-bak announced its plan to combine the commissions, revealing its reluctance to continue the previous government’s policy on transitional justice.[4)]

As matter of fact, dealing with past wrongdoings was one of the major issues that aggravated the bipolar division of Korean society under the progressive government of Roh. On one hand, the conservatives who have enjoyed lasting vested interests are likely to have various connections with previous authoritarian governments, or even directly with the Japanese. On the other hand, the conservatives emphasized the importance of experience and pragmatism, while the progressives valued morality, national identity and legitimacy. Rectifying past wrongs became an important agenda item of the progressive government in order for it to consolidate its support while weakening the moral basis of the conservatives.

To understand the extensiveness of the scope and subject matter, it would be useful to list all the existing 14 bodies handling past wrongs. However, they are not all part of the transitional justice machine. For example, the Presidential Commission on Suspicious Deaths, which came into being in October 2000 and should have completed its activities in September 2002, was finally dissolved in 2004.[5] Therefore, the com-

4) *The Chosun Ilbo Daily*, January 18, 2008.

5) It is legally justified by the Special Act to Reveal the Truth regarding Suspicious Deaths (Law No. 6170, January 15, 2000), which was revised to extend the length of its activity from six months to two years in Article 23(revised on March 25, 2002, Law No. 6670). However, the commission was dissolved in 2004 (a revised supplementary provision allowed for the extension of it sactivity. Law No. 6750, December 5, 2002). The commission received 80petitions. Among them, it recognized 19 cases as suspicious deaths resulting from the unlawful exercise of state power during the democratization movement, while 30 cases were ruled unverifiable. It rejected 33 cases since they were not connected to the democratization movement or were not unlawful state acts. For details of the commission's activities, see the commission's first term report, *A Hard*

mission is not listed here since it is no longer active. New cases, if they exist, will be handled by the Commission for Truth and Reconciliation to Cope with Past History, which has comprehensive jurisdiction on the subject matter, as we will see below.

The fourteen commissions are as follows:

1. The Commission for Compensation for Victims of the Gwangju Democratic Movement (formed in 1990)[6)]
2. The Review Committee for Restoring Honor for Victims of Geochang and Other Massacres (formed in 1998)[7)]
3. The Commission for Restoring Honor and Compensation for Victims of Democratization Movements (formed in 2000)[8)]
4. The Commission for Identifying Truth and Restoring Honor for Victims of the April 3 Jeju Massacre (formed in 2000)[9)]
5. The Commission for Identifying Truth Regarding Anti-National and Pro-Japanese Acts (formed in 2004)[10)]

Journey to Justice (Seoul: Sam in Books, 2004), p. 117. This report introduces all the cases it handled.

6) It is legally justified by the Act for Compensation for Victims of the Gwangju Democratic Movement (Law No. 4266, August 6, 1990),which later replaced ‘Gwangju’ with ‘May 18’ in revision by Law No. 7911, March24, 2006.

7) It is legally justified by the Act for Restoring Honor for Victims of Geochang and Other Massacres (Law No. 5148, January 5, 1996). The massacre in the Geochang area took place in 1951, during the Korean War. The Korean army slaughtered over seven hundred civilians in the wake of killing communist militia.

8) It is legally justified by the Act for Restoring Honor and Compensation for Victims in Connection with Democratization Movements (Law No.6123, January 12, 2000).

9) It is legally justified by Act for Identifying Truth and Restoring Honor for Victims of the Jeju April 3 Massacre (Law No. 6117, January12, 2000). This massacre on Jeju Island brought to death more than tens of thousand during 1947~48 in violent suppression over residents.

10) It is legally justified by the Act for Identifying the Truth on Anti-National and Pro-

6. The Commission for Identifying Truth Regarding Servitude under Japanese Colonial Occupation (formed in 2004)[11)]
7. The Review Committee for Restoring the Honor of Participants in the Donghak Farmers Revolution (formed in 2004)[12)]
8. The Review Commission for Restoring Honor and Compensation for Victims of the Samchoeng Training Camp (formed in 2004)[13)]
9. The Commission for Identifying and Restoring the Honor of Victims of the Nogeunri Massacre (formed in 2004)[14)]
10. The Commission for Compensation for Special Mission Performers (formed in 2004)[15)]
11. The Commission for Identifying Persons of Merit in Special Operations (formed in 2004)[16)]

Japanese Acts under Japanese Colonial Occupation (Law No. 7203, March 22, 2004). The commission announced publicly the list of anti-national and pro-Japanese collaborators, which caused significant social repercussions. *The Chosun Ilbo Daily*, December 6, 2007.

11) It is legally justified by the Act for Truth on Servitude under Japanese Colonial Occupation (Law No. 7174, March 5, 2004).

12) It is legally justified by the Act for Restoring the Honor of Participants in the Donghak Farmers Revolution (Law No. 7177, March 5), which took place in the end of 19th century.

13) It is legally justified by the Act for Restoring Honor and Compensation for Victims of the Samcheong Training Camp (Law No. 7121, January29, 2004). This training camp was established by the military junta after the *coup* in 1979 to appease public opinion by cleansing the public of hoodlums and bums.

14) It is legally justified by the Act for Identifying and Restoring the Honor of Victims of the Nogeunri Massacre (Law No. 7175, March 5,2004). This massacre was committed by U.S. army forces during the Korean War.

15) It is legally justified by the Act for Compensation for Special Mission Performers (Law No. 7122, January 29, 2004). This was for those who were dispatched to North Korea as military agents during Park Chung-hee’s rule.

16) This was to identify meritorious acts by those who carried out dangerous operations within enemy areas during the Korean War.

12. The Commission for Truth and Reconciliation to Cope with Past History (formed in 2005)[17]
13. The Commission for Identifying the Truth regarding Suspicious Deaths during Military Service (formed in 2006)[18]
14. The Commission for Investigating the Property Holdings of Anti-National and Pro-Japanese Collaborators (formed in 2006)[19]

These committees were created upon the enactment of special laws governing respective subjects after persistent petitioning by victims or those concerned, as well as NGOs. Among them, five laws were sunset laws with a limited time of validity.[20] The others do not specify the length of validity. The Lee Myung-bak government wanted to combine the commissions without any time limit into the Commission for Truth and Reconciliation to Cope with Past History (hereafter the Commission for Truth and Reconciliation), which is the most comprehensive of all the committees, and is scheduled to draw to a close in April 2010, while the others will be terminated in the time designated by the respective law sconcerned. The scope of the Commission for Truth and Reconciliation is not limited to past wrongs but includes heroic acts like independence movements, as the titles indicate. The commission will rectify distorted history and discover as-of-yet uncovered events.[21]

17) It is legally justified by the Basic Law to Arrange the Past History for Truth and Reconciliation (Law No. 7542, May 31, 2005).

18) It is legally justified by the Act for Identifying the Truth regarding Suspicious Deaths During Military Service (Law No. 7626, July 29,2005).

19) It is legally justified by the Special Act for Returning the Property of Anti-National and Pro-Japanese Collaborators to the State (Law No.7769, December 29, 2005).

20) For example, among the above commissions, the 5th will conclude by July 2010, the 6th by November 2008, the 12th by April 2010, the 13th by January 2009, and the 14th by July 2008.

21) For details regarding endeavors to rectify history since democratization, see Seo Jung-

Period of Past Wrongs

Past wrongs handled by the above bodies can be divided into three categories according to the chronological order of occurrences of past wrongs, excluding the case concerning the Donghak Farmers Revolution, which took place at the end the of 19th century, during the last decline of Yi dynasty.

The first group of past wrongs includes those that occurred during Japan's colonial occupation (1910~1945), or resulted from it. Three bodies were created to deal with these issues; one for identifying the truth regarding anti-national and pro-Japanese acts, one for identifying victims of forced labor mobilizations by Japanese colonial authorities, and one for investigating property holdings of anti-national and pro-Japanese collaborators. They are re-adventions of a previous effort that took place under the first post-liberation government of 1948, but was subsequently aborted. Those acts which are not covered by these bodies will be handled by the Commission for Truth and Reconciliation. The Commission for Investigating Property Holdings of Anti-National and Pro-Japanese Collaborators can seize such property if it is proved that the land was acquired as a result of anti-national or pro-Japanese dealings, by lawsuit if necessary.[22] However, there are many obstacles faced by

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seok, "gwageosa jeomgeom-munje-wa hyanghu-gwaje[Issue of Examination of Past History and Future Task]," *yugsa-bipyung [Critical Review of History]*, Vol. 80 (Fall 2007),pp. 54-79; Kuk Cho, "Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization" (paper presented at the Conference on Law &Democratization in Taiwan &South Korea: Twenty Years' Experience, University of Wisconsin Law School, October 19-20, 2007).

22) This commission was the result of public resentment of absurd court rulings. When

this committee as a result of the passage of a long period of time and the involvement of third parties in some transactions.[23] On the other hand, disclosure of new documents on these issues, and in particular, declassified documents by authorities of both countries upon expiration of prescription, facilitated the efforts of these bodies.

The second group is concerned with the period around the time of the Korean civil war. In the wake of the division of the Korean Peninsula after liberation from Japan, ideological strife within South Korea was serious. While North Korea adopted communism as its new political system after the old Soviet Union, South Korea maintained a capitalistic system under American occupation, which was later replaced by an independent South Korean government in 1948. In South Korea, however, there were conflicting elements among anti-communists and pro-communists, nationalists and pro-Japanese collaborators, and so on. Political disorder after liberation exasperated the situation. Harsh punishment of civilians in the name of a communist crack-down by state authorities such as the police or army triggered serious clashes between these groups and pro-communist militia, which sometimes resulted in civilian casualties or serious massacres. The Geochang Massacre and April 3 Jeju Massacre

descendants of first class collaborators brought suits to recover their ancestors' properties, which had been granted by Japanese authorities in return for their collaboration, they were successful in several cases. These incidents were contrary to general sentiment and common sense. It provided the momentum to create a special law to cope with these kinds of matters. See http://www.chosun.com/svc/news/www/printArticle.htlm 2008-11-01

23) The courts' decisions were conflicting in cases in which third parties had purchased the property at issue with good faith after enforcement of the special law. See *Hangyereh 21*(weekly magazine), Vol. 718 (July 15, 2008), pp. 52-53.

are the most well-known cases. War is often tainted by innocent civilian casualties, and the Korean War was no exception. Among these civilian atrocities, the Nogeunri incident occasioned by U.S. forces drew much attention. Families, relatives, and surviving victims demanded appropriate measures, including a reinvestigation. In order to uncover the truth and identify and restore honor to the victims, special laws were enacted as described above.

The third group of incidents occurred during the most recent period of authoritarian rule, since the 1970s. As authoritarian political power oppressed and persecuted political activists and dissidents calling for democracy, violations of human rights were frequently inflicted. Many were tortured and punished by state institutions. Some even faced death without being accused of clear charges, while others were forced to enter reeducation camps under the blanket reason of social risk, without having been convicted of any crime. The most notable incident was the Gwangju democratic movement against the military coup, which took place in May 1980 and resulted in the massacre of many civilians. Several laws were enacted to deal with these issues. The Commission for Truth and Reconciliation has comprehensive jurisdiction over the uncovering of the truth regarding anti-Japanese movements, civilian massacres, and serious violations of human rights by state authorities after liberation in1945, as well as other important historic incidents.[24)]

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24) See the Basic Law to Arrange Past History for Truth and Reconciliation (Law No. 7542, May 31, 2005), article 2.

Means of Rectifying Past Wrongs

As means of rectifying past wrongs, investigation of past incidents, identification of past wrongs or those responsible for them, imposition of accountability on those responsible, reparations to victims, and restoration of honor for victims can be employed separately or in combination. What actions will be carried out by the committee will be determined based on several factors, such as the nature of the incident, point in time of its occurrence, public perception on the incident, and the state's capability to carry out the recommended solution. Means to rectify past wrongs will be devised or selected in consideration of these factors.

Among tasks of the commissions dealing with human rights violations against democratic activists during authoritarian rule, compensation to victims was the most important. Since they are not only the most recent incidents of abuse or misuse of public authorities, but also since many victims are still alive, they need to be provided reparations. For compensation, the results of the relevant investigation will be followed in order to determine appropriate action. At the same time, restoring the honor of these victims was also a part of the work of the commissions, however, other commissions dealing with massacres around the time of the Korean War or incidents that took place during the Japanese occupation or even before were created to identify the truth and restore honor as their primary mission. If necessary, a mark of honor or memorial tower could be provided by the state. Although respective laws dealing with particular incidents or certain types of acts provide specific means

to rectify past wrongs, the governing law on the Commission for Truth and Reconciliation provides very broad authority to the commission to choose relevant means.[25)]

Dealing with the Gwangju Massacre

Among past wrongs, resolving the issues entwined with the Gwangju massacre was a matter of utmost urgency for the newly inaugurated democratic government. The military had cruelly repressed civilian protesters in Gwangju, a city in southwest Korea, in May 1980, who were speaking out against the *coup* and military intervention into politics that took place in December 1979. The military's response to the demonstrations at that time resulted in several hundreds of deaths and thousands of injuries and arrests. Although Roh Tae-woo, a major accomplice of the Gwangju massacre as a leading member of the December 1979 *coup*, was successful in his bid during the presidential election of December 1987 thanks to a split of democratic loyalists between the two Kims, the government party failed to command a majority in the ensuing election for National Assembly members in April 1988.The opposition took the initiative to investigate the Gwangju massacre by creating a special committee in the legislature and holding hearings to uncover the truth, drawing a great deal of public attention. Former President Chun Doo-hwan, who had masterminded the 1979 *coup*, was also called to testify before the hearing. He was exiled to a temple on are mote mountain. The National Assembly also enacted a law to

25) *Ibid*., articles34~40.

compensate victims in 1990.[26] However, this did not mean a full resolution of the issues of the Gwangju massacre. Further progress unfolded as the following civilian government of Kim Young-sam was launched in 1993.

In 1993, victims of the *coup*, including the then-martial law commander, officially filed complaints of treason against former Presidents Chun and Roh, as well as other leading generals who had been involved. They were accused before the fifteen-year statute of limitations expired.[27] President Kim was reluctant to punish them in the beginning, as he had succeeded Roh from the same government party, despite the fact that he did not have any connection with the *coup* and was the first civilian president. While he acknowledged the historic meaning of the Gwangju democratic movement, he expressed his belief that judgment on those involved in the coup should be reserved for history. This meant that he did not support the idea of punishing them through legal means, but left it to "the history to take care of itself." Accordingly, the prosecutor in charge announced a 'suspension of indictment' in July 1995, although the government recognized that the *coup* of December1979 amounted to military mutiny, insurrection, and murder. At the same time, regarding the Gwangju massacre of May 1980, it held that the prosecution had no authority to indict, even though it found crimes of treason and general murder. The reasoning of the

26) As introduced, it is the Act for Compensation for Victims of the Gwangju Democratic Movement (Law No. 4266, August 6, 1990).

27) According to the Korean Criminal Procedure Code (Article 249), serious crimes with, for example, a life sentence are subject to a fifteen-year statute of limitation.

prosecutor's office was that "a successful *coup* should not be punished."[28] This sort of announcement from the prosecutor caused public uproar. The complainants appealed and re-appealed the prosecutor's decision not to institute indictments to a higher prosecutor's office, but they were denied. They then filed a constitutional petition with the Constitutional Court to challenge the prosecutor's non-indictment decision. The Court ruled in favor of the prosecutor by concluding that non-indictment in this case was not arbitrary, but rather, within the reasonable scope of prosecutorial discretion. However, the Court implied in its reasoning that the statute of limitation might not run during Chun and Roh'sterm, and that a successful *coup* could be subject to criminal prosecution.[29] Citizens as well as victims doubled their efforts to reverse the prosecution's position and petitioned to enact a special law to punish them.

The situation reversed in October of the same year after the disclosure of huge slush funds owned by former Presidents Chun and Roh. This disclosure aggravated public fury and thus allowed President Kim Young-sam to change his previous attitude toward treatment of Chun and Roh. This time, instead of leaving history to take care of itself, he announced that "the wrongful history should be righted," and directed his ruling party to take legal measures to hold these former presidents responsible. Kim' volte-face position accelerated the process of swiftly

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28) For the details of legal treatment on this issue, see James West, Martial Lawlessness: The Legal Aftermath of Kwangju, *Pacific Rim. Law &Policy Journal,* Vol. 6, pp. 85-168(January 1997); In Sup Han, Kwangju and Beyond: Coping with Past State Atrocities in South Korea, *Human Rights Quarterly,* Vol. 27, pp. 998-1045(2005).

29) See 7-1 KCCR 15, 94 Hun-Ma 246 (January 20, 1995); 7-2 KCCR697, 95 Hun-Ma 221, etc. (December 15, 1995).

punishing them. The National Assembly rushed relevant bills through, and finally, two special laws were enacted in December to provide legal grounds and remove legal obstacles such as statutes of limitation.[30] The special law prescribed that the time limitation for the prosecution of the particular cases of the December 12 military *coup* and May 18 massacre in Gwangju should not begin until February24, 1993.[31] This meant that the opportunity to prosecute did not expire during the terms of Chun and Roh, but rather, began with the inauguration of the new civilian government, since indicting those responsible for the *coup* and Gwangju massacre was, in fact, impossible under the rule of Chun and Roh governments. As these new laws removed legal obstacles, high-ranking officials in the military and the executive branches, including Chun and Roh, who were involved in the *coup* and the Gwangju massacre were arrested and indicted.[32] Upon their defense lawyers' constitutional petition challenging the constitutionality of the special laws blocking the expiration of the time limitation, the Constitutional Court upheld their constitutionality.[33] Finally, Chun was sentenced to life in prison and Roh, 17 years imprisonment. Others accused were handed lesser sentences.

The trial for this case was unprecedented and extraordinary incon-sideration of the parties involved and the nature of the case. For the first

30) One is the Special Application Act Concerning the Statute of Limitations for Crimes Against the Constitutional Order (Law No. 5028, December21, 1995), and the other is the Special Act Concerning the May 18 Democratic Movement (Law No. 5029, December 21, 1995). The former is provided to abolish application of the statute of limitations for crimes destroying constitutional order such as treason, foreign invasion, military insurrection, or genocide.

31) The Special Act (Law No. 5029), article 2.

32) As the slush fund cases were handled together, chairmen of big businesses were also tried.

33) See 8-1 KCCR 51, 96 Hun-Ga 2, etc. (February 16, 1996).

time in Korean history, maybe beyond Korean history, two former presidents, not one, were on the same trial bench and both were found guilty. The most notorious wrongdoing in modern Korean history was rectified for the first time by the state authority. Handling of this case can be the best lesson to prevent repetition of similar cases in the future.

The Commission for Truth and Reconciliation to Cope with Past History

This commission was created in December 2005 by the governing law, the Basic Law to Arrange Past History for Truth and Reconciliation (hereinafter the Basic Law).[34] This commission has comprehensive jurisdiction over past incidents and is tasked with uncovering the truth and righting distortions. It includes anti-Japanese independence movements within and outside of Korea, civilian massacres after the August 15, 1945 liberation, incidents that occurred around the time of the Korean War, serious violations of human rights by public authorities including the destruction of constitutional order since liberation, terrorism, violence, slaughter and killing by elements who denied the legitimacy of Korea or were hostile to Korea after liberation, and other historically important incidents of which the commission has recognized the necessity of identifying the truth.[35] The purpose of the Basic Law is also very comprehensive. Its goal is to establish national legitimacy and contribute to national integration through reconciliation with the past by identifying

34) Law No. 7542, May 31, 2005.
35) The Basic Law, article 2.

truth or distortion regarding the above incidents.[36] The commission will cover incidents that are not being handled by existing commissions.

The commission is made up of 15 members, among whom four are working on a standing basis. The commission is divided into three branches. Although the president appoints all commission members, the National Assembly recommends eight, while the Chief of the Supreme Court recommends three. Two standing members are selected by the president, while another two are chosen by the National Assembly. The president appoints one of the standing members to chair the commission.[37] The selection should be independent from outside interference.[38] One term will span four years, and can be extended for two more years.[39]

As the commission kicked off its operations, files came flooding in. For one year, from December 2005 to November 2006, the number of cases filed reached 10,860, among which 9,609, or about 88.5 percent, were related to civilian massacres.[40] These statistics symbolically tell the serious tragedy of modern Korean history. Ideological confrontation on the peninsula blinded judicious thoughts. Political manipulation and instability worsened the situation. The Korean civil war intensified the confrontation, and brought in indiscriminate slaughter. Although most notorious massacres were handled by the respective commissions, it was

36) *Ibid.*, article 1.
37) *Ibid.*, article 4.
38) *Ibid.*, articles 3(3), 8.
39) *Ibid.*, article 25.
40) For the statistics, see Truth and Reconciliation Commission, Investigation Report of the First Half of 2007 (July 2007), pp. 15-35.

found that there were many uncovered large-scale killings, and many suspicious cases which had drawn social attention but had been closed with questions remaining. Politically fabricated cases were subject to reexamination. Many of them were concerned with violations of anti-communist law or national security law in spy cases or subversion attempts. Many human rights violations were reported. People also wanted to gain recognition for their activities in the anti-Japanese independence movements.

The commission decided to open investigations into 9,291 cases as of December 31, 2007, which amounted to about 85 percent of the total cases filed.[41] The commission has already disclosed the results of its investigations.[42] As the question of how to cope with past history or the means to rectify past wrongs is difficult, the commission has the comprehensive authority to provide relevant solutions, and the government is obliged to respect the decisions of the commission. The most widely used tools of the commission include the uncovering of the truth, restoration of honor, reparation for damage, compensation, and fostering reconciliation. The commission can even go so far as to recommend to the president a pardon or reinstatement for victims, inviting reconciliation between victims and offenders, and creating a foundation to conduct research on past history.[43]

41) Truth and Reconciliation Commission, Investigation Report of Second Half of 2007 (February 2008), p. 17.

42) For the details, see a series of Investigation Report of the Commission.

43) See the Basic Law, articles 34-40.

Individual Agencies' Efforts to Uncover the Truth

Among others, law enforcement agencies were, by nature, involved in the many cases of past wrongdoings. As nationalist-minded President Roh Moo-hyun expressed his stern commitment to right past wrongs and distorted history, and his government launched measures for transitional justice across the board, law enforcement agencies were put in an awkward position. They were obliged to cooperate with the commissions concerned, and thus, on one hand, they could passively wait until asked for assistance, while on the other hand, they could take a more proactive approach by identifying the truth on their own.

The National Intelligence Agency, the Korean version of the American CIA, which had been the central body defending previous authoritarian powers under the name of protecting national security from subversive elements, created a committee within itself. It was the first state institute to take such measure. Then, other agencies, such as the National Police Bureau and the Ministry of Defense, followed suit. Finally, the Supreme Court mended its own wrongdoings. However, the Prosecutor's Office, which had also often been a faithful supporter of authoritarian governments, did not join this self-rectification.

The state's top intelligence agency launched 'The Committee for Development Through Identifying the Truth of Past Incidents of the National Intelligence Agency' in November 2004, in close consultation with NGOs and religious organizations. The committee was composed of 15 members, among whom ten were civilian, including a civilian chairperson.

The committee selected and opened investigations into seven cases, including the so-called People's Revolutionary Party case, the kidnap of Kim Dae-jung, the case of missing former KCIA director Kim Hyung-wook, the explosion onboard KAL flight 858, and the East Berlin espionage case. All of the cases were well known to have been manipulated by or involved with the agency and not clearly disclosed. The committee examined documents within the agency and then asked other agencies for cooperation or interviewed those concerned. It disclosed wrongdoings in some cases, while it could not in other cases dueto difficulty in getting cooperation from those concerned or because of diplomatic issues. However, in spite of falling short of expectations, it was afresh effort by the once notorious security agency as a public display of official resolution not to repeat such wrongdoings.[44]

The state police created 'The Committee to Identify the Truth regarding Past Incidents' and announced in 2006 the results of its investigation into several important cases, including massacres by police, police involvement in rigged elections, illegal surveillance, and fabrication of evidence regarding communists. The results of its investigation were criticized as lacking seriousness and thoroughness.[45] The defense minister created a committee under the same title and disclosed in 2006 its reports on a case of forced conscription, a case involving a military agent training camp, a case which examined a training camp for civilians, and others. The committee recommended an official apology from the government or authorities concerned.[46] These committees established within respective

44) *The Dong-A Ilbo Daily*, February 3, 2005.
45) Seo Jung-seok, *supra* note 21, pp. 67-68.
46) *Ibid*., pp. 69-70.

agencies concluded their activities at the end of 2007.

The Supreme Court's response began with the inauguration of a new, reform-minded Chief Justice. Chief Justice Lee Yong-hoon said in his inaugural speech in 2005 that the courts should reflect on errors in their past decisions and distortions of justice caused by external influences. The Seoul district court retried, in 2007, the so-called "People's Revolutionary Party case", in which eight accused were sentenced to death, and which had led to criticism of judicial murder of innocent citizens. In the retrial, 32years later, the court found the defendants not guilty. The Court announced that it had selected several hundred security-related cases with grounds for a retrial, and would restore the honor of victims in due process, recognizing their culpability in delivering such decisions in concert with the authoritarian power. As recently as September 2008, in marking six decades of the nation's modern judicial system, the Chief Justice apologized for the unjust rulings handed down during authoritarian rule, and disclosed that the highest court selected a total of 224 controversial rulings, which are expected to be included in a book summarizing the 60-year history of the Korean judiciary.[47] The confession and reparation of wrongdoings by the judiciary, which had been deemed the most reliable institution among public institutions, meant that it would launch a fresh new start with a strong determination as an independent organ to operate for the sake of the people and for the implementation of justice, not for the sake of political power. It would be very difficult for the judicial branch to repeat similar mistakes again in the future.

47) *The Korea Herald*, September 27, 2008.

Chapter 10. Creation of the National Human Rights Commission

The effects of democratization are directly reflected in the protection of human rights. Truly, there has been significant improvement in this area in practice and institutionalization as well as in public perception. One abhorrence of authoritarianism is rooted in its contempt for and neglect of human rights. A panoply of laws and mechanisms set up in order to protect human rights ends up toothless under an authoritarian government since state powers do not have the will to enforce them, and instead, laws are exercised in favor of those in power, but not for individual citizens. On the other hand, a democratic government that is obliged to respond to citizens' wishes and demands puts a great deal of effort into the protection of human rights. Protection of human rights is, *ipso facto, raison d'etre* of the government.

Watchdog for Human Rights Violations

For the sake of the protection and promotion of human rights, one of the most prominent accomplishments of Korea's democratic administrations since 1987 was the creation of the National Human Rights Commission, which was established in 2001 under the Kim Dae-jung government.[1] In

1) The governing law for the commission is the Act for National Human Rights Commission (Law No. 6481, May 24, 2001). Creation of a national human rights commission was a campaign promise of Kim Dae-jung in the run-up to the 1997 presidential election.

spite of a short history and much skepticism in the beginning, the commission has already become a formidable institution and faithful watchdog for the protection of human rights in Korea. In particular, for those who are in flux and at risk of falling between the cracks in the social welfare net and so hardly have access to state agencies, or for those individuals who are looking to have their problems heard for various reasons, the existence of the commission has significant meaning, regardless of its lack of authority to enforce remedies. Its lack of coercive force has not prevented the commission from becoming a reliable protector of socially vulnerable groups and minorities. The flood of complaints that have been filed since its inauguration testifies to its usefulness and necessity. Over the last six and half years, the commission has received over 30,000complaints.[2)]

The commission is an independent state agency[3)] composed of 11 commissioners, among whom there is one chairperson and three standing commissioners, while the remaining seven are working on anon-permanent basis.[4)] Although the president appoints eleven commissioners, including the chairperson, the National Assembly and president each select four, while the Chief Justice of the Supreme Court chooses three.[5)]

The most important task of the commission is to monitor, prevent and remedy human rights violations and to provide recommendations and

2) As of May 31, 2008, the number of complaints the commission had received since its inception on November 26, 2001 totaled 31,361. http://www.humanrights.go.kr

3) The Act for National Human Rights Commission, article 3.

4) *Ibid*., article 5(2).

5) *Ibid.*

advice on improving human rights-related systems, and thus to realize human rights principles and standards consistent with the constitution and international human rights standards. In order to build milieu favorable to the respect of human rights, education for human rights and cooperation with domestic and international human rights organizations is also carried out.[6)]

The commission is not a law enforcement agency but a watchdog. Although it receives many complaints, it cannot enforce remedial measures on its own. It has to recommend appropriate remedies to agencies concerned or report violators to relevant law enforcement agencies. In this regard, its preventive role in improving the system and environment in favor of human rights is more notable. As a watchdog, unlike a law enforcement agency, the commission does not need to be restricted by existing laws when seeking a solution. Instead, it can suggest a future-oriented, desirable remedy that may not fall within the scope of current laws or practices, and so it is in a better position to find alternatives. Although the commission's recommendation lacks enforcement measures such as a mandamus or an injunction, it can command more persuasive power based on moral legitimacy, and thus recruit public support to improve a given system and awaken public awareness of an issue or potential problem.

6) *Ibid.*, article 19.

Providing Recommendations /Opinions to Improve Laws, Policies and Practices

One of the major functions of the commission is to carry out investigations and research into laws, mechanisms, policies and practices concerned with human rights, and to provide recommendations for their improvement. The commission conducts research on the conditions of human rights in order to enhance understanding of various human rights issues and to find grounds for policy recommendations. It also presents recommendations or opinions on ratification and domestic implementation of international human rights treaties.[7]

The commission may, if deemed necessary to perform the above role, request consultations or hearings with public agencies, including national as well as local governments, and with private organizations, as well. The commission may visit detention or protective facilities to conduct investigations based on filed complaints or on its own initiative without a complaint. It may present its opinion to the court at hand or to the Constitutional Court when an important case on human rights is pending. Furthermore, the commission should submit an annual report to the president and the National Assembly to illustrate its activity and the current human rights situation.[8]

During the last five years, the commission has provided 128 recom-

7) *Ibid.*, article19(i)(iv)(vii).
8) *Ibid.*, articles 20~29.

mendations or opinions on improving laws, systems, policies or practices regarding human rights. Among them, 73 were accepted by the authorities concerned, such as the National Assembly, Ministry of Justice, Ministry of Foreign Affairs and Commerce, Ministry of Labor, and the National Police Bureau, while 18 were spurned and 37 are in the process of review. Provided that those cases in the review process are declined, 57 percent of the commission's advice will be reflected in the new changes implemented by the agencies concerned. This relatively high rate of acceptance signifies the important role of the commission.[9]

The commission has presented recommendations or opinions on important and delicate political and social issues. To name but a few, the commission submitted to the National Assembly a dissenting opinion on the proposed legislation on the Counter-Terrorism Act,[10] and the National Assembly accepted it. On the other hand, the National Assembly did not accept the commission's opinion against the Iraq War.[11] The commission offered a recommendation to the National Assembly and the Ministry of Justice calling for the abolishment of the National Security Law, which has frequently been the focus of debate regarding its pros and cons,[12] but as of yet, there has been no positive response. The commission expressed its opinion to the legislature that the death penalty should be abrogated,[13] and this opinion is still under review. The commission

9) National Human Rights Commission of Korea, Five Years of National Human Rights Commission: Outcome and Agenda (February 2007), pp. 49~54.

10) It was decided on February 20, 2002 by the National Human Right Commission.

11) It was decided on March 26, 2003 by NHRC.

12) Decided on August 23, 2004 by NHRC.

13) Decided on April 6, 2005 by NHRC.

recommended to the National Assembly and the Ministry of Defense the adoption of a system allowing for alternative service for conscientious objectors of military service,[14] which is also under review. However, several recommendations to enact special laws to rectify past wrongs were accepted and special laws for victims concerned were created and enacted.[15]

As seen above, many of the opinions issued by the commission were in regard to important social issues currently in dispute. The commission could propose its opinions or recommendations from a unique perspective and suggest a path that would be most favorable for the protection of human rights. They would provide legitimate grounds for the authorities concerned to resolve issues at hand, as well as for the NGOs concerned to be able to reenergize their efforts.

Investigations and Remedies for Human Rights Violations

The commission conducts investigations into and provides remedies for human rights violations.[16] Any person whose human rights, guaranteed by constitutional articles 10 through 22,are infringed upon by public agencies, including detention or protective facilities, can file a complaint

14) Decided on December 26, 2005 by NHRC.

15) The decision regarding the victims of the Samcheong Training Camp was made on March 10, 2003; the decision regarding the victims of special missions into North Korea, on March 12, 2003; the decision on suspicious deaths during military service, on February 16, 2004.

16) The Act for National Human Rights Commission, article 19(ii).

with the commission.[17] The modes of infringement are divided into two catagories; civil and political rights violations, and discriminatory acts.[18] Infringement of human rights through unequal treatment of a private citizen is also within the jurisdiction of the commission.[19] After reviewing complaints, the commission dismisses or rejects cases if either they do not fall within its jurisdiction, or if they do not constitute human rights violations. Once a complaint is found to be within the commission's jurisdiction and has merit, the commission performs an investigation and provides a relevant recommendation to prevent recurrence or to ensure restoration of fairness.

If we look at the statistics, we can see that people are very active in utilizing the commission. As of May 31, 2008, the number of complaints that had been filed since the commission first opened its doors to applications, on November 26, 2001, totaled 31,361, among which 29,769, or almost 95 percent, was disposed. On average, more than 4,800 complaints were filed yearly. About 80 percent of the total, 24,973 of the complaints that were filed, were regarding civil and political rights violations, while complaints of discriminatory acts amounted to about 15 percent, or 4,624 cases. It is alarming that 10,691 complaints, about 43 percent, regarding civil and political rights violations were filed against detention facilities. The next-largest accused agency was the police, with 5,459 complaints, or about 22percent. These were followed by 1,594 cases filed against protective facilities, and 1,293 cases reported against

17) *Ibid*., article30(1)(i).
18) *Ibid*., article19(ii) and (iii).
19) *Ibid.*, article30(1)(ii).

the prosecutors' office. About 65percent of complaints were filed against detention facilities and police. This statistic reveals that most human rights infringements take place within the law enforcement sector.

Statistics of Annual Filings

Year	Civil &Political Right Violations (%)	Discriminatory Acts (%)	Others (%)	Total
2001	619 (77.1)	53 (6.6)	131 (16.3)	803 (100.0)
2002	2,214 (79.3)	138 (4.9)	440 (15.8)	2,792 (100.0)
2003	3,041 (79.7)	358 (9.4)	416 (10.9)	3,815 (100.0)
2004	4,664 (86.3)	389 (7.2)	352 (6.5)	5,405 (100.0)
2005	4,211 (73.9)	1,153 (20.2)	337 (5.9)	5,701 (100.0)
2006	3,339 (79.6)	828 (19.7)	29 (0.7)	4,196 (100.0)
2007	4,208 (80.4)	985 (18.8)	40 (0.8)	5,233 (100.0)

ComplaintsFiled against Organizations

(November 26, 2001 ~ May 31, 2008)

Against	Detention Facilities	Police	Prosecutors' Office	Protective Facilities	Military	Judiciary	Other Gov't Agencies	Total
Number	10,691	5,459	1,293	1,594	482	359	5,095	24,973
%	42.8	21.9	5.2	6.4	1.9	1.4	20.4	100

However, the number of complaints which were affirmed amounted to a mere 1,253 cases out of total of 29,769 disposed cases, a mere 5.4 percent. On the other hand, 6,983 complaints, or about 23.5 percent,

were rejected for insufficient grounds. When affirmed, the commission proffered various relevant remedies such as settlement proposals, mutual settlements, requests for investigation, recommendations of disciplinary action, requests for legal aid, and more. Surprisingly, the number of complaints dismissed during the screening process, before the case reached review on merit, was as high as 20,270 cases. This means that more than two thirds of the total complaints disposed did not have chance to be reviewed. In spite of the large number of cases filed, the commission dismissed or rejected almost 92 percent. It was very selective in choosing which cases for which it would provide remedies.

Statistics ofComplaints Handled

(November 26, 2001 ~ May 31, 2008)

	Filed	Disposed				
		Total	Affirmed	Rejected	Dismissed (in the screening process)	Others*
On Civil and Political Rights Violations	24,973	23,844	1,088	6,236	15,676	844
On Discrimination	4,624	4,162	481	667	2,950	64
Others	1,764	1,763	27	80	1,644	12
Total	31,361	29,769	1,596	6,983	20,270	920
%		100	5.4	23.5	68.1	3.0

* This includes cases marked ‘Transferred’ or ‘Suspension of Investigation’.

Although the rate of affirmation of cases as human rights violations is low, remedies provided for particular complaints worked as momentum to improve old practices, in many instances beyond simple remedies for individual issues involved. In particular, many practices that led to complaints of mistreatment in detention facilities were greatly improved. Those who are incarcerated in facilities such as prison or facilities for mental patients or the homeless are often vulnerable as they do not have access to legal counsel due to their confinement. The commission has proved to be an excellent agency to take care of such realms not easily noticed by or publicized to outsiders or the media. Apart from complaints filed, the commission has the legal authority to visit such facilities on its own and conduct investigations.[20] It is of great use for the state agency in charge of remedying human rights violations to be able to initiate investigations *ex officio* without a petition.

Various types of violations were filed. Complaints from detention and protective facilities were most frequent, while more than a few were in reference to infringements of rights during the investigative process by law enforcement agencies. For example, denial of medical treatment, naked physical examination, assaults by officials, cruel conduct, infringements on privacy, infringements on freedom of expression, illegal investigations, excessive punishment and the like in these confined centers were handled by the commission, which recommended relevant remedies. In most cases, the agencies concerned accepted the commission’s recommendations and

20) *Ibid*., article 24(1).

rectified or improved conditions. The release of personal information, fingerprinting, deportation of foreigners, lack of facilities for the handicapped, sexual harassment, and other human rights violations were also filed. Complaints against discriminatory acts on the basis of various grounds such as gender, age, disability, and country of origin, were also handled by the commission.

In addition, the commission conducts human rights counseling through a variety of means such as telephone, Internet, mail and in-person services. Its counseling teams also visit detention and protective facilities to tender counseling, legal consultation, and complaint-filing services.[21) The commission created two regional offices, in Busan and Gwangju, in 2005 to promote and facilitate the protection of human rights throughout the country.

One recent accomplishment of the commission was the release of its Recommendation for the National Action Plan for the Promotion and Protection of Human Rights (hereinafter, Human Rights NAP) in January 2006.[22) Upon receipt of this recommendation, the Korean government finalized the Human Rights NAP in May 2007. The Human Rights NAP represents Korea’s commitment to the international community to promote and protect human rights as it provides the foundation upon which

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21) The total number of counseling sessions from November 2001 to the end of 2006 was 34,200, among which about 62 percent were conducted done via telephone. National Human Rights Commission, *yeongan-bogoseo 2006 [Annual Report 2006]*, p. 94.

22) This Human Rights NAP was prepared upon the recommendation of the UN Committee on Economic, Social and Culture Rights in 2001.

national human rights policies are formed and implemented. This is the comprehensive roadmap for Korean human rights policy for the next five years and will contribute to maintaining international standards.[23)]

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23) ROK Government, *gukga-ingwon-jeongchaekgibbon-gyeheok [National Action Plan for the Promotion and Protection of Human Rights 2007-2011]* (May 2007).

Chapter 11. Strengthened Protection in the Criminal Process

Democratization has brought in significant changes in there lationship between the individual and the state. The criminal process is one area where state authority and individual interests often conflict when the state exercises its authority to realize justice by punishing criminals. Therefore, human rights are frequently infringed upon during the criminal process, and even more so under authoritarian rule. Democratization inevitably emphasizes the importance of due and fair process in implementing criminal justice in favor of the suspected and the accused.

One of the most significant changes in the criminal process since1987 is the improvement of the Criminal Procedure Code, which amounts to a Bill of Rights for the criminal. As the new constitution adopted in 1987 provided better protection for individual liberties in the criminal process, the Criminal Procedure Code (CPC) had to be revised in order to incorporate such changes.[1] Since that time, the Code has been changed periodically to keep up with deepening democratization along with rapid social change. From the first enactment of the new Criminal Procedure Code in 1954[2] up to the recent sweeping revision in 2007,[3] there have been 16 revisions, among which 11 had been made since the implementation of the 1987 Constitution, This shows that democratic governments since 1987 have made continuous efforts to improve the

1) See revision of CPC made on November 28, 1987 (Law No. 3955).
2) Law No. 31, September 23, 1954.
3) Law No. 8496, June 1, 2007. This has been in force since January 1, 2008.

criminal process in favor of individual rights.

The revision of 2007, when 196 articles among a total of 493 were changed, was a departure from previous fragmentary or technical revisions from the perspective of quality as well as quantity. Although more substantial change in the criminal procedural law was demanded by various interest groups, change was not made until full-scale judicial reform was carried out under there form-minded Roh government. Reform of the criminal justice system was of particular interest to the Judicial Reform Committee,[4] and the following Judicial System Reform Promotion Committee as well.[5] There vision in 2007 of the Criminal Procedure Code incorporated and reflected significant parts of recommendations made by the reform committee. This revision transformed the fundamental structure of the criminal justice system. As the committee tried to reflect democratic values and universal principles as global standards recognized by advanced society in the contemporary world, so did the revision. Among other things, inquisitorial remains were more removed, *habeas corpus* is more protected, and the accused are more safeguarded. Important changes worth noting will be introduced here.

Concentration of Trial

Trial in Korea used to be held over an extended period of time, as had been common in old inquisitorial continental trial systems. Records

4) It carried out work from October 2003 to December 2004.
5) It carried out work from January 2005 to December 2006.

prepared by investigation agencies carried significant weight, and most of statements in the trial were written rather than oral. Judges put more emphasis on reviewing records than on oral arguments delivered by the parties before them. Interrogation was focused on getting a confession, which carried paramount weight for incrimination. Torture was sometimes employed to extract these confessions as the overwhelming status of law enforcement officials over individuals resulted in a judicial system that favored administrative convenience and discretion. By nature, such a system is likely to cause infringement of human rights and impede transparency in the process, resulting in distrust in the judicial system.

New revisions reinforced mechanisms for the accused to conduct abetter defense, on equal footing with the prosecutor, by making oral arguments of parties concerned before a judge the centerpiece of a trial. For this purpose, both parties, prosecutor and defendant, are granted relevant rights to be able to prepare for a showdown before a judge. Parties have to prepare for trial in advance under the instructions of the court in order to facilitate a consolidated trial. For example, the defense is bestowed the right to request reading or copying of records or evidence in the hands of the prosecutor, and *vice versa*. Issues have to be laid out and plans for evidence discovery should be set out ahead of trial. When a trial needs more than a day, it should be open continuously in order to prevent distraction and distortion.[6] The key goal of the preparation process is to inform the accused in advance of what is going to proceed on trial day and give time to prepare a proper defense.

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6) CPC, articles 266-3 ~ 266-16, 267-2, 275-3.

Improvement of Detention, Seizure and Search Processes

Personal liberty is oftentimes infringed upon in the process of detention or search and seizure. Although arrest is strictly restricted to exceptional occasions, it has frequently been resorted to for the sake of the convenience of investigators, disregarding the interests of the accused. Investigation without custody should be the rule, but it has become the exception in spite of the principle of presumption of innocence. Abuse of arrest has resulted in many irregularities and distrust in the judicial process.

New revisions helped to discourage abuse of the power to arrest. When a judge issues an arrest warrant, he/she should consider the seriousness of the crime, the risk of repetition, possible harm to the victim, and other pertinent, case-specific factors including the lack of a permanent residence, opportunity to destroy evidence, and flight risk.[7] Formal grounds are not enough for an arrest that overly restricts personal liberties. Bail conditions are more diversified to extend the principle of investigation without custody by considering particular factors of the case and the accused at hand.[8] The emergency arrest system was also improved. In the case of an emergency arrest, the prosecutor should request a warrant without delay within 48 hours. When an investigation agency has released the suspect without requesting a warrant, it has to report this to the court.[9] Conditions for emergency search and seizure

7) CPC, article 70(2).
8) CPC, articles 97~100.
9) CPC, article 200-4.

also became more stringent. In the case of an emergency arrest, emergency search and seizure is available within 24 hours. In order to retain seized articles, a separate warrant for search and seizure should be requested within 48 hours of an arrest.[10)]

Protection of the suspect who has not yet been indicted is also reinforced. The previous law provided less protection for an initial suspect than it did for one who had been formally indicted. According to the new revision, the judge who has issued an arrest warrant should question the suspect no later than the day after the warrant was requested in order to give the suspect an opportunity to defend the accusation. The suspect's right to refuse to make a statement during interrogation is explicitly provided and participation of counsel is permitted during an interrogation. All the processes, including interrogation before indictment, should be recorded.[11)]

Expanded Remedy for Non-indictment by a Prosecutor

The prosecutor in Korea commands extensive authority in the performance of criminal justice in comparison to other societies. The authority of the prosecutor's office covers not only criminal investigation, indictment and trial, but police in charge of criminal investigations are also under its supervision. Independent authority for police over a criminal investigation is not yet allowed under the new revision,[12)]

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10) CPC, article 217.

11) CPC, articles 201-2, 243-2, 244-3, 244-4.

although police have demanded it be granted. The prosecutor's power is decisive in distributing criminal justice. Concerning indictment, the prosecutor entertains very broad discretion, and may choose not to indict in consideration of various factors.[13] Since the authority to indict is monopolized by the prosecutor, the prosecutor's decision not to indict prevents other agencies from further pursuing criminal justice.

Therefore, how to handle non-indictment by the prosecutor in spite of a complaint by victim or concerned party has become an issue. To curb the prosecutor's discretionary authority over indictments is necessary to limit him/her to reasonable exercise of authority. Although a complainant can appeal to the head of the higher prosecution office within the same jurisdiction in the case of a decision not to indict,[14] this is an internal checking mechanism within the prosecutor's office, and so, external intervention is still necessary. For this purpose, the CPC has provided a means by which a petition to a higher court can be filed by a complainant whose request to indict was rejected by the prosecutor. The higher court at hand can decide to issue an indictment in place of the prosecutor when a petition has merit. However, the scope of crimes subject to petition was limited to crimes such as abuse or wrongful exercise of official authority by a public official.[15] This means that

12) CPC, article 196.

13) CPC, article 247.

14) The Prosecutors' Office Act, article 10. (Law No. 3882,December 31, 1986)

15) This restriction to several limited crimes by officials was made after President Park Chung-hee consolidated his dictatorship through constitutional revision in 1972. See CPC, Article 260 of the revision on January 25, 1973, Law No. 2450. Before this revision, there was no such limit, so that a complainant could petition on account of other crimes, as well.

victims or complainants of other crimes had no further recourse when the prosecutor decided not to indict. As far as indictment was concerned, the prosecutor enjoyed almost full discretion without restraint. This is why constitutional petition has been employed as a new means to challenge non-indict decisions by the prosecutor. Since the launch of the Constitutional Court system, almost half of all constitutional petitions have been against non-indictment decisions.[16] However, petitioners prevailed in less than four percent of the petitions.

The recent revision in 2007 incorporated this issue and extended the scope of crimes for which victims and complainants could bring a case to court. The new CPC abolished the limit and allowed petitions for any crime.[17]Now, a victim or complainant who has the authority to raise a complaint can file a petition to the higher court in the same jurisdiction as the prosecutor at hand when the prosecutor spurns their request to indict an offender. In the event several crimes have been committed by public officials, ordinary citizens other than the victims or those who have legal authority to raise complaint can also file a petition when the prosecutor decides not to indict malfeasant officials. This is to prevent collusion among public officials and to secure the people's oversight over official wrongdoing. In order to prevent abuse and misuse of this system, a dismissed petitioner can be ordered to pay for the expenses incurred by the petition process.[18] When the higher court at hand finds that the petition has grounds, it shall decide on the indictment. Then, the head of

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16) See Chapter 8.
17) CPC, article 260.
18) CPC, article 262-3.

the prosecution office at hand should designate a prosecutor to handle the case and the assigned council cannot withdraw or revoke an indictment made by the court.[19] However, the examination over this petition is not open to the petitioner. Related records are also restricted.[20]

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19) CPC, article 264-2.
20) CPC, article 262-2

Chapter 12. Enhanced Protection of Social Minorities and the Vulnerable

The transition to democracy from authoritarian rule brought a direct and immediate impact to civil and political rights, which has been seriously damaged and so were of immediate concern to post-transition authorities. As democratization has progressed, other areas began to have drawn attention. Among these other areas, protections for socially marginalized people and minority groups have emerged as important social issues. A flourishing number of civic organizations have cropped up since democratization, contributing, in part, to bringing citizens' interest to diverse social issues. As many political activists have turned their interests to specific public causes after the decline of authoritarian rule, they have paid heed to vulnerable social groups, indigent people and neglected rights in gray areas, along with important social issues such as the environment and consumer protection. They have contributed greatly to pressing government and public agencies for change in favor of their causes. Heightened freedom in amore democratized society has also provided more understanding and tolerance of social minorities. With democratization, the rule of law has gained importance as a tool for social change and reform, and thus, both the creation and the exploitation of relevant laws and legal mechanisms have increased. For example, discriminatory acts against a social minority have often been challenged through legal channels. To some extent, discrimination seems to be a magical tool mobilized in favor of social minorities based on equal protection provided by the constitution.[1] Legal motions have become a

1) Article 11(1) of the constitution provides equal protection by stating, "All citizens shall

very effective means of achieving their goals for many NGOs. Several examples of this will be introduced below.

Protection of the Handicapped

Protection of the rights of persons with disabilities has become an important social issue as Korean living standards have improved and welfare has been extended as a right guaranteed by law. The government started to take employment of the handicapped seriously, since their self-reliance is closely connected with their employment, but working opportunities for those with impairments are limited. The government has enacted several laws for the handicapped. Among others, notable is the Act for Employment Promotion of the Handicapped,[2] passed in 1990. In accordance with this act, the Corporation for Employment Promotion of the Handicapped, a public agency, was created to tackle this issue. This law stipulates that state and local governments are obliged to implement relevant policies for employment of the handicapped. The government encouraged private companies as well as public agencies to hire the handicapped by providing various incentives, including subsidies. Ten years later, in 2000,the title of the law was revised to the 'Act for Employment Promotion and Rehabilitation of the Handicapped' in order to put emphasis on rehabilitation.[3] As economic standards have improved,

be equal before the law, and there shall be no discrimination." In fact, Article 2(4) of the Act of the National Human Rights Commission lists more than twenty possible causes of discrimination. Listed causes are no more than examples. Therefore, discriminatory treatment on any account is likely to be against equal protection.

2) Law No. 4219, January 13, 1990.

3) Law No. 6166, January 12, 2000.

treatment in favor of the handicapped has improved in many aspects.

However, their subsistence has been still very difficult. As Korea had adopted a growth-first policy, distribution had been de-emphasized. Even the basic facilities necessary to aid with their mobility, such as lifts in the public transportation system, were unavailable. The voice of the weak had often gone unheard. With democratization, they have invigorated their demands in various ways, including public protests. Legal suits were also brought against discrimination on account of disabilities. A private university was sued on the grounds that it rejected an entrance application from a handicapped prospective student, and was fined and ordered to provide compensatory damages.[4] A wheelchair-bound handicapped student brought a suit against a university that did not furnish wheelchair-accessible facilities, and won the case, in part. After this case, the Ministry of Education issued a policy calling for the improvement of school facilities inorder to accommodate the needs of handicapped students. A university turned down hiring a professor due to medical checkup and was sued. This case was concluded in mediation by the National Human Rights Commission with an agreement to hire.[5] These suits were 'test cases' of public interest lawyering with the help of NGOs, and contributed to drawing public attention to the need to enhance social awareness on this issue beyond protection of the individuals involved.

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4) http://news.naver.com/print_form.php?office_id=038&article_id=0000... 0228-11-01

5) http://www.ddask.net/skin/board/cheditor/print.php?bo_table=comuni... 2008-11-01

As recently as 2008, the government established the Act on Prohibition of Discrimination against People with Disabilities and Relief,[6] which not only prohibits discrimination across-the-board, but also provides a means to rectify discrimination against the handicapped. Private as well as public entities are under the jurisdiction of the law. For example, access to education has been expanded, and entities providing education or services should equip and improve facilities to meet the needs of the handicapped as well as prevent discrimination. The National Human Rights Commission is obliged to monitor and investigate disability-based discrimination. The Minister of Justice has the authority to issue a correction order when necessary.[7] If damage is caused by discrimination, the offender is responsible for compensation. Furthermore, if done maliciously, a judge may impose imprisonment or a fine.[8] This law is perceived as being a comprehensive bill of rights for the disabled and thus is a great improvement in protection of the handicapped against discrimination in the sense that it provides concrete mechanisms to rectify cases of discrimination.

Protection of Migrants

The total number of foreign residents in Korea exceeded one million in 2007.[9] The number has tripled in the last ten years. The lion's share of

6) Law No. 8974, March 21, 2008.
7) Articles 38~45.
8) Articles 46~50.
9) As of June 2008, the number of foreign residents reached1, 145,660. About 20 percent of them were illegal residents.

these residents is made up of those from developing countries throughout Asia.[10] Since Korean society had not become accustomed to interacting with foreigners, it also lacked legal grounds to protect their rights in many cases. Discrimination and violation of human rights against foreign migrants has been pervasive throughout their daily lives, although the bulk of migrant workers are engaged in arduous and manual jobs. In particular, illegal foreign residents were extremely vulnerable and thus often exploited. With such an increase in the number of foreign residents, including migrant workers, foreign spouses and international students, the government has come up with more accommodating policies and provided more legal protection, and basic necessities for their subsistence such as medical and industrial accident insurance has been improved. Foreigners are equally protected by anti-discrimination laws and various benefits havebeen expanded to them.

Nonetheless, the reality is still far from legitimate protection. NGOs involved have raised their voices, calling for enhanced protection. The National Human Rights Commission has become an important agency for those foreigners who find it difficult to employ adequate means to prevent or respond to infringements on their human rights. The commission, for example, issued are commendation to the Prime Minister's Office and the Speaker of the National Assembly in 2002 and 2003 calling on them to abolish the industrial trainee system and to adopt an employment permit system and to protect unregistered workers. Finally, the government enacted the Foreign Workers Employment Act[11] in 2003

10) Chinese account for almost half of all foreign residents. Among Chinese residents, about two thirds are ethnic Koreans.

to provide improved protection, including the employment permit system to provide for more stability in their work. This law is a great step towardover coming abuse and malicious misuse of the industrial trainee system and to better protect the human rights of migrant workers.

Protection of Conscientious Objectors

The issue of conscientious objection to military service has been a very delicate issue in consideration of Korea's unique circumstance of existing under the constant threat of military confrontation with North Korea. Military service has been compulsory for young males and deemed the most important obligation of Korean nationals amid the tense standoff between the two Koreas. Although the constitution has provided the freedom of conscience,[12] conscientious objectors to military service have not been protected and, instead, punished consistently in violation of the Military Service Act.[13] Members of a particular denomination of religion opposed military service on the grounds that military service is against their religious conscience and followers of that religion did not enroll, leading to their repeated punishment. With democratization following the collapse of the Cold War structure, this issue has drawn public attention in favor of conscientious objectors.

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11) Law No. 6967, August 16, 2003.

12) Article 19 provides that "All citizens shall enjoy freedom of conscience."

13) It was first enacted in August 6, 1949 as Law No. 41, and it was lastly revised in February 29, 2008 as Law No. 8852. According to Article88, a drafted person who has failed to enroll or report, without justifiable cause, shall be punished by imprisonment for up to six months or a fine of up to two million Korean Won.

However, the Constitutional Court ruled in 2004 that the law to penalize conscientious objectors was not unconstitutional.[14] The Court stated that individual interests involved were surpassed by the public interest to be achieved by the legal provisions at issue since national security was very important and a prerequisite for the existence of a nation and for all liberty and freedoms. It also said that the adoption of an alternative military service system was premature considering Korea's particular situation.[15]

In the following year, nevertheless, the National Human Rights Commission confirmed that the right to conscientious objection was within the scope of the freedom of conscience provided by the constitution and the International Covenant on Civil and Political Rights, and recommended to the Speaker of the National Assembly and the Minister of National Defense that they introduce an alternative military service system that would serve as a compromise between the right to conscientious objection and the Military Service Act.[16] While the progressive Roh government was in favor of the alternative service, the current conservative Lee government seems less sympathetic to it. The adoption of the alternative service system should be affirmatively considered.

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14) 16-2(A) KCCR 141, 2002 Hun-Ka 1, August 26, 2004.

15) The Constitutional Court of Korea, Constitutional Court Decisions(1998-2004), Vol. I, pp. 104-105.

16) National Human Rights Commission of the Republic of Korea, Annual Report 2005 (in English), p. 33.

Active Public Interest Lawyering

As democratic political authority continued to grow and evolve, the enhanced rule of law and the scope of civic society were broadened, and more civic organizations started to focus on law as an effective instrument to achieve their goals. As a result, public interest lawyering, or cause lawyering, has expanded in Korea. It is important to note that the increase in public interest lawyering is also closely related with the increased number of lawyers as a result of the increased quota for the bar examination. This increased supply of lawyers provided more resources for cause lawyering and *pro bono* activity. Many lawyers now have affiliations with NGOs and offer their professional skills and knowledge. Although social reform-oriented organizations need cooperation with various kinds of professionals, *pro bono* legal activity is *sine qua non* for effective achievement of their goals. The typical issues of interest of these NGOs include human rights, women's status, laborers' status, consumer protection, environmental protection, and economic justice, to name but a few.[17]

Among other things, the activities of 'Lawyers for a Democratic Society (*Minbyun*),' are quite remarkable. Although this organization was officially formed in 1988, just after the democratic revolution of 1987, a group of courageous lawyers had dedicated themselves to the democratic movement by providing their legal expertise in various cases with political

17) For more on public interest lawyering in Korea, see Dae-Kyu Yoon, "Legal Aid and Public Interest Lawyering," in Dae-Kyu Yoon ed., *Recent Transformations in Korean Law and Society* (Seoul: Seoul National University Press, 2000), pp. 381-389.

implications, including those involving political dissidents, since the 1970s, when Korea was still under authoritarian rule. Their success in commanding broad sympathy from their colleagues through their devoted activities and the improved political environment after the successful democratic movement in 1987 enabled these lawyers to create this organization, which boasts broad participation from young lawyers committed to the public cause. As of 2008, membership stand sat about 550 lawyers, and it has local chapters in several major cities.[18)]

The primary instrument used to realize the goals of this cause is courtroom litigation, rather than the provision of legal counseling. Member lawyers are assigned cases in a rotation. Legal fees are minimal or at no cost. Approximately (2000?) cases have been handled over the past twenty years. This number is significant, considering the nature of the cases handled. Beyond legal representation, these lawyers conduct on-site investigations and submit reports to relevant authorities. Members also monitor the practices of law enforcement by public agencies, environmental protection, Korea's welfare system, violations by big businesses, and more. The scope of the group's activity is across-the-board for social change toward the realization of progressive political ideals and social justice. It is the top organization in terms of quality and enthusiasm for public interest lawyering.

Another noticeable NGO is 'People's Solidarity for Participatory Democracy,' founded in 1994. It is dedicated to promoting participatory

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18) For details of this organization, see http://minbyun.jinbo.net/minbyun/zbxe/

democracy and human rights, and to preventing abuse of government, judiciary and business. This organization achieves its goals through advocating social justice, monitoring public programs, launching campaigns, introducing alternative policies, and encouraging people's participation.[19] When necessary, it also takes legal action. For example, when it uncovered violations of minority shareholder rights in big corporations, it brought a suit against the directors who damaged the shareholders through their mismanagement. As the scope of its concern is very broad, several hundreds of *pro bono* professional advisors a reinvolved and enable a multidisciplinary practice. As can be anticipated, public interest lawyering for 'test cases' is an important instrument for their goals. There are many other civic organizations that use lawyering in the pursuit of their goals. This trend will be reinforced as Korea produces more lawyers and the rule of law becomes more consolidated.

Expansion of Legal Aid

Legal aid for socially marginalized people as well as the impoverished has also been expanded since 1987. Along with the state-initiated legal aid system, civic organizations and the bar association have reinforced their legal aid programs. As Korea has been successful in economic and democratic developments, and has increased the number of lawyers in practice, conditions have improved for NGOs engaged in legal aid. Funding from public coffers and private donations has been augmented, while lawyers' *pro bono* activity has been strengthened. Practicing lawyers

19) For details of this organization, seehttp://www.peoplepower21.org/

are legally required to provide a set amount of time per year for *pro bono* legal service.[20)]

However, the most important aspect of legal aid is what the state provides for the indigent. First of all, as provided in the constitution,[21)] for the protection of human rights in the criminal process, the court at hand should appoint a counsel for the indigent criminal defendants who are unable to retain lawyers at their own expense. The Criminal Procedure Code provides detailed conditions for court-appointed counsel. When no counsel is retained by the defendant in a case during which the defendant is: i) arrested; ii) underage; iii) seventy years old or over; iv) deaf or mute; v) suspected of mental instability; or vi) charged with an offense punishable by death or a prison sentence of more than three years, the court at hand should appoint counsel.[22)] Of course, the accused has the right to ask the court to appoint counsel when he/she is unable to retain it. With democratization, several legal revisions have made the conditions for court-appointed counsel less stringent.[23)]

In spite of its usefulness, this court-appointed counsel system has several problems. Among other things, it is often looked upon as

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20) The Lawyers Act (Law No. 6207, January 28, 2000), article 27, which delegates details concerning lawyers' *pro bono* activities to the by laws of the Korean Bar Association.

21) Article 12(4) of the constitution provides. "Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by law."

22) See Criminal Procedure Code, articles 33, 214-2(10), 282, 283.

23) For example, all the detainees, regardless of before or after indictment, have right to enjoy this benefit. See CPC, articles 33, 214-2(10).

perfunctory service due to the low legal fee and lack of devotion, and thus the low quality of their legal service has been criticized. As a new means to improve this problem, the Supreme Court has appointed, since 2004, several dozens of lawyers who exclusively take care of court-assigned cases and so are not allowed to retain criminal cases privately. They are obliged to manage 40cases per month, and they receive monthly payment based on a two-year contract. This system is similar to that of the public defender in the United States. As this new system has contributed to the improvement of the quality of service provided by court-appointed counsel, it has been expanded.

One unique aspect of the Korean legal aid system is the prominent role of the Korea Legal Aid Corporation (hereinafter KLAC). This corporation, anon-profit organization funded by the government and supervised by the Ministry of Justice, was founded in 1987 as a result of the newly enacted Legal Aid Act[24] which provides legal aid to the socially vulnerable in order to protect human rights and to promote legal welfare.

KLAC hires lawyers as full-time employees, not on the basis of *pro bono* service, in order to provide high quality and quantities of legal service. In consideration of the dire shortage of lawyers, the corporation had faced difficulties with recruiting full-time lawyers since its inauguration up to early 1990s. The increased number of lawyers resulting from the increased quota for the bar examination facilitated

24) Law No. 3862, December 23, 1986.

recruiting lawyers for the corporation. The adoption of a public-service advocacy system also added momentum to its active operation. The corporation can now secure scores of public-service advocates who are lawyers but have to provide substitute services in lieu of military service. [25] They are required to work for three years and are paid by the Ministry of Justice, not from the corporation. The public-service advocacy system greatly contributed to the expansion of KLAC legal services.

As of August of 2008, KLAC employed 43 lawyers and 135 public-service advocates on a full-time basis. In addition, about 500 non-lawyer staff and supporting personnel are working for the corporation. Government subsidies have also greatly increased over the last twenty years. The corporation is a nationwide organization with its local offices found near courts and prosecutor's offices throughout the country. Since its inauguration, the corporation has expanded the scope of subject matter as well as beneficiaries as it has beefed up its size. The corporation provides legal advice and counseling in legal representation in the court on general legal matters. Though it handled civil and domestic cases in the beginning, it expanded its aid to those involved in criminal cases in 1996, and then to administrative and constitutional cases in 2000. However, a civil case where the Republic of Korea is a party is not eligible for KLAC legal aid.

25) In Korea, young males are subject to compulsory military service unless exempted for legitimate causes. Due to an increased number of lawyers, the military could not accommodate all the lawyers who were required to perform military service. Therefore, the government enacted the Public-service Advocates Act (Law No.4836, December 31, 1994) and paved the way for these young lawyers to work in the civilian sector in lieu of military service.

KLAC's legal aid is available to everyone. However, courtroom representation is available only for the socially vulnerable groups such as those below the poverty line, low-ranking public officials, veterans, female victims of domestic violence, the handicapped, farmers, fishermen, and criminal victims. The client should pay the incidental costs incurred during a case, such as postal or delivery service fees and attorney's fees specified by the corporation at the conclusion of the case, which are generally fairly cheaper than a private attorney's fee. The corporation also has a free legal aid system that exempts legal expenses for those who need special assistance, for example, those on the welfare list for basic necessities or the handicapped. Free criminal defense service is available for all criminal cases. Therefore, citizens and foreign residents can have easy access to KLAC for any possible legal aid nation-wide.[26] The number of cases handled by the corporation has rapidly increased year by year, as the following statistics indicate.

Statistics of Legal Aid

(Unit: Case)

Classification Year	Civil / Family Cases				Criminal Cases	
	Total	Aid Prior to Lawsuit	Lawsuit-related Aid	Litigated Amount (billion won)		
1987~ 1994	141,546	99,867	41,679	5,784		

26) For details, see http://www.klac.or.kr/english/intro/01.php.See also Dae-Kyu Yoon, "Legal Aid and Public Interest Lawyering," in *Recent Transformations in Korean Law andSociety*, pp.376-381.

Classification Year	Civil / Family Cases				Criminal Cases	
	Total	Aid Prior to Lawsuit	Lawsuit-related Aid	Litigated Amount (billion won)		
1995	14,165	5,958	8,207	1,916		
1996	15,824	5,366	10,458	2,263	654	
1997	17,184	4,900	12,284	2,437	1,954	
1998	19,971	4,369	15,602	3,318	2,716	
1999	20,921	3,301	17,620	2,619	3,752	
2000	25,664	2,745	22,919	3,246	9,442	
2001	29,884	1,698	28,186	3,837	11,880	
2002	33,310	1,256	32,054	4,441	11,606	
2003	44,437	999	43,438	6,398	16,705	
2004	49,339	743	48,596	7,291	20,153	
2005	58,980	453	58,527	9,147	17,078	
2006	75,976	377	75,599	14,565	17,304	
Total	547,201	132,032	415,169	67,262	113,244	

Statistics of Legal Consultation

(Unit: Case)

Classification Year	Total	In-person Advice	ARS Advice	Internet Advice
1987~1994	2,477,473	2,035,163	327,964	114,346
1995	683,334	365,142	231,256	86,936
1996	1,082,151	489,205	442,113	150,834
1997	1,161,231	594,777	338,620	227,834
1998	1,590,768	804,535	379,226	407,007
1999	1,599,724	822,864	364,058	412,802
2000	1,894,228	840,283	391,745	662,200
2001	3,283,801	894,006	405,702	1,984,093

Classification Year	Total	In-person Advice	ARS Advice	Internet Advice
2002	4,710,666	899,285	252,803	3,558,578
2003	5,935,543	1,001,370	251,500	4,682,673
2004	5,478,029	996,255	201,537	4,280,237
2005	5,436,938	1,002,908	150,090	4,274,940
2006	4,245,456	1,035,714	148,047	3,061,695
Total	39,579,343	11,781,507	3,893,661	23,904,175

Chapter 13. Laborers' Rights Improved

Labor law is one of the areas which have undergone the most significant and frequent changes since democratization in 1987. As the most persuasive justification for authoritarian rule in Korea had been the country's rapid economic growth, it was, to some extent, inevitable that the rights of laborers be sacrificed in favor of business in order to facilitate economic development in the competitive international market. Low wages, long working hours, and restrictions on strikes were the norm. Although many of these abuses were outlawed by related laws, the implementation of these laws in practice had often been lacking, while the movement to improve poor labor conditions and the status of workers had been bitterly suppressed by the authoritarian government. The connection of laborers with political groups had been closely watched and strictly dealt with. Labor standards were far behind international standards as democracy in Korea was not at a stage at which it exerted enough influence to protect those who were building the country.

However, the situation has been dramatically reversed since 1987. As the legacy of authoritarian rule faded, laborers' oppressed demands erupted to the surface. The explosive rise in labor disputes in 1987 went so far as to paralyze normal production nationwide, resulting in violence, with workers ignoring existing labor laws.[1] Labor law became one of the areas requiring urgent attention. The new constitution of1987 revised

1) While the number of labor disputes in 1986 was 276, there were3, 749 in 1987. As labor laws improved, the number declined so rapidly that in 1990 there were only 322.

articles to improve working conditions in favor of laborers. For example, the constitution mandates the adoption of a minimum wage system, which was not prescribed in the previous constitution.[2] Workers' rights to independent association, collective bargaining and collective action were better protected by removing a reservation clause.[3] Labor rights of public officials and workers in public entities or important industries have been more broadly expanded.[4] Based on the new constitutional principle on labor relations, pertinent laws have been revised and enacted since 1987.[5]

Labor law is a very distinctive area of law directly reflecting the bargaining power of the government and civil society involved, as well as laborers and businesses. The current economic situation, domestic and global, is also an important factor. While a government with more sympathy for the plight of workers will be more positive to legal reform in their favor, economic recession would work against them. For example, the Korean financial crisis and IMF bailout made aggressive demands of laborers unacceptable in order to satisfy the so-called market-friendly conditions called for by lenders. Generally speaking, however, labor laws have been changed toward the enhancement of rights and interests of laborers.

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2) Constitution, article 32(1). Compare with Article 30 of the1980 Constitution.

3) Constitution, article 33(1). Compare with Article 31(1) of the1980 Constitution.

4) Constitution, article 33(2) and (3). Compare with Article31(2) and (3) of 1980 Constitution.

5) For the change and issues of Korean labor law in the 1990s, see Seon-soo Kim, "Korean Labor Law: Emerging Issues and Developments," in *Recent Transformations in Korean Law and Society*, pp. 339-361.

As a part of the democratic government's policy of accommodating labor rights and interests, the Korean government joined the International Labor Organization (ILO) on December 9, 1991. The government is now officially exposed to ILO pressure and recommendations, and should abide by ILO rules and respect its policies. Korea's membership in the ILO has contributed to enhancing the protection of Korean laborers, as ILO standards are reflected and extended further in Korean labor relations. Korea's entry into the ILO also facilitated Korean labor organizations' expansion of their cooperation with international communities.

Individual Labor Relations Acts Improved

The basic law governing individual labor relations is the Labor Standard Act (LSA), which lays down the minimal standards for employment conditions. The LSA prescribes details on employment contracts, wages, working hours and breaks, protection of female and underage workers, apprenticeships, compensation for industrial accidents, rules of employment, labor inspectors, and more. After a partial revision in 1987, the LSA has gone through many changes, among which those in 1997 and 2007 were quite major.[6] Many articles have been changed in order to provide more protection for laborers. For example, the scope of work places governed by the LSA was extended to places with as few as ten employees, and then five.[7] Working hours per week were reduced to 44, and then 40.[8] Laborers' claims for wages are better

6) See Law No. 5309 of March 13, 1997, and Law No. 8372 of April11, 2007.
7) Labor Standard Act (Law No. 8372), article 11.
8) LSA, article 50(1).

protected, while allowances for shutdown shave been increased.

On the other hand, however, new provisions were introduced to cope with new challenges. In particular, in the wake of the IMF bailout, dismissal for managerial reasons was allowed. Dismissal was justified when an 'urgent managerial need' is found. Furthermore, the transfer or M&A of businesses to prevent the worsening or downfall of management is deemed as urgent managerial need. An employer should make every effort to prevent dismissal. At the same time, an employer should select laborers to be dismissed on rational and fair standards, without gender discrimination. An employer should also give at least 50 days prior notice of dismissal to the trade union.[9] Despite these provisions, labor security has weakened.

Also introduced was the so-called "flexible working hour system"in order to give an employer more flexibility in its management of working hours. This system allows an employer to have an employee work for specific days or weeks beyond the limit of prescribed working hours (8 hours per day and 40 hours per week) on the condition that average working hours per week in a period do not exceed the limit. In this case, overtime pay is not applied as long as the average working hours within a two week period do not exceed 8 hours per day and 40 hours per week. If agreed upon with an employee, an employer can utilize this system as long as the average working hours within a 3 month period does not exceed the limit.[10] In addition, also adopted is the selective

9) LSA, article 24.

working hour system under which a worker can decide when to begin and finish work, on the condition that the average working hours per week in a month is under 40 hours.[11] Although business interests had vigorously lobbied to ease the rigidity of working hours in order to cope with the volatile and unpredictable market situation and to be able to cope with global competitiveness, this system is likely to lead to long working hours as well as the deprivation of overtime payments.

Different laws were enacted to deal with dispatched workers[12] and temp workers.[13] A dispatched worker is hired by a manpower supply company, and then seconded to another business, a manpower recipient company. A temp worker is a laborer working for a limited period on the basis of an employment contract. They both offer a means to enhance flexibility in the labor market. New laws to handle them were created to provide better protection of those workers who had previously been outside of legal protection. When an employer had continuously hired dispatched workers for over two years, the employer was required by law to hire him/her directly.[14] When the temp worker had been employed for more than two years, the employer was required to hire him/her. The employer was not allowed to discriminate against temp workers.[15] While these laws are likely to contribute to protecting these

10) LSA, article 51.

11) LSA, article 52.

12) The Act Relating to the Protection of Dispatched Workers (Law No. 5512, February 20, 1998).

13) The Act Relating to the Protection of Temporary Workers (Law No. 8074, December 21, 2006).

14) The Act Relating Protection of Dispatched Workers, article6-2.

15) The Act Relating to Protection of Temporary Workers, articles4, 8~15.

workers, at the same time, they legalize adoption of these systems and thus justify their exploitation.

Besides, many laws regarding wage claims, foreign workers, employment insurance, industrial accident insurance, and industrial security were enacted or revised in order to further protect the workers.

As globalization continues, competition in the global market is intensified. Where the welfare system is yet to be stabilized, workers' status becomes more vulnerable. The "growth first policy" for rapid economic development has not paid enough heed to the importance of distribution and the social welfare system. Although the previous progressive government tried to make up for the lack of reform, the situation was not improved to any great extent.

Collective Labor Relations Acts Balanced

More dynamic changes took place in collective labor relations, which are a direct reflection of the power relations between trade unions and employers. Under authoritarian rule, laborers' collective rights and action had been restricted. In concert with a constitutional change in labor relations, the requirements for the establishment of labor unions have been eased, while their activities have been more protected. As the constitution guarantees laborers'rights to organization, collective bargaining, and collective action,[16] laborers are now in a better position to exercise bargaining power. The law sconcerning collective labor relations also

underwent a major change in 1997,after several more minor revisions since 1987. The Trade Union and Labor Relations Adjustment Act (TULRAA),[17] which is the most important law governing collective labor relations, deals with the trade unions, collective bargaining, collective agreements, arbitration of industrial disputes, and unfair labor practices. The Labor Relations Commission Act[18] stipulates details of the commission's organization and procedures regarding the exercise of its authority. As the laws have been enacted through democratic processes, they improved many restraints that were imbedded in previous laws on the basis of autonomy of the employee and employer. Many provisions restricting collective labor rights were removed or eased, so now, labor disputes are more likely to be resolved within a normal legal framework.

After democratization in 1987, the number of trade unions grew rapidly.[19] However, there was a prohibition on multiple trade unions, which prevented the establishment of a new union in the same enterprise or industry in which a union was already in force. It was a blatant infringement of the constitutional rights of laborers to organize at their free will as guaranteed by Article33(1) of the constitution. This prohibition effectively outlawed any alternative to business-sponsored

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16) Constitution, article 33.

17) In 1997, the Trade Union Act and the Labor Dispute Adjustment Act were integrated into this TULRAA as Law No. 5310 of March 13, 1997.

18) Law No. 5311, March 13, 1997.

19) While the number of trade unions in 1986 was 2,658, in 1987 it was 4,086, and in 1989 it peaked at 7,861. Since then, it has started to decline. In 2005, there were 5,971. However, the union membership rate did not show a big difference, ranging between 10 to 20 percent. It was 16.8 percent in 1986, while 18.5 percent in 1987, 19.8 percent in 1989, and 10.3 percent in 2005 respectively.

unions at the company level, and any alternative federation not existing at the industry level. The new TULRAA of 1997 allowed multiple unions.[20] At the national level, in parallel with the existing Federation of Korean Trade Unions,[21] the Korean Confederation of Trade Unions[22] was created in 1995 and legalized in 1997 by this law. Thus, the former, which had enjoyed a monopolistic position under authoritarian rule, lost such privileges, while the latter commanded fresh legitimacy thanks to its aggressive challenge in favor of laborers and political reform.[23] Trade unions at the industrial level were also created. Nonetheless, adoption of multiple labor unions at the enterprise or working place level was suspended until 2009 by a supplementary provision.[24] Conflict between existing labor unions and any new union in the same company may arise, and interested parties have not reached an agreement on this matter yet, which will be discussed at the meeting of the Tripartite Commission, consisting of representatives of laborers, businesses, and government, as introduced later in this section.

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20) TULRAA, articles 5, 10.

21) http://www.fktu.or.kr/

22) http://www.kctu.org/

23) On the basis of legitimization of progressive trade unions, the Democratic Labor Party, a progressive political party speaking for the interest of laborers, was inaugurated in 2000. It has produced candidates since the presidential election of 2000. In the National Assembly election of 2004, it secured 10 seats and 13 percent of popular support in party choice, and became the third-largest party in the National Assembly. However, it faced a setback in the 2008 National Assembly election, commanding a mere 5 seats.

24) TULRAA, supplementary provision 5 (revised as Law No. 8158 on December 30, 2006). This suspension was extended, in the beginning, to 2001,and then again, to 2006, and then, once again, to 2009.

Another unique problem of Korean trade unions is the issue of remuneration for full-time officials of a trade union. Though the union should be responsible for its expenses, including wages of its full-time officials, Korean practice so far has been the opposite; the employer has paid remuneration for such full-time officials of the unions. This practice began due to the fact that trade unions at company level in Korea had been created in cooperation or collusion with employers, and thus were friendly to employer sunder the authoritarian government. In return, employers took care of expenses such as the wages of full-time officials of the union. As trade unions have since become independent and challenged employer's policies, the employers do not recognize such practices anymore, as they are out of date in consideration of the equal status of the trade union and employer after democratization. The new TULRAA of 1997 accepted the employers' position and provided that full-time officials of a trade union shall not be remunerated by the employer during their tenure.[25] If an employer has paid wages for full-time officials of a trade union or provided financial support for the operation of the union, it amounts to an unfair labor practice and faces a penalty.[26] However, this ban on remuneration to full-time officials of the union has been also suspended until 2009 by a supplementary provisio n.[27] Since the financial infrastructure of the trade union is still vulnerable, it is reasoned that implementation of a ban to pay wages by an employer would seriously hurt the union's strength.

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25) TULRAA, article 24(2).

26) TULRAA, articles 81(iv), 90.

27) TULRAA, supplementary provision 6 (revised as Law No. 8158 on December 30, 2006)

Third-party intervention in a labor dispute was prohibited and made punishable as a criminal offence by up to five years imprisonment under authoritarian rule.[28] Many leaders of the labor movement were punished on the grounds that they supported or assisted the activities of other trade unions. The law in question was particularly controversial in the wake of the 1987 democratization movement. The revision bill to repeal the ban on third party intervention was, however, vetoed by then-President Roh Tae-woo in 1989. Following this, the controversial provision was challenged in the Constitutional Court, which upheld its constitutionality in 1990.[29] The Court's majority opinion stated that the law at issue justifiably restricts interventions related to political objectives that are "irrelevant to the improvement of salary and other working conditions", and that it does not prevent employees from obtaining assistance from lawyers or other experts "to the extent that the employees' free decision is not affected." On the other hand, a dissenting opinion argued that the prohibition of third-party intervention should have been deemed unconstitutional because it has a severe chilling effect on the ability of trade unions to obtain assistance from qualified professionals.

In 1993, the ILO strongly recommended that the prohibition of the third-party intervention be repealed, since the provision at issue went against Article 3 of the ILO Convention, No. 87 by seriously restricting the free functioning of trade unions. However, the new TULRAA of

28) Labor Dispute Adjustment Act, articles 13-2, 45-2 (revised by Law No. 3926, December 31, 1986). Article 13-2 outlawed "manipulation, instigation or obstruction of the parties concerned with respect to acts of dispute or other intervention intended to influence them."

29) 2 KCCR 4, 89 Hun-Ka 103, January 15, 1990.

1997, a major revision and the substitute of the old Labor Dispute Adjustment Act, maintained this principle in Article 40, although softened. Finally, this provision was removed in 2006.[30] Now a trade union is free to seek assistance from a third-party.

The collective labor rights of public officials and schoolteachers had also been at issue. Their collective labor rights had been banned under authoritarian rule, but changed with democratization. In the case of public officials, Article 33(2) of the 1987 Constitution stipulates that only those public officials designated by legislation shall have right to association, collective bargaining and collective action. Article 5 of the 1997 TULRAA prescribes that public officials and teachers shall be governed by separate laws. However, the government first enacted the Act Concerning Establishment and Operation of a Workplace Consultative Committee for Public Officials[31] in 1998 before it made the governing law for trade unions. The role of this Workplace Consultative Committee is to consult with the head of public organizations on matters involving improvement of the working environment and performance efficiency, grievances, and so on.[32] The government adopted this committee system as a transitional body before employing an ordinary trade union for public officials. Finally, although belatedly, the Act Concerning the Establishment and Operation of a Trade Union for Public Officials (AEOTUPO)[33] was enacted in 2005, and public officials are now free to create a union.[34]

30) Law No. 8158, December 30, 2006.
31) Law No. 5516, February 24, 1998.
32) Article 5.
33) Law No. 7380, January 27, 2005.
34) Upon enactment of this law, Article 66(1) of the National Public Service Act and

Accordingly, most workplace consultative committees have been transformed into trade unions and some illegitimate unions that were formed before this law came into being in 2005 became legalized. The scope of officials eligible to form unions is prescribed in the law.[35] Now, low-ranking public officials have their own unions to speak for their rights and interests on the national level, as well.[36] However, the trade unions formed by public officials are not allowed to engage in collective action such as strikes or work stoppages which impedes the normal operation of public service.[37]

Similarly with public officials, teachers were not allowed collective labor rights until 1999. Because Korean school teachers are regarded as public officials, they could not exercise their collective labor rights. Furthermore, as the laws governing teachers of public schools extend to teachers of private schools,[38] all school teachers were prohibited from organizing and engaging in collective action. After democratization in 1987, there was a strong movement by teachers to form a trade union, which was then banned. However, in 1989, teachers created the Korean Teachers and Education Workers' Union(*Jeongyojo)*,[39] with the participation of more than 23,000 teachers. The government outlawed the union and went so far as to dismiss about 1,500 teachers. After almost

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Article 58(1) of the Local Public Service Act, which prohibit collective labor rights, no longer have any impact, as provided by the Article 3 of AEOTUPO

35) AEOTUPO, article 5.

36) In the case of the unions of public officials, union membership rate was as high as about 60 percent as of December 2007.

37) AEOTUPO, article 11.

38) The Private School Act, article 55.

39) See http://www.eduhope.net/

ten years of persistent struggle, the teachers' union was finally legalized by the institution of the Act Concerning the Establishment and Operation of the Teachers' Trade Union in 1999.[40] Like the union of public officials, its collective rights are still significantly restricted.[41]

In the wake of the financial crisis and IMF bailout, and the inauguration of President Kim Dae-jung, the new government established the Tripartite Commission of Labor, Management and Government in 1998 to facilitate overcoming the pending predicament and to reach an agreement on issues concerning labor relations. The government was in a dilemma, needing to satisfy the conflicting interests of laborers who supported the progressive party of Kim Dae-jung and the lenders who demanded a market-friendly system at the cost of laborers. The government devised this Tripartite Commission to reach a compromise on important issues and policies regarding labor relations with the participation of parties concerned. In the beginning, it was an advisory body to the president, but later, it became a legal entity after enactment of the Act Concerning the Establishment and Operation of the Tripartite Commission of Labor, Management and Government in 1999.[42] Now its activity has become more official and its agreements more binding.

The Tripartite Commission discusses and advises the President on the following matters: labor policies concerning employment stability and

40) Law No. 5727, January 29, 1999.

41) See article 8.

42) Law No. 5990, May 24, 1999. The title of this law was changed to the Act for the Commission of Labor, Management and Government for Economic and Social Development in 2007 (Law No. 8297, January 26, 2007), which lessened its role.

labor conditions, industrial and socio-economic policies which have a substantial impact on the labor policy; principles and directives for restructuring in the public sector[43]; improvement of the system, mind set and practice to better labor relations; methods for implementing agreements by the commission; and methods for supporting cooperation among labor, management and government.[44] In spite of a serious confrontation between labor and business interests within the commission, many important labor and social issues with conflicting interests and social repercussions have been resolved through the commission, and thereby a good number of new legislative proposals on labor relations were passed. However, as the financial crisis settled down, the commission's activities became much less visible.

43) This item was eliminated in the revision of January 26, 2007.
44) Article 3.

Chapter 14. Status of Women Enhanced

Democratization since 1987 has influenced and changed the social and legal status of women in Korea. Political authoritarianism provided a fertile environment for patriarchy to persist in Korean society for a long time, grounded in Confucian tradition. Although all Korean constitutions, from the first one in 1948, have stipulated equal protection regardless of gender, reality and practice were not consistent with constitutional provisions.[1] Political transformation toward democracy has inevitably made politicians realize the importance of female voters, who make up half of all the voters in Korea. They have been very active in responding to the demands of NGOs to promote the status of women. While demands for the improvement of women's status under the authoritarian rule tended to have stalled at the level of domestic relations or employment,[2] equality based on gender has now been extended to the political arena as well.

As the democratization movement gained strength in the 70s and 80sunder authoritarian rule, the women's movement to improve their status was also reinforced. In addition to the conservative and accommodating women's organizations, more progressive organizations had cropped up to take part in the political movement. Political democratization became an important agenda of many organizations for

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1) The 1987 Constitution has more detailed provisions for the protection of women. See articles 9(2), 32(4), 34(3), 36.

2) The top priority of women's associations under authoritarian governments had been to change the family law which discriminated against women in favor of men.

women. They joined in political protests and demonstrations. In order to improve women's status, they paid attention to changing government policy and the revision of laws concerning women and women's rights. After 1987, they became influential as an interest group and NGOs in support of women's liberties have grown considerably.[3] Equality based on gender has been significantly improved over the last twenty years.

Changes in Government Organizations Dealing with Matters on Women

Amid the strengthened movement of women's organizations in Korea and the international community,[4] the government started to beef up public organizations for women. In 1983, the Korean Women's Development Institute was created, based on the Act for Korean Women's Development Institute of 1982. While the Ministry of Health and Society was in charge of matters related to women since as early as 1955, the government formed the Review Committee for Policy on Women under the Prime Minister in 1983. In 1988, for the first time, a separate body at the national government level became responsible for matters on women through the creation of the office of the Second Minister without Portfolio as the top officer in charge of those matters, but it did not have the authority to enforce laws and policies. Under the

3) For example, Korean Women's Association United, an umbrella organization composed of various organizations engaged in promoting women's status, was formed in 1987. See http://www.women21.or.kr/

4) The Korean government ratified the UN's Convention on the Elimination of All Forms of Discrimination against Women in 1983, with reservations on several articles.

Kim Young-sam government, a sub-committee for policy on women was created within the Presidential Committee for Globalization Promotion in 1995, and selected 10 agenda items to promote and expand women's participation in society. The Basic Law for Women's Development[5) wasalso enacted in the same year.

The progressive government of Kim Dae-jung was more active on this matter. His government created the Special Committee for Women under the President in 1998. It was designed to carry out policies stipulated in the Basic Law for Women's Development. It was in charge of planning, developing and adjusting policies on women, investigation and rectification of discriminatory cases, promotion of equality, consultation to the President for the enhancement of women's status, and other oversight responsibilities. While it had much potential to be an active committee, according to the president's will, it had limits of its own, derived from the nature of the organ. It had to rely on other executive bodies for the execution of its policies. Neither did it have the authority to draft bills, nor did it have the authority to supervise other agencies. In order to solve these problems, departments of policy for women were created in six ministries tasked with important business in connection with women, such as the Ministry of Labor, the Ministry of Justice, the Ministry of Agriculture, the Ministry of Education, the Ministry of Government and Local Autonomy, and the Ministry of Health and Welfare, to facilitate implementation and coordination of policy on women.

5) Law No. 5136, December 30, 1995.

Finally, the Kim Dae-jung government created the Ministry of Women in 2001, which had been a persistent demand of NGOs supporting women's rights. Under the Roh Moo-hyun government, this ministry's jurisdiction was more broadly expanded by taking over the responsibilities of nursing from the Ministry of Health and Welfare in 2004. As Korea has suffered from a low birthrate and rapidly aging society, matters on family became a more important part of the ministry, and its title was changed to the Ministry of Women and Family in 2005. However, the new conservative government of Lee Myung-bak tried to abolish the ministry as he pursued smaller government. After he failed to close it, it narrowly survived in February 2008 by returning to the original title and jurisdiction of the Ministry of Women by transferring matters on family and nursing to the Ministry of Health and Welfare.

Changes of Laws for Equal Protection of Both Genders

Since democratization, equal protection regardless of gender and improved quality of women's lives has been more actively pursued by the government due, in part, to the government's recognition of the importance of gender equality and, in part, the significant growth in the number and activity of NGOs for women. In particular, women's organizations were very successful in achieving their goals by setting up agendas and mobilizing resources for them. Most of their long-held and ceaseless demands were reflected through a series of revisions or the enactment of relevant laws.

The most important step has been the change of the family law in the Civil Code.[6] Its revision in 1990 significantly improved recourse against discrimination against women in domestic relations, including redefining the scope of relatives, inheritance, and child custody rights.[7] However, the head-of-household system had been maintained until the revision in2005.[8] Before this revision, the Constitutional Court ruled that the articles of the Civil Code concerning the head-of-household system were inconsistent with the constitution since a household is formed around the head at its core, and passes down only through direct male descendants serving as successive heads of household.[9] This system of family law was rooted in Confucian tradition, but was repealed and replaced by new articles based on gender equality.[10] A wife or mother now entertains almost the same status or rights in domestic relations. Now children can have their mother's surname if the parents agree.[11]

In a similar vein, before this decision, the Constitutional Court held that Article 809(1) of the Civil Code, which prohibits marriage between those with the same surname and, at the same time, same origin of surname, is nonconforming to the constitution on the grounds that it broadly restricts sexual self-determination, which originates from the right

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6) This is the basic law on domestic relations as well as contract, property and torts. It was first enacted in February 22, 1958 as Law No. 471, and revised sixteen times, with the latest revision on December 21, 2007, Law No. 8720.

7) Law No. 4199 of January 13, 1990.

8) Law No. 7427 of March 31, 2005.

9) 17-1 KCCR 1, 2001 Hun-Ga 9.10.11.12.13.14.15 and 2004 Hun-Ga5(consolidated), February 3, 2005.

10) The Civil Code, articles 778~799. The title of the chapter was changed from 'House Head and Household' to 'Scope of Family, and Surname and Origin of Child.'

11) Article 781(1).

to pursue happiness and, in particular, the right to choose a spouse for marriage.[12] This prohibition was justified by the Confucian tradition of patriarchy and male supremacy based on the bloodline of a patriarch, but not grounded on genetic evidence. The article voided and nullified such marriages. Therefore, couples in such marriages could not register their marriage. After this decision, such prohibition was, *de facto*, repealed. This article was later changed in the 2005 revision to prohibit marriage to a relative closer than a third cousin. The Civil Code was revised once again in2007 to grant more gender equality in other areas, such as the minimum age for marriage. A deliberation period in uncontested divorces was also adopted.

The Nationality Act, which had been enacted in line with the Civil Code based on patriarchal tradition, was also revised.[13] For example, in the event of a marriage in which one spouse is not a Korean citizen, the new revision allows Korean nationality to children of a Korean mother as well as a Korean father.[14] A spouse who has married a Korean has the right to choose his/her nationality instead of automatically adopting the husband's.[15]

Important laws concerning gender equality in the workplace were made after democratization in 1987. The Act for Gender-equal Employment[16]

12) 9-2 KCCR 1, 95 Hun-Ka 6, etc., July 16, 1997.

13) The Nationality Act was first enacted on December 20, 1948 as Law No. 16. A major change was made in 1997 (Law No. 5431 of December 13, 1997)after a ruling by the Constitutional Court invalidating discriminatory provisions of the family law.

14) Article 2(1)(i).

15) Articles 4(2), 8(1).

was enacted in 1987 to protect equal opportunity and treatment in the workplace regardless of gender, to promote hiring women and to protect the maternity rights of female workers. An employer cannot discriminate against female workers and is not allowed to dismiss them on account of marriage, pregnancy or birth. This law was implemented to ban discriminatory practices prevailing at that time. In order to facilitate implementation and effectiveness, it was revised several times before its last revision, at which point the title was changed to the Act Concerning Gender-equal Employment and Support Compatibility of Work and Family in 2007.[17] In the wake of the low birth rate and rapid aging, female employment needs to be balanced with family life. Now, employment-centered policies for women should have a broader perspective. In order to promote business activities of female entrepreneurs, the Act Concerning Support for Female Business[18] was enacted in 1999.

In this regard, the Act Concerning Anti-discrimination of Gender and Remedy of 1999[19] deserves notice. This law was enacted to enforce gender equality in practice. For the first time, under this law, gender discrimination and harassment was banned in public as well as private agencies. Under the Special Committee for Women, the Commission for Gender Discrimination Improvement was created by this law. The commission received complaints of discriminatory cases and investigated them. It had the authority to mediate, to recommend rectification or to

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16) Law No. 3989, December 4, 1987.
17) Law No. 8781, December 21, 2007.
18) Law No. 5818, February 5, 1999.
19) Law No. 5934, February 8, 1999.

press charges. With the establishment of the new Ministry of Women and Family in 2005, this law and the commission were closed, and the authority of the commission was transferred to the National Human Rights Commission. During its six years of operation, it received 1,137 cases, among which it is sued recommendations of rectification in 159 cases, with significant effects. In spite of its short life, the commission contributed greatly to the task of discontinuing long lasting discriminatory practices.

As sexual assault and domestic violence, where women are most likely to be victims, drew social attention, two new laws stood out as being particularly important in dealing with them; the Act to Punish Sexual Assault Crime and Protect Victims,[20] and the Act to Prevent Domestic Violence and Protect Victims.[21] The former was prepared to strictly handle various sexual assaults including crimes covered under the Criminal Code, and to prescribe effective measures to protect their victims, while the latter was prepared to ensure that domestic violence, which had often stayed beneath the surface under the patriarchal tradition, was not ignored, and that its victims were actively protected. In fact, previously, sex-related crimes had been punished relatively leniently and thus women became more vulnerable. The government and society took them more seriously and expressed an intention to handle them firmly by enacting these laws.

20) Law No. 4702, January 5, 1994.
21) Law No. 5487, December 31, 1997.

The sex trade was banned by the Anti-prostitution Act from early on.[22] Although this law prohibited prostitution, the reality was a different story and prostitution was prevalent throughout Korean society. The authoritarian rulers were fairly lenient in dealing with this matter. It went as far as trafficking of women and kidnapping women for prostitution. However, democratization changed society's perspective on this matter, as it came to have been recognized as a serious violation of the human rights of the women involved, exploiting women mentally as well as physically. In particular, this law had been criticized since it attributed responsibility to women prostitutes and punished them, while johns purchasing sexual favors or persons running prostitution businesses were handled very leniently or not punished in practice. A major revision was made in 1995 to reinforce punishment of johns and pimps who exploited women, and, at the same time, strengthened protection and rehabilitation programs for women in need.[23] However, the long lasting practice and perception of prostitution hardly changed. NGOs for women resorted to moral mandates against the sex industry and won the debate with realists, replacing the Anti-prostitution Act with the Act Concerning Punishment of Sex Trade and Arrangement in 2004.[24] The new law bans all possible types of sex trade and strictly punishes those involved, including johns, and protects victims. It displays the strong will of the government to solve this issue. Nevertheless, it seems unlikely that the sex trade will be eradicated. Red light districts still exist, although many of them disappeared from the surface and, instead, infiltrated into residential areas.

22) Law No. 771, November 9, 1961.
23) Law No. 4911, January 5, 1995
24) Law No. 7196, March 22, 2004.

Occasional crackdowns without lasting effect are almost all the authorities can do to cope with this problem. Although this law has been often ignored and hardly enforced in reality, it is not easy for realists to challenge the moral legitimacy of this law. The battle of idealists and realists on this issue still goes on quietly.

In order to promote the participation of women in the political process and public service, affirmative action, with quotas, was adopted. For example, political parties were required to recommend female candidates for at least 30 percent of proportional seats in elections for the National Assembly and council of local governments by the 2000 revision of the Political Party Act.[25] This contributed to a significant increase in the number of female members in there presentative bodies. When the Political Party Act was re-written in 2005,this quota system was incorporated into the election law, as Article 47(3) of the Public Election Law was revised to carry this female quota.[26] This revision increased the female quota to 50 percent of the proportional candidates, and dictated that every other slot on the list for proportional candidates of political parties should be filled by female candidates.

In the case of a make-up examination to recruit public officials, respective public agencies concerned could select officials based on gender. In many cases, they restricted the quota for females to 10

25) The original Political Party Act was enacted in 1962 as LawNo. 1246, on December 31, 1962. The female quota was adopted by the February16, 2000 (Law No. 6269) revision. The current Political Party Act was revisedon August 4, 2005 (Law No. 7683).

26) Law No. 7681 of August 4, 2005.

percent, but this instance of gender discrimination has since been repealed.[27] Instead, public agencies are allowed to select extra female candidates beyond the designated volume of recruitment when the number of successful female examinees falls short of a certain ratio.[28] This is also an example of adoption of affirmative action in favor of women. Other discriminatory bylaws against female officials, for example, regarding family allowance or leave for family events such as weddings or funerals, were also rectified.

As to gender equality in public offices, the Constitutional Court passed down a notable decision in 1999. According to then-existing laws, veterans received extra points, amounting to 3 or 5 percent, on the results of civil service examinations,[29] and so those who did not serve in the military found it extremely difficult to be successful. Since civil service examinations are very competitive, the extra points amounting to 3 to 5 percent are decisive in success. Considering that avery small number of women can become veterans while most males should serve inthe military under the compulsory military service system,[30] these extra points for veterans effectively discriminated against women. Therefore, the

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27) Presidential Order for Public Official Recruitment Examination(Presidential Order No. 2405, from February 7, 1966), article 2 was revised to remove discriminatory recruitment on June 16, 1989 (Presidential Order No.12730).

28) Article 13-3 was inserted for this purpose in the Presidential Order for Public Official Recruitment Examination. Presidential Order No.14838, December 22, 1995. The newly written version of this order in 2004prescribes such extra recruitment for both genders in Article 20. Presidential Order 18424, June 11, 2004.

29) The Act Concerning Support for Discharged Soldiers (Law No.5482, December 31, 1997), article 8(1) and The Enforcement Decree for the Act Concerning Support for Discharged Soldiers (Presidential Order No. 15870,August 21, 1998), article 9.

30) The Military Service Law (Law No. 4685, December 31, 1993), article 3(1).

Court stated that this system violated equal rights as protected by Article11, and the right to hold public office guaranteed by Article 25 of the constitution. The Court noted that veterans might need to be supported through various social policies, but not by depriving other groups in society of equal opportunity.[31)]

31) 11-2 KCCR 770, 98 Hun-Ma 363, December 23, 1999.

Chapter 15. New Approach Toward North Korea: From Archenemy to Brotherhood

South Korean's perspectives on North Korea have changed dramatically since democratization. Authoritarian rulers in the South and the North had manipulated division for their domestic political purposes. After the internecine civil war between the two Koreas, the continued existence of a bellicose enemy just across the border provided fertile milieu for leaders in both Seoul and Pyongyang to justify despotic and authoritarian rule at the cost of individual freedoms and rights for the sake of national security. Demonization of the other side was reinforced to maintain undemocratic systems. The concurrent occurrence of South Korean democratization and the collapse of the Socialist bloc following the implementation of *Perestroika* in the Soviet Union carried with it an explosive impact on inter-Korean relations. The democratized government of South Korea could exercise initiatives to transform the relationship of mutual distrust and confrontation into that of reconciliation and cooperation, to dismantle the Cold War structure on the peninsula and seek the establishment of a peace regime.

With the backdrop of the new international environment and people's desire for unification after democratization, President Roh Tae-woo did not lose any time in proposing an initiative for a new inter-Korean relationship by making a special declaration on July 7, 1988, key parts of which were calls for mutual opening for human exchange, inter-Korean trade, cooperation in improving North Korea's relations with the

United States, Japan and other countries on friendly relations with the South, and promoting an improved relationship with the then-Soviet Union, the People's Republic of China and other socialist states. Now North Korea was no longer Seoul's archenemy, but rather, its new, legitimate partner for peace and unification. This approach reflected a new perspective on North Korea and a paradigm shift made possible by political democratization. On the other hand, this kind of announcement was necessary to facilitate participation of socialist countries in the upcoming Seoul Summer Olympics the same year.[1] The1988 Seoul Olympics proved to be a great success and served as an opportunity for Seoul to display the level of development in South Korea to the world and to expand diplomatic relations with former socialist countries.

This announcement became a milestone for South Korea's engagement policy toward the North. The Roh government enthusiastically pursued its so-called *Nordpolitik* policy based on this announcement. Inter-Korean dialogue was initiated[2] and inter-Korean trade was legally opened. Both Koreas simultaneously gained UN membership in 1991. South Korea normalized relations with socialist countries, particularly with the Soviet Union and China,[3] while the democratic government's engagement policy

1) In 1987, a Korean Airline flight was brought down by a North Korean terrorist act in an attempt to disrupt the Seoul Olympics.

2) Before this dialogue, at the height of the Cold War and for the first time since the Korean civil war (1950~53), the two Koreas held clandestine dialogue and agreed upon the Joint Communique in July 4, 1972,after which both governments strengthened its one-man rule. Park Chung-hee revised the constitution in the same year to perpetuate his rule, and Kim Il-sung did the same in the North.

3) Diplomatic normalization with the Soviet Union took place in1990, while with China in 1992.

for reconciliation and cooperation with the North also produced new phenomena in South Korea's legal realm.

Conflicting Constitutional Provisions on Inter-Korean Relations

The new constitution of 1987, which is a symbol of Korean democracy, created a new provision, Article 4, which states, "The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy." The phrase "upholding the peaceful unification" was first inserted in the Preamble of the 1972 Constitution after the first-ever inter-Korean joint communiqué of July 4, 1972, and was kept in the 1980 Constitution. It had remained as asymbolic and long-term vision. However, the current constitution, established after the 1987 democratic movement, instituted a separate article in the text and displayed the state's strong will and policy toward unification. It has proven to have a concrete effect in practice, as laws at issue are justified or challenged on the basis of this provision.

The democratization movement had been closely connected to the unification movement in Korea. Korean authoritarianism had been built up on a strong anti-communist platform as it had legitimized its rule by defending against North Korea's aggressive attempts to communize the South. Sympathy with the North had been strictly suppressed asa violation of the Anti-Communist Act or the National Security Act.[4]

4) The Anti-Communist Act (Law No. 643 of 1961) and the National Security Act (Law

Aspeople realized that the division of the Korean Peninsula had been exploited as a complacent masquerade for undemocratic rule, the democratic movement was expanded to include unification and peace movements. In this regard, the democratic movement shared much with the unification movement, while authoritarianism, to a large extent, was a staunch supporter of anti-communism. This is why the anti-government democratic movement in Korea was frequently identified with nationalism supporting peaceful unification. Article4 of the constitution became a reflection of this movement after its success. As inter-Korean relations have improved, many laws to expedite cooperation and unification, for example, the Act Concerning Inter-Korean Exchange and Cooperation[5] and the Act Concerning Inter-Korean Relations Development[6] wereenacted on this constitutional basis.

The other constitutional provision which has raised some issues in connection with the improvement of inter-Korean relations is Article 3 on territory, which reads, “The territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands.” This article defining Korea’s territory was provided in the very first constitution in 1948 in order to demonstrate that the government in the South was the only legitimate government on the Korean Peninsula since the UN-supervised election took place in the South only. Although the

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No. 549 of 1960) were repealed and replaced by a new law, also named the National Security Act, in 1980 (Law No. 3318, December 31, 1980), which incorporated most parts of the Anti-Communist Act.

5) Law No. 4239, August 1, 1990.

6) Law No. 7763, December 29, 2005.

government in the South cannot exercise its sovereign authority over the North, the territory of the northern part of the peninsula still belongs to the South Korean government from the constitutional viewpoint.[7] This article has been the basic legal grounds for negating the legitimacy of the North Korean government and to define it as an anti-state organization.[8] Laws to ban or crack down on pro-North Korean activity such as the Anti-Communist Act or the National Security Act were justified on the basis of this provision on Korean territory.

As inter-Korean relations have improved, these two articles seemed to conflict with each other. The North Korean government now is not an object to negate or obliterate based on Article 3, but has become a legitimate partner of the South for dialogue and cooperation toward unification grounded upon Article 4, the peaceful unification provision.

The hostile military tension across the De-Militarized Zone still exists, as heavily armed forces of the two sides confront each other. In fact, the two Koreas have not replaced the 1953 armistice agreement with a peace agreement. Legally speaking, they are still at war, though this truce has lasted more than a half-century. How to reach a peace treaty to secure permanent peace on the peninsula is the most important agenda for the Koreas yet to come.

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7) This is the majority view within the Korean constitutional law discipline. The Constitutional Court and the Supreme Court of Korea also support this view.

8) On the other hand, the North Korean Constitution does not carry a provision on territory.

On the other hand, inter-Korean dialogue increased and led to the Agreement on Reconciliation, Nonaggression, and Exchange and Cooperation between South and North Korea(Basic Agreement), signed by the prime ministers of both Koreas in 1991.At long last, the first inter-Korean summit was held in Pyongyang in June 2000,resulting in the June 15 South-North Joint Declaration, signed by the heads-of-state Kim Dae-jung and Kim Jong-il, which established the framework for reconciliation and cooperation between the two Koreas and weighed significantly on the prospects for the future development of inter-Korean relations. This summit provided the necessary momentum to accelerate inter-Korean exchange and cooperation. From 1988 to the end of 2007, a total of133 agreements were reached between the two Koreas, among which 60 were concerned with economic cooperation, 33 with political issues, and 10 with military matters, while 16 were related to humanitarian support and 9 with socio-cultural matters. The vast majority of them were made after the first summit in 2000. The second summit was held in October 2007, and the two heads-of-state announced the October 4 South-North Joint Declaration, with detailed plans for further cooperation.

Then the issue is how this rapprochement and cooperation with the North can be compatible with the territorial provision of Article 3. The Supreme Court ruled that, on the one hand, North Korea was a partner for dialogue and cooperation, but, on the other hand, it was still an anti-state organization trying to overthrow free democracy in the South for a communized peninsula, even after the 2000 inter-Korean summit. The Court concluded that the inter-Korean summit did not terminate the very nature of North Korea a san anti-state organization, and therefore,

the National Security Act remains in force.[9] Although it is true that inter-Korean dialogue and cooperation greatly contributed to easing hostile tensions and confrontation, it appears that this dual status of North Korea will remain for some time, until the military confrontation and the character of the North Korean regime has transformed enough for North Korea to abandon its aggressive intentions.

However, political democratization since 1987 has influenced the interpretation of laws concerning North Korea's status. The government's new policy of conciliation and cooperation toward the North also contributed to the change in judicial attitude. The most notable example is the notorious National Security Act, which had been frequently abused to punish political activists under the authoritarian rule. In particular, Article 7 of the law was repeatedly challenged due to its vague and overly broad wording. Finally, the Constitutional Court reviewed the constitutionality of the provisions in Article 7(1) and (5) of the National Security Act, which banned the act of praising or encouraging anti-state groups and producing treasonous material,[10] and found it to be constitutional only when it is applied to limited circumstances "with the knowledge of threatening national security and the basic order of free

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9) Supreme Court Decision of July 22 (2002 Do 539); Supreme Court Decision of May 13, 2003 (2003 Do 604); Supreme Court Decision of April 8, 2003(2002 Do 7281).

10) National Security Act, Article 7(1) stipulated: Any person who praises, encourages, sympathizes with, or benefits through other means, operation of an anti-state organization, its members, or any person under its direction, shall be punished by imprisonment for up to seven years. Article7(5) stipulated; Any person who, for the purpose of performing the acts mentioned in sections (1), (2), (3) or (4), produces, imports, duplicates, possesses, transports, distributes, sells or acquires a document, a drawing or any other expressive article, shall be punished by a penalty prescribed in each section respectively.

democracy."[11] The Court stated in summary:

"The expressions such as "member", "activities", "sympathizes with",or "benefits" used in the challenged provisions are too vague and do not permit a reasonable standard for ordinary people with good sense to visualize the types of conduct covered. They are also too broad to determine the contents and boundaries of their definitions. Interpreted literally, they will merely intimidate and suppress freedom of expression without upholding any public interest in national security. Furthermore, they permit the law enforcement agencies to arbitrarily enforce the law, infringing on freedom of speech, freedom of press, and freedom of science and arts, and ultimately violate the principle of the rule of law and the principle of *nulla poena sine lege*. In addition, the broadness of those expressions can potentially permit the punishment of a pursuit of reunification policy pursuant to the basic order of free democracy or the promotion of national brotherhood. This result is not consistent with the preamble to the constitution calling for national unity through justice, humanitarianism and brotherly love pursuant to the mandate of peaceful unification, and Article 4directing us toward peaceful reunification.

This multiplicity, however, does not justify total invalidation of the entire provision. Pursuant to a general principle of constitutional law, the terms in a legal provision permitting multiple definitions or multiple interpretations within the bounds of their literal meanings should be interpreted to make the provision consistent with the constitution and to

11) 2 KCCR 49, 89 Hun-Ka 113, April 2, 1990.

avoid unconstitutional interpretation of these terms, giving life to its constitutional and positive aspects. Article 7(1) and (5) are not unconstitutional insofar as they are narrowly interpreted to cover only those activities posing a clear threat to the integrity and the security of the nation and the basic order of free democracy."[12]

In the year following this decision, the National Assembly revised the provision at issue, pursuant to the decision of the Constitutional Court.[13] The phrase "knowingly endangering the national integrity and security, or the basic order of free democracy" was inserted at the beginning of Article 7(1) as suggested by the Court. The expression "benefits an anti-state organization through other means" was replaced by "promotes and advocates national subversion." This revised provision was again challenged in the Constitutional Court, but the Court upheld its constitutionality.[14] As inter-Korean relations accelerated after the 2000 summit, this national security law was labeled obsolete by progressive groups, and the progressive ruling party under the Roh Moo-hyun administration tried to repeal it, but failed due to strong opposition from the conservative party. The law is still in force today.

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12) The Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court*, pp. 135-36.

13) Law No. 4373, May 31, 1991.

14) See Constitutional Court Decisions of October 4, 1996 (95 Hun-Ka 2) and January 16,1997 (92 Hun-Ma 6).

New Laws Concerning Inter-Korean Relations

As inter-Korean dialogue and cooperation began after the July 7declaration by President Roh Tae-woo, the government needed pertinent laws governing new activities and phenomena arising from inter-Korean relations. The enactment of new laws on this matter has legitimate constitutional grounds, provided in Article 4, the peaceful unification provision. The government issued a guide for inter-Korean exchange and cooperation in 1989,[15] after the July 7 declaration, to serve as interim legal precedent before any ordinary legislation was enacted. The Act Concerning Inter-Korean Exchange and Cooperation, which has been the basic law governing inter-Korean exchange and cooperation, was created in 1990.[16] Since then, inter-Korean trade and human exchange had been gradually increasing. In particular, the inter-Korean summit of 2000 proved to be a momentous catalyst for boosting inter-Korean relations in many respects.

One of the most significant aspects from a legal perspective is the drastic increase in the number of inter-Korean agreements. As inter-Korean relations were expanded to include many programs such as humanitarian aid, cultural exchange, and various cooperative projects as well as trade and business, the increase in the number of inter-Korean agreements was inevitable in order to remove obstacles and to stipulate procedural matters for inter-Korean exchange and cooperation. The

15) The Basic Guide Concerning Inter-Korean Exchange and Cooperation. June 12, 1989 (Prime Minister's Directive No. 232).

16) Law No. 4239, August 1, 1990.

outcome of various talks and conferences between the North and the South produced many agreements. In particular, the Gaesung Industrial Complex and Mt. Gumgang Tourist Resort projects, which brought large-scale investment into North Korea by South Koreans and resulted in a flurry of cross-border communication and transportation as well as visitation, needed a series of agreements for stable and secure operation of the projects.

As with formal agreements reached with any foreign government, the inter-Korean agreements were integrated into the South Korean legal system, and that of North Korea as well. The issue here is the effect of the inter-Korean agreements; i.e. whether the agreements with North Korea carry the same weight as agreements with foreign countries. The two Koreas agreed that their relationship is not a relationship between states but "a special one constituted temporarily in the process of unification."[17] The two Koreas want to differentiate their relationship from standard relationships between foreign countries. Such differentiation seems to have been aimed at emphasizing the common goal of unification to come. However, since both Koreas are members of the UN and have respective sovereignty, the inter-Korean agreement has no other effect than that of an agreement with a foreign state, according to its nature.[18]

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17) This is pronounced in the preamble of the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between South and North Korea of 1991.

18) However, neither Korea uses the term 'treaty', but rather, both use 'agreement' to describe inter-Korean contracts in order to distinguish them from agreements with foreign countries.

Article 6 of the constitution prescribes the impact of international law, including treaties, by stating that treaties duly concluded and promulgated under the constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea. Important treaties such as treaties on mutual security, friendship, trade, navigation, peace, legislative matters, or accompanying financial burdens, need congressional consent to have the effect of domestic legislative statutes.[19] In order for an inter-Korean agreement to have the effect of legislation, it should pass through the legislative process of consent. One of the major reasons for the Supreme Court and the Constitutional Court to deny the legal effect of the Inter-Korean Basic Agreement of 1991 and the June 15 Joint Declaration of first inter-Korean summit in 2000 and to conclude that they have no more impact than a non-binding gentlemen's agreement was the absence of a legislative process of consent.[20] Therefore, both Koreas went through the legislative process to ensure legal stature for important agreements.[21] For example, four major inter-Korean agreements to facilitate and stabilize business transactions came into legal effect with the consent and ratification of respective legislatures, and others followed suit.[22] If an

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19) Constitution, Article 60(1).

20) Supreme Court Decision of July 23, 1999 (98 Du 14525); Constitutional Court Decision of January 16, 1997 (92 Hun-Ba 6). There have been efforts by progressive groups for these documents to be ratified by the legislature to grant them binding legal effect, but have as of yet failed.

21) According to Article 91 of the North Korean Constitution(1998), the Supreme People's Assembly, which functions as a legislative body, has the authority to ratify treaties.

22) Four important inter-Korean agreements, the Agreement on Investment Protection between the South and the North, the Agreement on Clearing Settlement between the South and the North, the Agreement on Prevention of Double Taxation of Income between the South and the North, and the Agreement of Commercial Disputes

inter-Korean agreement deals with less important issues, neither Korea would request a legislative process and thus its effect would be less than that of ordinary legislation or treaties.[23] However, the effect of agreements between the two Koreas is still, to large extent, dependent upon the political relationship between Pyongyang and Seoul. Even though all the required processes guaranteeing legal effect have been completed, its effect in practice is vulnerable and hardly enforceable if one party does not want to abide by an agreement. In this regard, inter-Korean agreements are very fragile by nature.

In consideration of the confrontational political nature of inter-Korean relations, the government enacted the Act Concerning Development of Inter-Korean Relations in 2005[24] in order to lessen political influence and secure predictability on the basis of bi-partisan cooperation. This law prescribes the government's responsibility for promoting the inter-Korean relationship and procedures for inter-Korean dialogue and agreement. However, its abstract prescription and lack of punishment displays the very character of its political nature.

Resolution Procedures between the South and the North, were ratified by the respective legislative bodies in August, 2003 after being signed by respective representatives of both sides in November 2000. This is the first case in which inter-Korean agreements were ratified by the legislatures. As of the end of 2007, thirteen agreements including these four received congressional consent.

23) For more on inter-Korean agreements, see Gi-Hyoung Oh, "The Legal Framework of the Gaesung Industrial Complex," *Journal of Korean Law*, Vol. 5, No. 1 (2005), pp. 51-63.

24) Law No. 7763, December 29, 2005.

The Study of North Korean Law as a New Discipline

As inter-Korean relations have improved and transactions between the two have increased, the study of North Korean law is commanding attention and recruiting the interested in the South. When separated without dialogue or exchange, the study of law on North Korea had not drawn as much attention as that of politics or economics. In the new environment where inter-Korean transactions are frequent and South Korean investment is made in the North, law has emerged as an indispensable tool to resolve practical problems.

The scope of North Korean law studies is broad and covers not only laws of North Korea, but also South Korean laws concerning the North and interaction with the North, as well as inter-Korean agreements. Along with traditional areas of law such as constitutional law, criminal law, or civil law, all of which faced significant changes under the new environment, North Korean laws concerning foreign investment and special zones for South Korean investment such as the Gaesung Industrial Complex and Mt. Gumgang Tourist Resort are important parts of recent studies of North Korean law in the South. Legal infrastructure based on a market economy is an essential component to successfully attracting foreign investment. Inter-Korean cooperation in the field of law for the Gaesung and Mt. Gumgang zones was essential for attracting South Korean investors since North Korea's understanding of the market economy is still far behind and the North lacks experience. As matter of fact, most of the North Korean laws on these two zones were drafted by

South Korean professionals.

The government in the South enacted quite a few laws in connection with inter-Korean relations, as seen above. Some laws, for example, the Inter-Korean Cooperation Fund Law[25] and the Act Concerning Support for the Gaesung Industrial Complex,[26] were made to support those engaged in inter-Korean activities or businesses. In addition, as the number of North Korean defectors to the South has increased,[27] a law was enacted to help ease their adaptation to South Korean society.[28] Human rights in North Korea are also a hot issue in the South.

Even international laws related with the North are included in North Korean law studies. For example, international regimes regulating the proliferation of nuclear, chemical, biological, and conventional weapons, and the Wassenaar Arrangement are of keen interest to experts on North Korean law. South Korean laws on foreign trade are also related to this issue to control so-called strategic items when exported to the North. The recent Free Trade Agreement between Korea and the United States is also related to inter-Korean transactions as the country of origin of goods produced in the Gaesung Industrial Complex impacts their export ability. As inter-Korean relations develop, the study of North Korean law will become more important and will expand to other areas of South Korean law, more intricately interweaving with one another.

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25) Law No. 4240, August 1, 1990.

26) Law No. 8484, May 25, 2007.

27) As of October 2008, the total number amounted to about 16,000.

28) The law is the Act Concerning Protection and Settlement Support for North Korean Defectors (Law No. 5259 of January 13, 1997).

CONCLUSION

This writing succinctly reviews the last twenty years of political development from a legal perspective. Although this is far short of a detailed explanation and analysis on the theme, it suffices to show that there has been a great change and improvement across the board in the rule of law in Korea since 1987. As law plays a decisive role in consolidating and deepening democracy by institutionalizing politics and policies into the governing and social systems, democratic development in a country is no more than another expression of legal development. The Korean case testifies to this. In this regard, looking at democracy from a legal perspective is more than just useful; It is imperative to having a better picture of the democracy of a country.

This writing also shows that legal development follows and results from political development, not *vice versa*. Although legal development consolidates political development, the former cannot go ahead of the latter. The same text of a legal provision will bring about different or contradictory interpretation depending on the political circumstances. Politics is the force and matrix that creates and interprets laws. The dynamic change of law has been mobilized by the political dynamics so far in Korea. Although a society has a panoply of laws, breach of law can occur very easily if political power has not thrown its weight behind them, securing their legitimacy.

This writing testifies that the interaction of political elements or conflicting groups in a society is the very source of legal development. In this sense, the principle of checks and balances among them is paramount for the political development. The principle of separation of powers for checks and balances is not limited to government branches, but rather, extends into the all the public domain, serving as a sound bedrock for democracy in general.

On the other hand, the effect of the normative nature of law places a burden – to greater or lesser extent, depending on the degree of political development – on the political power in that it restricts its ambit of authority and discretion on legal interpretation, enforcement and application. Once improvement in law is made, it is very difficult for politics to regress. In order to justify regression, legitimate political reservoirs should be proportionately enlarged in order to pass scrutiny through election. As long as fair and free elections are conducted regularly, it is almost impossible for political power to make egregious regression, although there will inevitably be ebbs and flows to some extent.

The Korean case also highlights the fact that stable democratic development is made incrementally and can be deepened through improvement of law. Of course, Korea has a long way to go and has many obstacles to overcome to realize the ideal of democracy it is seeking. Although Korea's 20-year history of democracy is not satisfactory, she has been building a solid foundation for democracy, one brick at a time, by employing law and legal processes.