A Review of Korea's Rule of Law with a Case Study and Implications for the Legal Framework

Ahn, Yong Daw**

차 례

* This work was supported by the research fund of Hanyang University (HY-2014-N). The author greatly appreciates the insightful feedback from anonymous referees.
** Assistant Professor of Economics, Division of International Studies, Hanyang University
접수일자 : 2015. 10. 30. / 심사일자 : 2015. 11. 25. / 게재확정일자 : 2015. 11. 30.

Ⅰ. Introduction

The modern economic development hinges on the Smithian insight that self-interest leads to material affluence to human prosperity. The economic system embracing his insight is called the market economy. The market Adam Smith envisioned is not an arbitrary venue of trade but presupposes three key elements: voluntary exchange, purposive (conducive to goal attainment) rules of the game, and the rule of law.

First, all the market trades are based on each participant's free will. No one is forced to do anything against one's own will. Second, the rules of the game in the market need to be clearly defined because a large number of people are involved in the trade. Such rules should include two essential elements inasmuch as the function of the market is efficient allocation of limited resources: protection of the property right and fair trade. Third, the rule of law is indispensable for freedom, liberty and voluntary exchange as pointed out by many savants including John Locke, Adam Smith, and Immanuel Kant (e.g. Smith, 1776; Hayek, 1944; Friedman and Friedman, 1980). Essentially, this third condition is what keeps the preceding two conditions meaningful.

Now focusing on the Korean economy, most people would agree that Korea, as an emerging economy, needs continuous economic growth for many decades to come, and that the only viable economic paradigm to achieve that goal is the market economy. Unfortunately, however, the rule of law has not yet been firmly established in Korea. This means that Korea lacks one key foundation of a vibrant market economy, that is, the rule of law.

The purpose of this paper is to review the current status of Korea's rule of law and to suggest some practical measures to improve it. In Section II, I address how weak Korea's rule of law is. As an effective way of illustration, I append a case study whose main point is the overly-complex regulatory framework selectively penalizes people without power. In section III, I briefly review related literature

focusing on the differences from the two legal traditions, civil law vs. common law. One common finding is that the common law system is more effective to the rule of law, ceteris paribus. (My discussion here is rather illustrative than contending that common law is always preferable.) Section IV is to suggest the types of rules which are more conducive to establishing the rule of law. Section IV closes this paper.

Ⅱ. Rule of Law in Korea

The rule of law is defined differently by different people. One of the most often-quoted ingredients in the rule of the law is equality before the law. The Constitution of Korea clearly announces in Article 11 that all people are equal before the law. However, the reality is very different from that particular constitutional declaration.

Korea's judicial system has been generous to people with power. The flipside of such leniency is haphazard treatment of ordinary people, which has been less well documented. In this section, I review this double standard of Korea's judicial system. Particularly, I present in Appendix a case study of an ordinary citizen as an illustration of the Korean system's harshness to the powerless. Korea's judicial double standard is, of course, partly due to discriminatory applications of laws in the rule enforcement. Also, this is to a great extent caused by the legal framework itself as to be discussed in Section III and VI.

1. Not Guilty with Money

Not many Koreans would claim that the Korean people are fairly treated by the judicial authorities. Korea's deviation from the principle of equality before the law could not be better described than by the two conventional expressions of chonguan-yaiwu (special favors to the parties represented by ex-judges or ex-prosecutors) and yujon-mujay-mujon-yujay (not guilty with money guilty without).

In Korea, judges and ex-judges make a cohesive interest group among themselves while prosecutors do the same. This is primarily because judges and prosecutors are appointed for life and in groups when they pass a national recruitment exam. Most of them practice law in the private sector after retirement and represent their clients through the judicial process. In making an indictment or an adjudication decision, prosecutors or judges often give a special favor to the party represented by an ex-judge or an ex-prosecutor as the attorney at law. Judges and prosecutors may possibly do that in expectation of similar favors from their juniors when they themselves represent a client after retirement.

Korea's judicial system is widely understood to be generous to "people with money." Here, money represents various types of influence: wealth (literal money), political clout, being a government official, and the ability to mobilize a group of supporters like laborers, civil campaigners, students and all kinds of interest groups. Special favors are rendered to such people by the prosecution, the court or both, which I call "legal leniency."

The legal leniency starts from the indictment stage. Some people with money simply avoid investigation or indictment altogether. One prominent example is the case of the convertible bond (CB) scandal in the mid-1990s by the so-called "owner" of a gigantic chaebol. The government did not investigate that case even after a public plea with the signatures of 43 law professors (2000). So, a popular Korean saying has it that the particular chaebol is more powerful than the Korean government (e.g. Economist, 2009; WP, 2012).

A second stage leniency waits for those who are not fortunate enough to avoid the indictment. That is the "cotton ball punishment" meaning an extremely mild court sentence. For example, many chaebol "owners" were given the same sentence of "three-year imprisonment on a five-year probation basis" no matter what crimes they might have committed. This particular sentence has become popular because three years is the maximum length of imprisonment for which probation is allowed. These "cookie-cutter sentences," as some call it (e.g. Ohmynews, 2008), may not

have been made by a sheer coincidence.

The best of all the leniencies to the people with power might be the highly predictable presidential pardon. Most of the recent presidents issued one or two rounds of pardon almost every year in favor of a large number of people with all types of power, particularly in favor of chaebol "owners" (e.g. Economist, 2008; NYT, 2009). Very often, the timing of the blissful pardon is the earliest possible occasion after the court decision such as the following Independence Day or Christmas Day.

After a full circle of troubles in a year or two, people with money return to business as usual with little regard to the kind or degree of the crime they committed. So, one is effectively not guilty with money in Korea.

Ex-judges or ex-prosecutors are very effective defending their client but very expensive to hire as attorney at law. Only people with money can afford to hire them. Certainly the practice of chonguan-yaiwu selectively helps those people with money. The two undesirable Korean practices reinforce each other.

2. Guilty without Money

In contrast to leniency to the powerful, the bite of Korea's judicial system can be very painful to the powerless, which has not been so well documented so far. In this subsection, I show the flipside of the innocent-with-money-guilty-without practice by presenting a specific case study of an ordinary moneyless citizen in Appendix.

In the case study, the citizen with a pseudonym John experienced a total of 14 separate official investigations over eight years about a simple and straightforward fact. Even after those so many ordeals, John is not comfortable that his case is finally over, because he has been experiencing an endless process of one allegation after another in a slightly different form to follow. Similar events can happen to any Korean person in light that all of John's investigations were duly made under Korea's regulatory framework.

There are lots of redundancies in Korea's investigative system even for a minor violation or suspicion as such. Moreover, each process in the system is set up for the convenience of the government with little regard to potential costs to the involved citizens. The key point of Appendix is how complex and costly, in terms of money, time, inconvenience, annoyance, and sense of powerlessness, the Korean legal system can be to ordinary citizens without money. Even without conviction, a moneyless person can take serious de facto punishments once suspected. As such, the implication of the Korean practices is somewhat like "you will be punished no matter what, if you do not have money." So, one is effectively guilty without money in Korea.

In sum, Korea's legal system applies a double standard to Korean people, which is the enemy of a respectable legal system. On one hand, people with money do not heed to the rules because the rescue for a violation is at hand. On the other hand, people without money may well lose their respect for the whole legal system and, as a consequence, are tempted to violate the rules when possible. Then, there would be few people, with or without money, who would whole-heartedly abide by the rules of the game.

3. Stringent in Stipulation Loose in Enforcement

Korea's weak rule of law is to a substantial extent attributable to the double standard in application of rules. However, that is not the whole story because the strictness in enforcement can be affected by the type of rules. Here, as a way of raising the main issue in this paper, I suggest Korea's complex regulatory framework itself weakens the rule of law. More specifically, people with money can benefit from exception clauses while people without money are subject to redundant investigative processes as stipulated in all different laws and regulations.

Weak enforcement and still more rules. Korea has chosen the civil law tradition by a historical accident. As a result, Korea's laws and regulations are very detailed

and complex. Then, rules are technically difficult and economically costly not only for the people to comply with but for the government to enforce. As a natural consequence, the rule enforcement tends to be loose, everything else being equal. When the rule of law is weak, penalties to rule violators may not be so heavy (cf. Section IV).

If the penalty is mild for individual violations as is generally the case in Korea, people are lured into rule violations on the basis of their own cost-benefit analysis. As a particular type of violation becomes a social issue because of its prevalence or visibility, the Korean government tends to enact a new law to calm down the public resentment or outcries of certain interest groups.

One case in point is the violence in the National Assembly. Any violence is unlawful in Korea. However, the Korean judicial system has been generous to violence in the Assembly probably because assembly-people and their staff have power. As a result, violence used to be especially prevalent there. What remedy would be possible of the government? If the pertinent existing rules such as the Penal Code are strictly applied, violence will seldom happen in the National Assembly. Strengthening the rule of law, however, is not an option in this case because it is a structural issue and not applicable in this particular case alone. Then, the way out of such a political hot-potato situation is to take a highly visible action, that is, to make special rules. That is exactly what happened in 2013, namely, special clauses in the Penal Code regarding violence in the National Assembly. So, "one law for every contingency" in Korea as the Western press sometimes criticizes.

"Republic of special acts." New rules for a contingency often take the form of a special act. By definition, a special act implies exceptions to the general rules. In Korea, there are so many special acts and clauses that some legal experts have suggested that Korea be "a republic of special acts" (e.g. Lawissue, 2006). Exceptions make the whole legal system complicated. Complexity in turn begets opacity in a system and invites arbitrary judgments. To make matters worse, exceptions

themselves mean discrimination of people in one way or another. Discrimination damages the sense of fairness and helps people lose respect for the legal system.

Systematic harassment of people without money. All citizens have to abide by all the rules however complex they may be. If the regulatory system is multiplicative, a citizen has to go through all the required processes. To revisit Appendix, John was investigated multiple times as defined in the regulatory framework. It was the system itself before anything else that harassed moneyless John.

If an investigation at one of so many government agencies is thorough and the subsequent reprimand is well justified, one investigation might be enough for the government as well as all the other private parties concerned. To put it differently, it is highly probable that Korean citizens are investigated by multiple agencies only because Korea's rule of law is weak at each round of investigation.

To make things worse, the tenure of judges and prosecutors is short at a particular position. The purpose of the short tenure is generally believed to prevent them from making informal interpersonal connections while working there. This particular rule of short tenure itself is a contingency measure by the Korean government. This policy of short tenure may not be needed if a wrongdoing by a government official is rightly punished, which unfortunately cannot be expected in Korea because civil servants are in possession of power.

The practice of frequent changeover of government officials brings in huge inefficiency to the society in general and the involved citizens in particular. In Appendix, for example, one new judge and three new in-court prosecutors are supposed to study from the beginning to the end all the case documents of thousands of pages. If anything, that is waste of enormous time of high-paid officials.

Damages to the citizens are even larger. First of all, integrity of the court decision can be substantially undermined because the sentencing judge loses the fist-hand sense and information obtained by her predecessor during many sessions before her takeover. Second of all, citizens have to pay unnecessary costs. As shown in Appendix, John had to come to the court five additional times wasting half

a day each only because of unpreparedness of the judge or the prosecutor. Ultimately, judicial justice cannot be expected from judges and prosecutors who do not have full knowledge of the case in their charge.

All in all, ordinary Koreans, once suspected, are exposed to the risk of paying enormous time and money by the design of the legal system.

Ⅲ. Brief Review of the Literature

In general, the rule of law is better established in the common law countries than in the civil law ones. This implies that the type of legal framework affects the rule of law. Here, I only briefly review related literature in preparation of my suggestions in the next section.

1. Rule of Law

The rule of law means "government in all its actions bound by rules fixed and announced beforehand" (Hayek, 1944, p.80). Here, the rule of law is the opposite of the rule by man. In practice, there are lots of confusing definitions of the rule of law. Based on my review of the literature, I classify possible definitions of the rule of law from three different perspectives: input, throughput and output. Here, input refers to the contents of legal rules, throughput the application process of the rules, and output the end result.

Input. Before anything, the rules of the game should be acceptable, morally and culturally, to the general public. Hayek suggests that the rules in a market economy should be "fair and reasonable" (1944, p.85) and should not be overly restrictive to the individual liberty (1960). In addition, rules in a democracy should be "consistent with international human rights norms and standards" (UNSC, 2004).

Throughput. All the existing rules should be enforced as stipulated. One key principle in application of the rules is equality before the law (e.g. IBA, 2009). According to this principle, the judicial system should not discriminate people in

any regard. Same rules should be applied in the same manner to all the people including all the government officials.

Output. The purpose of a society's rules of the game is of course to keep it in order. As a result, the rule of law should ultimately be defined by the outcome or effectiveness of the legal system. For example, Kaufmann et al. define the rule of law as "the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence" (2009, p.6). Needless to say, the rule of law in the output is possible only with the right input and throughput.

2. Legal Traditions and the Rule of Law

In addition to the contents of the input and the process of the throughput, many jurists and economists show that the structure of the legal rules is a critical determinant of the rule of law. As to be discussed in Section IV, the structure greatly affects the throughput.

The legal structures of various countries are often classified into two broad categories: common law and civil law. The common law system was originated from England and develops general practices of the society into formal laws, which are to be common to all cases or all people. The civil law system was originated from France and codifies in advance desirable rules of the game for a civil society. The civil and the common law systems are compared in various regards: deductive vs. inductive rule-making; specific vs. abstract stipulation; ex ante vs. ex post control, and; application of rules to the letter vs. to the spirit.

Many researchers have found that the two legal systems have large and different impacts on the rule of law. In this regard, a group of four economists popularly known as LLSV (R. La Porta, F. Lopez-de-Silanes, A. Shleifer, and R. W. Vishny), among others, conducted various and comprehensive empirical studies on the consequences of different legal origins on the rule of law (1996, 1997a, b, 1998,

and 1999a, b). Later, three of them (LLS) wrote an article synthesizing those six previous papers and other studies by critics thereof under the name "the Legal Origins Theory" (La Porta et al., 2008).

In the articles by LLSV (and LLS), the authors, in addition to the conventional division of civil vs. common, subdivide the civil law system into French, German, and Scandinavian origins on the basis of differences in the legal rules and their enforcement. Their research focuses on the impact of the legal origin on the legal rules and subsequently on the rule of law. In their early studies (1996, and 1997a, b, 1998), their interest is in the effects of the legal tradition on the extent to which the market is kept in order. In the later studies (1999a; La Porta et al., 2008), they expand the concept of the rule of law to the extent to which all the laws and regulations are put into effect or the whole society is kept in order.

The following is an overall summary of key findings from the above-mentioned seven papers and some additional articles by different combination of L, L, S, V and other researchers (Botero et al., 2004; Djankov et al., 2008; Djankov et al., 2002, 2003; Johnson et al., 2000).

① Governments with the civil law system are much more interfering in private matters and have bigger direct ownership of their respective national economy.

② Common law countries (42 in a sample of 150 in La Porta et al., 2008) are best in maintaining the market-related rules of the game. It is better in enforcing contracts and protecting property rights. It better protects the investors and lenders, which in turn helps develop financial markets. The common law has better functioning labor markets. It is more efficient in resolving disputes through the judicial system. In a word, the market works better in common law.

③ The overall governance or the rule of law is not always associated with the legal origin, but it is generally poorer under the civil law tradition. Exceptionally, the German (19 countries) and Scandinavian (5 countries) traditions are the best of the four origins in rule enforcement. This is due

to unusually high ethical standards and high trust among people in those countries (LLSV, 2007a: see also Hayek, 1944).

④ The quality of government is the worst in the French tradition countries (84) not only in terms of enforcing the market rules but in terms of prevention of social vices (corruption, child mortality, illiteracy, etc.), efficiency in government functions, and political freedom. Put it differently, the French tradition is the worst in the rule of law.

More specifically, La Porta et al. conclude in their synthesizing paper, "The effect of legal origins on legal rules and financial institutions is statistically significant and economically large" (2008, p.294). The judicial formalism (detailed stipulation of the legal process) in the civil law is generally "associated with higher expected duration of judicial proceedings, less consistency, less honesty, less fairness in judicial decisions, and more corruption" (Djankov et al., 2003, p.453).

Korea has the civil law system. In terms of origin, Korea's is classified as the German style. However, in terms of the quality of government (LLSV, 1999a), Korea is much closer to the French civil law than to the German style. As matter of fact, what LLSV describe in their various papers as examples of weak rule of law in the French tradition are very similar to what happens in Korea. Without the exceptionally high ethical standards in Germany, the quality of rule enforcement there as it is today might not have been possible.

Ⅳ. Economics of Regulation

In this section, I discuss in general terms why the civil law system is less effective and less efficient for the rule of law than the common law. Effectiveness is about how conducive a system is to achievement of a defined goal. Efficiency concerns how costly the goal achievement is. I discuss efficiency of the legal system followed by its effectiveness.

1. Efficiency of the Legal System

A society has to incur two types of costs from a rule, the compliance cost to the private sector and the enforcement cost to the government.

Costs of a rule. By nature, human beings long for liberty. By definition, a rule restricts people's freedom. As a result, any rule or any restriction represents a pain or a loss. Probably because of this, J. Bentham once declared that "every law is an evil for every law is an infraction of liberty" (Hayek, 1988, p.63). Such a loss from forfeiture of liberty is the first cost that citizens have to pay in compliance. In addition, people often have to pay out-of-pocket expenses and spend extra time. All these costs may collectively be called the compliance cost.

The rule of law is never free to the government, either. To put a rule into effect, the government has to hire civil servants to oversee the people and administer all the related procedures. A new rule often requires a new public agency to be created and takes various investment costs as well. In any society there are rule violators. Some are simply suspected as such. The government investigates the suspected and reprimands those who are found guilty. All those costs can collectively be called the enforcement cost.

The case of traffic control. Here, I illustrate the comparative efficiency of the two legal systems taking the traffic control for example. The traffic system is very different between Korea and the state of California in the US: a highly civil-law style vs. a typical common law style. This contrast is especially stark in the traffic signaling in the suburban area, where the traffic is heavy sometimes but light most of the day.

In Korea, there are lots of traffic lights, turn signals, crosswalks and speed bumps. There are surveillance cameras in many places. Such signaling instruments are often added for a particular contingency, such as a car accident or someone's request. A cost-benefit analysis is rarely conducted before installing such a new instrument.

The Korean signals do not give any choice to drivers. They must pause and

stay for a while at every red light and slow down at every bump. They have to do all that even late in the night or early in the morning when there is little cross traffic or virtually no pedestrian. Very often, they have to detour miles just to make a turn. All in all, they have to make numerous seemingly unnecessary slowdowns, stops, stays and detours while wasting their time and gas. All these are the compliance cost.

In California, there are ubiquitous stop signs, some blinkers, not-so-many crosswalks, and few speed bumps in the suburban area. Making turns including U-turns are allowed in most places. Many things are the driver's judgment call. They are to pause before a stop sign and may go forward when safe. Blinkers are a call for caution not necessarily for a stop. Only when there is an accident, the government intervenes to see who made the wrong judgment. The party who did wrong is totally accountable for the accident. This practice is a typical ex-post regulation. All that drives have to do is giving enough care to the road condition so as to obtain the intended outcome of orderly traffic.

On the enforcement side, the Korean government has to invest a large sum of money to build and maintain so many traffic lights, speed bumps and expensive high-tech cameras. The government often dispatches patrol cars to ambush where frequent violations are expected. On the other hand, all the costs that the US government bears are minimal and mostly once and for all.

Comparing the two systems, there is no question that the Korean system is much less efficient than the US one in terms of both the compliance and the enforcement costs.

The society's cost of the rule of law. A society needs many rules before establishing the rule of law. Assuming the same degree of the rule of law, the total cost to a society will be determined by compliance and enforcement costs of a collection of individual rules. Comparing the civil law with the common law system, the former has more rules because it tries to control the processes of people's actions ex ante. Then, the civil law system is more costly in terms of the society's total

cost of compliance and enforcement.

In conclusion, the civil law system is less efficient than the common law: the former has more rules and each individual rule in the former is more costly to comply and to enforce.

2. Effectiveness of the Legal System

There are many determinants of the rule of law such as the societal culture, ethical standards, socio-economic stability, political history, political leadership, size of the government, and so on (e.g. North, 1990 in addition to various LLSV papers). As explained in Section III, the legal origin is certainly another key factor. In this subsection, I argue why the civil law system is likely to be less effective. I start with the cost and benefit of a rule violation from a citizen's perspective in order to estimate the probability of a violation.

The urge to violate. Most people hate restrictions and try to avoid them. A natural person is subject to the self-interest of avoiding the compliance cost. The saved compliance cost represents a basic type of the marginal benefit from a violation. In addition, the benefit might include gains from actively breaking the law as in various types of crimes including theft or embezzlement. On the other hand, there are two common deterrents to the temptation to violate: expected penalties and a sense of remorse. Then, the cost-benefit analysis of a potential rule breaking from a rational citizen's perspective would be as the following:

Net benefit from the rule violation under consideration = Marginal benefits (compliance cost saved, etc.) - (Expected marginal penalties + Marginal sense of moral remorse)

Here, *marginal* means something from the one-time violation under consideration at a particular moment. The expected penalties are determined by the probability of getting caught multiplied by the penalties when caught (cf. North, 1990, Ch.1).

People have a sense of remorse when they violate ethical or legal guidelines due to their "moral sentiments" to borrow from A. Smith (The Theory of Moral Sentiments, 1759).

The compliance cost is generally higher in the civil law system as explained above. Then, the *marginal compliance cost saved* from a violation is higher in civil law.

The size of the rule-enforcing government is not necessarily larger in the civil law country because its size is defined more by the affordable tax revenues (LLSV, 1999a; La Porta et al., 2008). At any rate, there are more laws to enforce in the civil law system because it is more intervening. Therefore, we may well conclude that the probability of being caught per violation is lower in the civil law, assuming the same law-enforcement budget.

In addition, the size of penalty is generally known to be greater in the common law system which has fewer exceptions on the one hand and allows punitive damages on the other hand. This comparison is especially stark between Korea and the US. For example, the *standard* penalty to Korean chaebol "owners" for a *straightforward* financial crime has been "three year imprisonment suspended for five years" while in the US a 150-year jail term was given to Bernard Madoff for a *tricky* Ponzi scheme (2009).

The remorse factor. In addition to simplistic responsiveness to intensives, human beings have a sense of justice and a sense of balance as Confucius and Mencius pointed out more than two millennia ago. In the context of this paper, humans make a sacrifice more readily when they think the rule is reasonable. Costs and benefits of a rule are certainly comprised in the criteria of reasonableness. In case of traffic signals, a driver will not have any objection to stop and wait before a red light when the street is busy. On the contrary, such a waiting with little traffic may not be justified and consequently could be regarded as unreasonable.

The *marginal sense of moral remorse* from a violation becomes smaller when the rule is less justified. This is nothing but a natural person's sentiment. In the

same vein, A. Smith warns against ill-managed import duties by saying, "An injudicious tax offers a great temptation to smuggling" (1776, Bk. V, Ch. II). He continues, "To pretend to have any scruple about buying smuggled goods … would in most countries be regarded as one of those pedantic pieces of hypocrisy …"

In the civil law system, the compliance cost saved is larger while the expected penalty and the moral remorse are smaller. There are both push and pull to a rule violation. The temptation to and accordingly the probability of violation of rules are higher in the civil law system. Therefore, the civil law system is *ineffective* in the rule of law on the basis of a cost-benefit analysis alone.

A vicious circle. People tend to repeat the same violation once they have done it before. If a driver enjoys the benefit of time saving from passing a red light early in a certain morning, he is likely to keep doing it. Violation becomes habitual. Worse, the kind and degree of violation tend to aggravate. The same driver may cross a red light at the daytime or in the urban area as well. This is because a pretext for deepening the *degree* in a certain behavior is much easier to find than one for starting a new *kind* of violation. After all, a needle thief easily becomes a cow thief as the Korean proverb has it.

Even worse, one person's violation tends to work as an incentive to other people for the same violation because people tend to follow others, as suggested by J. M. Keynes with the name "animal spirits" in his 1936 book. Then, the rule violation becomes pervasive and prevalent. Not surprisingly, violators of the traffic rules are everywhere in Korea.

Prevalence of the rule violation in turn weakens people's sense of remorse. There will be "a decline in respect for law in general" (Friedman and Friedman, 1980, p.289). Then, rule violation becomes even more prevalent. Because keeping the society in order is its job proper, the government is put under pressure to enact new laws, which only make the rule of law even weaker. All in all, the legal system goes into a downward spiral. This is exactly what Rousseau warns against: "[I]t is pointless to add edicts upon edicts, regulations upon regulations. All that

seems merely to introduce additional abuse without correcting the abuses with which one began. The more you multiply laws the more contemptible you make them" (1755, p. 120).

3. Additional Problems of the Strict Control

In addition to direct costs and benefits of individual rules there are indirect problems from overly tight control with detailed and complex rules. Some are unintended consequences and others are systemic drawbacks.

Reverse discrimination. If rule violation is not adequately penalized, only rule abiders pay the compliance cost. This is a frequently-heard complaint in Korea. For example, ethical politicians would not take any bribery while corrupt ones would. If the latter are not punished, the former might be in a great disadvantage where politics is very costly as in Korea. The system effectively discriminates against honest people. This may induce otherwise law-abiding citizens to break a rule in order not to become a victim of the disorder.

Adverse selection. The application process in Korea is one of the most typical examples of *ex ante* regulation. The standard process for an opening in the public sector requires, even for the first-round document screening, numerous documents including photos (no older than six months), verifications of education and careers, translations of foreign languages with notarization, and detailed job plans. This particular Korean practice vividly compares with the US practice of requiring minimum documents, a cover letter with curriculum vitae attached, for instance. Such a complicated process in Korea discourages competent people from applying because they could easily find other comparable jobs.

As widely reported in the popular press, the Free Economic Zone program in Korea since 2003 has been a great failure. The official web site of Incheon Free Economic Zone, the flagship of eight such zones, shows a little over one billion dollars of foreign direct investment from foreign-owned firms over a dozen years. Such mediocre performance is largely because of the strict business regulation

by the government.

Better candidates, individuals or firms, are to choose places easier to apply for or more convenient to conduct business in. On the other hand, less competent candidates may not have any alternatives other than difficult places. In short, the consequence of complexity in the process can be another type of adverse selection, as it were, from the perspective of the solicitor: wanted targets do not come while less competent candidates flood in.

Complexity spiral. Just because civil law has more rules, the whole system becomes more complicated. As often is the case, complexity makes management of a system technically difficult because of confusion in enforcement as well as in compliance. Then, the system needs more administrative vehicles and the whole system becomes exponentially more complex. This is the most basic cause of the diminishing returns to scale as explained in introductory economics textbooks.

Complexity to corruption. When a legal system is complex and complicated, it becomes less transparent to the general public. Consequently, violations or arbitrary applications of the rules become less visible. Opacity is often an invitation to corruption. To put it differently, transparency is the best deterrent of corrupt practices as the US Supreme Court justice Louis Brandeis famously suggested by saying, "The sunlight is the best disinfectant."

One might think tighter regulation or detailed stipulation of the judiciary process in the civil law improves the probability of righteous decisions at the court. However, Djankov et al. find differently: higher formalism with long duration in the process does not secure better justice but predicts higher corruption as well as lower fairness of the system (2003; see also Djankov et al., 2008). Strict regulation of business entry in the civil law system is to weed out unqualified players, but the real outcome is often the reverse because of more corruption in the screening process (Djankov et al., 2002).

4. Suggestions for Better Rules in Korea

In sum of the discussion in this section, the rule of law is not merely a matter of enforcement but highly affected by the type of the legal system. Well-written rules make the enforcement process more efficient and more feasible. After all, "formal rules matter a lot" (Botero et al., 2004, p.1347). On the basis of research findings, the common law system has an edge over the civil law. This is an irony in light that rules are to secure the rule of law on the one hand and that the civil law system with more rules is weaker in achieving that goal on the other hand.

Here, I suggest that Korea's legal rules should have the following traits in order more firmly to establish the rule of law. They are more or less close to the general characteristics of the common law system. They help dampen people's urge to violate the rules and at the same time reduce the enforcement costs to the government.

User-friendliness. New rules may restrict liberty of citizens to the minimum and take the least of their time and money while keeping the society in order. Such *user-friendly rules* are very effective in prevention of their violation by reducing the temptation to violate and by preserving people's respect for the legal system.

For example, the best way to prevent unlawful driving turns is to make them legal unless they significantly disturb the traffic. There are numerous other ways to make Korea's traffic control system friendlier to drivers and thus reduce traffic violations. The best way to stop transgression in a lawn garden is to make a diagonal shortcut for passengers unless it harms the garden seriously. The easiest way to prevent illicit tutoring is, of course, to make touring lawful.

In the same vein, unnecessary or unreasonable rules should be repealed. Here, "unreasonable" means that a rule's costs to the society are larger than its benefits. The government should make a thorough cost-benefit analysis for any rule from the whole society's perspective not particular interest groups'. The government should take a broad view including unintended consequences when it cares for

a particular contingency.

Generality and few exceptions. A rule may have fewest exceptions possible because exceptions result in arbitrary rule application, blur accountability in disputes, and reduce predictability of outcomes. Moreover, exceptions make the legal system more complex and less transparent. Complexity and opacity make the accountability even less apparent and become an invitation to corruption. Additionally, exceptions discriminate people. All these factors reduce the public respect for the whole legal system as well as relevant individual rules of the game.

As widely known with the name of public choice theory, the minority interest often wins over the majority interest when the government allows an exception to a policy. Then, there will follow lobbying activities, corruption, and logrolling, all of which lead to societal inefficiency (e.g. Friedman and Friedman 1980).

Because of all those problems with exceptions, F. Hayek once suggested, "[F]or the Rule of Law to be effective it is more important that there should be a rule applied always without exceptions than what this rule is. Often the content of the rule is indeed of minor importance, provided the same rule is universally enforced" (1944, p.88). This generality is probably the best principle in the US where the legislature "must deal with particular problems in such a manner that the underlying principle can also be applied in other cases" (Hayek, 1960, p.285). Judicial decisions might not be applied "according to the relative desirability of particular ends or values" (Hayek, 1960, p. 327).

Clear accountability. As a conventional wisdom has it, control *by kind* ("who is liable?") is more effective than *by degree* ("how liable?") because accountability for an event is clearer in the former. Unclear accountability makes arbitrariness inevitable in judging who is liable and how much and can cause additional troubles to the society. For instance, if the lane-changing party is fully responsible for a collision accident, drivers would not try to change lanes when they are not sure of safety. If the accountability is shared between two parties, the driver already in the lane has to pay attention to the lane-changing traffic, which in turn encourages

unsafe lane changing by other drivers. The result is more accidents.

Zero tolerance. In Korea, some rules are not applied to some cases at the discretion of rule enforcers. Sometimes, lighter penalties are given to rule violators at the discretion of judges. "Special consideration of the unique situation" is taken for granted in the Korean judicial system. Special tolerances are often given to people with money. This selective application of rules invites complexity, uncertainty, unfairness, and certainly corruption. The zero-tolerance principle makes things simple ("the simplicity of zero"), "dispenses with ambiguity," and "prevents an erosion of standards" (Zingales, 2012, p.208).

Generality, clear accountability, and zero tolerance principle would not allow arbitrary adjudication. Then, such undesirable practices as *chonguan-yaiwu* or *yujon-mujay-mujon-yujay* would disappear in Korea.

Heavier penalty. There are two ways to increase the expected penalty to a potential violator: one is to enhance the probability of catching and the other to make the penalty heavier when detected. Of the two, the enforcement cost is much smaller in the latter case. Moreover, the latter has much stronger signaling effect because people are more afraid of less-probable-but-greater damages. For example, people are scared of the lightening but not of the traffic accident even though the expected casualty due to the former is much smaller than the latter.

According to various research findings by behavioral economists, people quickly retrieve salient events from memory and salience is very often defined by the media (e.g. Kahneman, 2011). Due to its innate sensationalism, the popular press is strongly interested in rare events of heavy penalties while not paying attention to frequent small fines. (Heavier penalties to the unfortunate few may raise a fairness issue. But, that is largely beyond the scope of this paper.)

Compliance as a rule. As the frequency of rule violation increases in a society, the respect for the legal system declines. Then, the rule violation becomes even more pervasive and practically impossible for the government to stop. For example, stopping one driver blocking the crossroads is easy, but punishing drivers in droves

is not. After all, "the sheer number of crimes insures impunity" as J. Rousseau points out (1762, p. 160).

To put it differently, an effective way to the rule of law is to remove an opportunity of violation altogether. The International Bar Association suggests that the rule of law requires *widespread* acceptance of the law by the public or a culture of respect for the rule of law (IBA, 2009). IBA also claims that the law will lose its acceptance if it cannot satisfy basic economic needs of the member of the society over a long time. Therefore, the law should not cost too much time or money to the observers.

All the policies discussed above will help reduce the possibility of rule violation and enhance respect for the legal system. If people make it as a rule to comply with all the rules and regulations they will refrain from violation in the first place only because their remorse would be very strong. Then, habitual, addictive, and contagious violations can effectively be prevented. Prevention of the first-time violation is a critical key to the rule of law.

V. Closing Remarks

There is no other alternative to speedy economic growth than a vibrant market economy to which the rule of law is essential. One problem with Korea's economy is weakness in its rule of law. This weakness in turn is mainly caused by overly complicated rules of the game combined with weak enforcement.

According to various studies, the rule of law can be secured with good rules, high ethical standards of people, a big government, and a reliable judicial system. In terms of the global practice, good rules are originated from the common law tradition. Unfortunately, Korea has chosen the civil law system. To make things worse, Korea does not have other elements for the rule of law. It seems to be quite natural that Korea's rule of law be very weak as illustrated in Section II.

An effective way to establish the rule of law in Korea is to change its legal

framework into the common law style. A country's legal framework is a typical example of path dependence (Pistor, 2005). It is created by an historical accident and very difficult to change. A transition to a common law system may be executable over many decades or more feasibly in a century or so. Nonetheless, step-wise introduction of the common law tradition should be readily possible (e.g. Coffee, 2001).

Indeed, gradual convergence of the two legal origins is a global trend according to various studies (e.g. Pistor, 2005; La Porta et al., 2008). This means that Korea does not need to transform its whole system into the common law tradition all at once, which is not only infeasible but also undesirable. Instead, Korea should take a gradual approach. For example, "many legal and regulatory rules, such as entry regulations, disclosure requirements, or some procedural rules in litigation, can be reformed without disturbing the fundamentals of the legal tradition" (La Porta et al., 2008, p. 325).

To say the minimum, new rules can be enacted to become user-friendly as suggested in the previous section in order to make the compliance and enforcement processes more efficient. At the same time, Korea can improve the judicial system in various ways to restore its public respect. Then, Korea may be able to gradually establish the rule of law.

According to a World Bank report, the quality of governance in a country can substantially change over time, say, a decade (Kaufmann et al., 2009). The weak rule of law in the present-day Korea is anything but a destiny.

Appendix <Case Study>

Lengthy Journey through Korea's Judicial System

1. Background[1)]

John worked for a newly-created special purpose agency of a municipal government in Korea (hereinafter "SPA" of "MG"). SPA opened its door in the early 2000s. John was hired through SPA's first "open recruitment" as director general of its *business* division ("AB Division"). John signed an employment contract for 28 months up to the middle of 2006. The task of AB Division was to attract foreign firms into the municipality.

The agency. SPA, especially AB Division, was very unique as a government entity. First, its operation was very much business-like and required lots of marketing activities. Second, some key positions, including commissioner of SPA and direct general of AB Division, were open to outsiders for a limited term. (The traditional hiring practice of civil servants is for the lifetime and through a recruitment test.) Third, the human resources (HR) system was dual, one for life-time civil servants and the other for term-hires from outside.

John had three direct reports: one career official and two term-hires. John was to supervise about fifty people when positions were fully filled, roughly a half reserved for the inner circle and the rest open to outsiders. On the first day at work, John found out that about a half of the open positions were yet to be filled.

The reason why John had to start with many vacancies was because the qualifications for application were too strict while the job prospect was too uncertain. Qualifications were slightly different depending on the levels, but in general consisted of a certain

1) This case study was prepared by this author on the basis of John's statements, his memos and notes, supporting documents from various government agencies, and testimonies of a number of other people. All the names are disguised. All the people including John and Kincaid are Koreans.

number of years of experience in the designated field, a PhD or master's degree combined with experience for fewer years, and something different but "thought to be" equivalent to any of the above. On the other hand, the tenure for the term hires was limited to maximum five years.

One trouble with this hiring guideline was that few people could meet the qualifications other than in the *something thought to be* ("equivalence") category. The mission of SPA was so unique that virtually no Koreans had prior experience of the same kind. As a matter of fact, the commissioner, John and the two direct reports from outside were hired on the basis of the equivalence qualification.

The section and its chief. The other key person in this case study Kincaid was hired from outside together with John for 28 months. He was to manage one of the two business sections. His section ("XY Section") was to have a total of eight people when filled, three insiders and five outsiders. Kincaid was the only outsider in his division at the opening of SPA. He had yet to fill four open positions in his section, two level-A, one level-B and one level-C. Apparently, filling the vacancies was very urgent in light that the given tasks of XY Section took a long time before the fruition of any result on the one hand and that his tenure was a little over two years on the other hand.

Incidentally, Kincaid had a PhD degree in the field of his job, and had taught for some years as a college lecturer. He had never been in business and had had no people-management experience. At SPA, he did not maintain good relationships with people around him, including potential investors and overseeing officials at the central government. One of the first things he did at SPA was quarrel with his only direct report who was an insider at level-A. One of the first things John, as his supervisor, had to pay attention to was his tardiness: he used to take the morning off without a prior notice if he drank in the previous evening with outside people for business or with his subordinates for team building.

In January 2004, SPA offered its second open recruitment including one level-A opening of XY Section. Three applied for that particular opening but none was

acceptable at other than the equivalence clause. The first ("Han") had long years of experience in international affairs. The second ("Kim") held a JD from an American law school and had a few years of experience on the legal side. He claimed that the JD was a type of PhD degree and could pass the first-round screening on that basis. The third ("Min") was to earn his PhD in August and had some work experience in international business. Min's father had just been appointed as a cabinet member of the central government whose responsibility was closely related to SPA's operation. John, Kincaid and one invited university professor interviewed the three candidates. Each of the three interviewers gave a passing score (higher than 60 out of 100) to all the three applicants but the highest one to Min. That was to cater to the SPA commissioner's wish. The commissioner's logic was that Min *could pass* the qualification test as a "soon-to-be PhD" and that Min's presence would help draw his father's attention to SPA. Min was subsequently hired and directly reported to Kincaid.

In April 2004, SPA offered its third round of open recruitment including one level-A, one level-B, and one level-C positions of XY Section. This time again, Han and Kim applied for the level-A opening, but Kim was dropped out at the first-round screening because he was not thought to be a PhD holder this time around. After the screening, a total of five applicants were waiting for their interviews for positions at XY Section: Han for the level-A opening, two for level-B, and another two for level-C. The interview committee consisted of John, Kincaid and two invited college professors.

Shortly before the interview, John met Kincaid and suggested to hire Han and one ("Nah") of the two level-B applicants in light that their time at the current jobs was limited. Kincaid kept silent and seemed to acquiesce. John gave very high scores to the two, Han and Nah, to make certain of their hiring. After the interviews, John was disappointed but subsequently surprised. His disappointment was because none of the other three interviewers gave a passing score to Han while only Kincaid gave a barely passing score (60) to Nah. John thought both

of them failed because, according to the general practice, the majority of interviewers should give a passing score to allow a final yes to an applicant. John's surprise was that the two were declared later on to have passed the interview according to the HR department's guideline for that particular hiring occasion that the average score from the interviewers be higher than the passing line (60). Han was hired but Nah opted out for some reason. Incidentally, John gave a failing score to the other three applicants, one of whom (Tan) was then working at another department of MG. She failed the interview because she spoke Japanese while SPA preferred an English speaker.

In May 2004, Kincaid committed battery while drunk in a picnic of AB Division (where alcohol is allowed). He was investigated by Audit Office of MG ("MAO"). He conceded his misbehavior and was forgiven only after swearing not to repeat the same mistake again. In October, he committed battery one more time over a dinner of XY Section. After intensive investigations by MAO for two months and the final decision by the HR Committee of MG, Kincaid's contract was terminated around the end of 2004.

2. The Investigations

Kincaid's termination was the beginning of John's eight-year ordeal. John was questioned, investigated, tried, and took the witness stand for a total of 35 times at 14 government agencies (in some for multiple occasions). All through the process, John had to spend a great deal of time, energy and money.

The following is a simplified chronology of all the incidents John had to go through. Here, incident means a separate occasion where John was called in and investigated (queried or tried) by a certain public agency. In general, John had to spend a half to a full day for each call. All the incidents were due to Kincaid's allegation.

Timeline (# of Calls)	Incident	Kincaid's Allegations
Nov. 2004 (1)	Investigation by Municipal Audit Office (MAO)	Wrongful choice of Min in January and **unjustifiably high score to Han** in April (during MAO's investigation of his second battery)
Jan. 2005 (1)	Same as above → MAO's decision: **Evaluation Scores at interviewer's discretion**	Same as above (in his petition to Central Administrative Appeals Commission for a correction of his contract termination)
Feb. 2005 (1)	*Same as above*	Wrongful choice of Min and forgery of documents **without interviewing Han** (in his petition both to The Blue House and The Board of Audit and Inspection of Korea which was relayed to MAO)
Mar. 2005 (1)	Investigation by the Anti-corruption Commission of Korea → No notification of result	Same as above (as relayed from Blue House and the Audit Board)
Mar. 2005 (2)	Investigation by The Board of Audit and Inspection of Korea → The Audit Board finding: **John was in the Han interview.**	Same as above
Mar. 2005 (1)	Inquiries by mass media and various branches of MG	Same as above (as reported in newspapers and TVs) (At this point, Min and his father resigned from their respective position only due to this bad publicity.)
Mid 2005 (1)	Queries at Municipal Assembly	*Same as above*
Jan. 2006♠ (1)	Queries at Municipal HR Committee	Inappropriate choice of Min (in the Audit Board report)

	→ John to get an official reprimand for the Min case	(The Han case was not an issue because the Audit Board had dismissed it.)
May 2006: John's retirement from SPA due to expiration of contract		
May 2006 (2)	Municipal Police Department (MPD) → **The Han case dismissed as per direction from MPO**	Wrongful choice of Min and forgery of documents **without interviewing Han** [in his charge against John and the Commissioner who incidentally was a former cabinet member of the central government]
Dec. 2006♠ (1)	Municipal Prosecution Office (MPO) → **The Min case closed without indictment**	The second round investigation of the above claim relayed from MPD with the Han case previously dropped
* In the meantime, Kim civilly sued MG in conjunction with the Min case. He won the first trial but lost at Seoul High Court (SHC). Incidentally, SHC supported SPA's hiring of Min while denying Kim's claim of JD being a type of PhD. Kim finally lost the case at the Supreme Court * Later on, Kincaid also sued MG for damages from wrongful dismissal of him. He lost at all of the district, appellate, and Supreme Court trials. Incidentally, the district court's sentencing document explicated that Kincaid's dismissal not have anything do to with the Han case.		
April 2008♠	SHC as a witness at Kim's suit against MG → John responded to Kim's attorney regarding the Min case only.	* John was previously fined ₩1,000,000 for excusing himself twice for not taking the witness stand because of a schedule conflict.
Mar. 2009 (1)	SHC as a witness at Kincaid's civil suit against MG → John responded to **Kincaid's attorney** regarding the Min and Han cases	Wrongful choice of Min and forgery of documents **without interviewing Han** *John was surprised to find out that he was called in by Kincaid's lawyer and not MG's. There was no plausible reason that Kincaid's side might expect favorable

		testimony from John.
Jan. 2010 (2)	Municipal Police Department	Perjury at the SHC testimony in March 2009 regarding the Han case
May 2010 (2)	Municipal Prosecution Office → **Indictment of John for perjury**	Same as above as relayed from MPD

♠ The Min case only (not included in the number of incidents in the text)

3. The Indictment

The Municipal Prosecution Office ("MPO") indicted John to the Municipal District Court ("MDC") in July 2010 for perjury at the Seoul High Court (SHC) as a witness to the trial between Kincaid and MG in 2009. John thought the indictment did not have any merit for various reasons including the following:

① The same MPO made mutually contradicting decisions in 2006 and 2010 regarding John's participation in the 2004 interview of Han. MPO ordered the MPD (under its supervision) to dismiss the case earlier but indicted John this time.

② MPO disregarded several SPA documents evidencing that John had to participate and had actually participated in the interview of Han. MPO did not take into consideration the explicit comment in a report from the Board of Audit and Inspection of Korea with regard to its March 2005 investigation that "one outside interviewer duly testified John joined the interview of Han."

③ MPO did not indict John for *forgery of official documents* while alleging he lied about the April 2004 interview. If John had not been in the interview, various documents from SPA would have been forged. Forgery of official documents and choosing the wrong candidate is a crime at least as serious as perjury at a court testimony.

④ Kincaid's statements in his documents contained numerous inconsistencies and self-contradictions. For example, he initially blamed John for unjustifiably

high score to Han in the interview, but changed his words later on and claimed that John did not participate in the interview altogether.

Once indicted, anyone has to endure a lengthy trial process. Very often, the defendant goes through three proceedings, at the district, appellate and Supreme Court. As such, indictment by the prosecution makes a critical juncture for the suspect. Ideally, an indictment is to be made only after a thorough investigation because it becomes very costly to the government as well as to the defendant.

4. The Trials

In late July 2010, the first session was held at MDC. It was largely a formality without any substantive queries and answers. John attended the hearing with a lawyer. Subsequently, there were a total of 11 court sessions over 10 months. At the final 11th session for judgment, John was acquitted. Nevertheless, MPO appealed to the Regional High Court (RHC).

All the appeals and arguments at RHC were made by MPO. John did not hire a lawyer for the appellate trial, because he had nothing additionally to present to the court. Instead, he submitted a written statement explaining what actually happened and the self-contradictions in the documents from the prosecution. After a lengthy appeal proceeding, John was found not guilty once again. Nevertheless, MPO proceeded to the highest court. Finally on May 2012, the Supreme Court of Korea (“SCK”) dismissed the case.

Through the court proceedings, John experienced many strange instances. First, he was not allowed to say anything other than responses to queries. It was not clear to him why he had to be in the court in person for each and every session including those solely reserved for inquisition of witnesses.

Second, there are frequent changeovers of judges and in-court prosecutors due to the periodic personnel transfer practices in the Korean government at large. John wondered how each judge or prosecutor *could even skim* case files, some of which can be thousands of pages. In John’s case, the judge was replaced once

and the prosecutor twice in the first proceeding over 10 months. The prosecutor was replaced once in the second proceeding over six months. In the meantime, the stack of documents grew from 881 pages at the initial indictment to 2,503 pages for the final review of four Supreme Court justices. Moreover, his case was only one of tens of cases that each judge or prosecutor was concurrently in charge of.

Third, the judges at trial and at final judgment can be, and is likely to be, different. If a judge does not observe in person actions and attitudes of witnesses, she may lose subtle but critical information in *judging* their credibility. In John's case, the first judge was provoked a few times by Kincaid and his witness for a lack of sincerity, which could not be recorded for the replacing judge.

Incidentally, John was having a very important personal event in the US in the late August 2010 which happened to fall in between the second session in mid-August and the third session in September. John could not go to the US because MDC put his passport renewal on hold. That was in spite of his written petition supported with one document verifying that his event in the US was real and another document evidencing that John had to teach classes in the fall semester beginning September 1st. John had to vividly experience the so-called Murphy's law in his real life.

Even after the SCK decision, John was worried what claims or complaints Kincaid might file in the years ahead. Indeed, John felt somewhat uneasy every time he was notified in a written letter from the court that Kincaid had *officially requested* a copy of transcripts from a particular session. There were a total of nine such notifications from three different levels of courts. Kincaid might find one pretext or more from the numerous documents to file a new complaint against John!

The following is a summary of key points in the court proceedings.

Court (Calls)	Month	Notes
MDC (11)	July 2010	Identification of the defendant and arraignment by a single judge
	Aug. 2010	Kincaid's testimony Judge's warning against Kincaid's inappropriate comments and attitudes in the court. The judge said to Kincaid, "This is my court, not yours."
	Sept. 2010 <**New prosecutor**>	The two outside interviewer's testimony: *Not sure because of the six-year time gap.* . * One of the two had testified to the Audit Board in its March 2005 investigation that John had interviewed Han together with her (or him).
	Nov. 2010	Han's testimony: *John interviewed him in person in parallel with the other three interviewers.*
	Dec. 2010	Kim's testimony: *He came to SPA on the interview day in April 2004 even if he had dropped out in the document screening. He peeped into the interview room and found out "John was not there." He himself said that his certifying statement previously submitted as a support for Kincaid's claim was partly falsified by someone else.* * The judge warned that integrity of Kim's statement and some of his comments were suspicious. He added, "Saying 'Don't know' to what you know can be perjury." ** As opposed to Kim's allegation as above, Kincaid, in one of his supporting documents, claimed that the interview process was so tightly controlled by the HR of SPA that even the interviewees could not move or interact among them freely.
	Jan. 2011	Tan's testimony: *John interviewed her in person in parallel with the other interviewers. She particularly recalled John's shameful comment about her English inability.*
	Feb. 2011	Testimony of the SPA's HR director general: *All SPA*

		documents presented were genuine. John had "most probably" interviewed all the interviewees in light that any hires would be John's staff members.
	Mar. 2011 <**New Judge/ New Prosecutor**>	New judge and new prosecutor replaced the old ones due to periodic personnel transfers at the MDC and MPO. The judge announced closing of the hearing process after "testimony" of little relevance from a Municipal Assembly clerk and John's final statement as defendant. The new prosecutor sought an eight month imprisonment for perjury.
	April 2011	The new judge postponed the session because he needed more time to know the case before any decision.
	May 2011	Judge postponed once again for the same reason.
	May 2011	Judgment: *Acquittal* of John * The judge added that he suspected John was not in the interview in light that his score to Han had been strangely high but that he had to announce "not guilty" simply because of a lack of hard evidence to decide otherwise. He recognized authenticity of the SPA official documents but said they might not be enough to prove John's innocence. He went as far as suggesting John should make a counter-claim against Kincaid for a false accusation only after a decision by the Supreme Court, if ever.
May 2011: MPO appealed. Most notably, the appellate brief erroneously quoted the HR director general's testimony.		
RHC (7)	July 2011	Identification of the defendant and arraignment by a panel of three judges MPO wanted three remaining interviewees (other than Han and Tan) as witnesses.
	Aug. 2011	Nah's testimony: *A high official (John) was in the interview.* The fourth interviewee's testimony: *He saw a high official (John) in the interview.* . The fifth interviewee did not appear and was dismissed

		as an additional witness.
	Sept. 2011 <**New Prosecutor**>	A changeover in the in-court prosecutor. He was not prepared because he had just arrived. He submitted a document which the chief judge said was favoring the defendant (John) rather than the prosecution.
	Oct. 2011	The prosecutor sought an extension because he was still not prepared.
	Dec. 2011	The prosecutor said that at Kincaid's motion he was waiting for a certain document from The Board of Audit and Inspection. The chief judge was doubtful of the document's merit as new evidence. * John blasted what the prosecution was doing while ruining his busy schedule.
	Jan. 2012	No motion from MPO. The chief judge declared the proceeding closed.
	Feb. 2012	Appellate decision: *Dismissal of the case*
Feb. 2012: MPO advanced the case to the Supreme Court of Korea (SCK)		
SCK (0)	May 2012	SCK decision by three justices*: Dismissal of the case* * John was never called to SCK.

REFERENCES

Botero, J., S. Djankov, R.La Porta, F. Lopez-de-Silanes, and A. Shleifer (2004). "The Regulation of Labor," *The Quarterly Journal of Economics,* Vol.119, No.4, pp.1339–82

Coffee, J. C., Jr. (2001). "The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control," *Yale Law Journal,* Vol.111, No.1, pp.1–82

Djankov, S., O. Hart, C. McLiesh, and A. Shleifer (2008). "Debt Enforcement around the World," *Journal of Political Economy,* Vol.116, No.6, pp.1105-1149

Djankov, S., R. La Porta, F. Lopez-de-Silanes, and A. Shleifer (2002). "The Regulation of Entry," *The Quarterly Journal of Economics,* Vol.117, No.1, pp.1-37

_____ (2003). "Courts," *The Quarterly Journal of Economics,* Vol.118, No.2, pp.453–517

Economist, The. (2008). "Pardon me: The president forgives some tycoons." August 14

_____ (2009). "Succession at Samsung: Crowning success." June 4

Friedman, M. and R. D. Friedman (1980). *Free to Choose: A Personal Statement,* New York and London: Harcourt Brace

Hayek, F. A. (1944). *The Road to Serfdom,* Chicago, Il: The University of Chicago Press

_____ (1960). *The Constitution of Liberty* (Annotated by R. Hamowy in 2011), Chicago, Il: The University of Chicago Press

_____ (1988). *The Fatal Conceit: The Errors of Socialism,* Chicago, Il: The University of Chicago Press

IBA (International Bar Association). (2009). "Resolution of the Council of the International Bar Association of October 8 2009 on the Commentary on Rule of Law"

Johnson, S., R. La Porta, F. Lopez-de-Silanes, and A. Shleifer (2000). "Tunneling," *The American Economic Review,* Vol. 90, No. 2, Papers

and Proceedings of the One Hundred Twelfth Annual Meeting of the American Economic Association: pp.22-7

Kahneman, D. (2011). *Thinking, Fast and Slow*. New York: Farrar, Straus and Giroux.

Kaufmann, D., A. Kraay, and M. Mastruzzi (2009). "Governance Matters VIII: Aggregate and Individual Governance Indicators 1996–2008," The World Bank Policy Research Working Paper 4978.

Lawissue. (2006). "Assemblywoman Rah Kyongwon, 'Republic of Korea as Republic of Special Acts'" ("나경원의원, '대한민국은 특별법 공화국'"), retrieved December 31, 2013 from http://www.lawissue.co.kr/news/articleView.html?idxno=2760

La Porta, R., F. Lopez-de-Silanes, and A. Shleifer (2008). "The Economic Consequences of Legal Origins," *Journal of Economic Literature,* Vol.46, No.2, pp.285–332

LLSV (La Porta, R., F. Lopez-de-Silanes, A. Shleifer, and R. W. Vishny) (1996). "Law and Finance," NBER Working Paper 566. Also published in 1998 as "Law and Finance," *Journal of Political Economy,* Vol.106, No.6, pp.1113-1155

_____ (1997a). "Trust in Large Organizations," *American Economic Review Paper and Proceedings,* 87, pp.333-38

_____ (1997b). "Legal Determinants of External Finance," *The Journal of Finance,* Vol.52, No.3: pp.1131-50

_____ (1998). "Law and Finance," (see LLSV 1996)

_____ (1999a). "The Quality of Government," *Journal of Law, Economics, and Organization,* Vo.15, No.1, pp.222–79

_____ (1999b). "Corporate Ownership Around the World," *The Journal of Finance,* Vo.54, No.2, pp.471-517.

North, D. (1990). *Institutions, Institutional Change, and Economic Performance,* New York: Cambridge University Press.

NYT (New York Times). (2009). "Korean Leader Pardons Samsung's Ex-Chairman," Dec. 30

Ohmynews (2008). "Minbyun, 'Cookie-cutter Sentences of Probation to Crimes

of Chaebol Owners'" ("민변 '재벌총수 범죄는 집행유예 정찰제 판결'"), retrieved October 25, 2013, http://www.ohmynews.com/NWS_Web/view/at_pg.aspx?NTN_CD=A0000950799

Pistor, K. (2005). "Legal Ground Rules in Coordinated and Liberal Market Economies," European Corporate Governance Institute Law Working Paper N° 30/2005

Rousseau, J. (1755). "Discourse on Political Economy," reprinted in *Jean-Jacques Rousseau: The Basic Political Writing,* Indianapolis: Hackett Publishing, 1987

_____ (1762). "On the Social Contract or Principles of Political Right," as above

Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations* (annotated by E. Cannan in 1904), The 1994 Modern Library Edition, New York: Random House.

UNSC (United National Security Council). (2004). "The rule of law and transitional justice in conflict and post-conflict societies," report of the Secretary-General

WP (The Washington Post). (2012). "In South Korea, the Republic of Samsung," Dec. 10

Zingales, L. (2012). *A Capitalism for the People: Recapturing the Lost Genius of American Prosperity,* New York: Basic Books

<Abstract>

The market economy has three pillars: voluntary exchange, purposive rules of the game, and the rule of law. Unfortunately, the rule of law is notoriously weak in Korea partly because Korea follows the civil law tradition. In addition to general discussion, I present a case study which illustrates *inequality before the law* in Korea due to complexity of the regulatory framework. The goal of this paper is to suggest practical measures to enhance the rule of law in Korea as a precondition for speedier economic growth in the future. I rely on logical arguments and previous academic works in showing why the common law system is generally preferable. The main point is that common law is friendlier to rule abiders and subsequently less costly to the citizens and the government. In a word, common law is more effective and efficient in establishing the rule of law, *ceteris paribus*.

Key Words : Rule of law in Korea, economics of regulation, use-friendly regulatory framework, effectiveness of legal system, cost of rule enforcement

A Review of Korea's Rule of Law with a Case Study and Implications for the Legal Framework

사례연구를 중심으로 본 한국의 법치현황 및 바람직한 법제에 대한 시사점

안 영 도*

한국은 선진국으로 도약하기 위해 애쓰고 있는데 현실적으로 시장경제 이외의 다른 경제 모델은 없다. 시장경제에는 합목적적 경기규칙과 엄정한 법치가 필수불가결하다. 한국의 문제는 아직도 법치가 취약하다는 점이다. 여러 가지 이유가 있겠지만 일부 학자들의 실증연구에 따르면 한국이 civil law 전통을 따라서 그 법제가 지나치게 복잡하다는 것도 그 중의 하나이다. 본고는 일단 특정 사례연구(case study)를 제시하고 그에 대한 검토를 중심으로 한국의 법치가 "법률 앞에서의 만인의 평등"이라는 기본원칙에서 벗어남을 살핀다. 그리고 문헌연구를 통하여 그렇게 된 것이 부분적으로 법제자체의 복잡성에서 때문이다. 한국 법제의 복잡성은 civil law 특유의 구체성에서 출발하여, 각종 특별법의 많은 예외 조치, 즉흥적 입법 조치 등에 기인하는 것으로 진단한다. 그런 진단을 바탕으로 보다 효과적이고 효율적인 법 체제에 대한 시사점을 도출한다. 즉, 준법·집행 비용이 적은 "준법자 지향"(user-friendly)에서 출발하여 투명성을 높이기 위해 예외조항을 줄이는 일, 정도(degree, 누구 잘못이 큰가)보다는 유형(kind, 누가 잘못한 것인가) 중심의 사법판단, 일벌백계의 처벌 방식 등이 논리적 근거를 바탕으로 제시된다.

주제어 : 한국의 법치현황, 규제의 경제학, 준법비용 및 집행비용, 준법자 지향의 법제, 법제의 효과성,

* 한양대학교 국제학부 조교수