

Constitutional Developments in Korea

Choi Dai-Kwon*

The Korean authoritarianism was practised at the backdrop of the written liberal democratic constitution since its birth in 1948. The “democratization” of 1987 was a turning point which made the political practice live up to the constitution. Particularly with judicial activism in constitutional review of state actions, the constitution has become a living democratic document. The constitutional developments can best be surveyed from the perspectives of Korean nationalism and economic order as well as liberal democracy.

Keywords: liberal democracy, authoritarianism, the gap between the formal norm and the political reality, nationalism, and economic order.

1. Introduction

The Constitution of the Republic of Korea is a living constitution. It started its life in 1948 as the constitution of humble origin for a poor, divided nation, a by-product of the Cold War following the Second World War. Since its birth, it has undergone dynamic changes promising to be a well-functioning democratic document for the future of a flourishing market economy. What accounts for the changes? How has it been affecting political and socio-economic changes in Korean society? An attempt will be made in this essay to trace the developmental interchanges between the constitution and the Korean society from the following three perspectives: Korean democracy, nationalism, and market econo-

* Professor Emeritus, Seoul National University, Chair Professor, Handong University

my.¹ This approach will be justified in the conviction that the constitution of Korea can best be subsumed in these three major themes.

For the entire nation, Korea had a population of 22 million in 1944. Following national division in 1945, South Korea had a population of around 20 million. North Korea had around nine million in 1949. Following the Korean War(1950-53), in 1955 the South still had around 20 million and the North nine million. Hereinafter, South Korea alone will be dealt with; North Korea will be left out of the following statistics and analyses. No doubt, the political and socio-economic change that took place thus far in Korea has been reflected in the constitution of Korea in the form of nine constitutional amendments, and in the numerous constitutional reviews of state actions. The political and socio-economic change in turn can be attributed to the constitution and its changes. The interactions between the constitutional and the political-, socio-economic changes have been one of the outstanding features of the Korean constitution, as will be shown. Totalitarian societies are, however, characterized by the lack of such a dynamism between society and its constitution, in that their constitutions would simply incorporate the political decisions made from above and not affect their state actions by way of a judicial review of legislation. The Constitutional Court's constitutional review of state actions has been very active in Korea thus far and will remain so in the future. Each year, around 600 constitutional cases are filed at the Constitutional Court for review of the constitutionality of state actions, mostly concerning legislation. Among them, around two thirds of the cases are dismissed either on merits or on procedural grounds, and, for an annual average of 37.4 cases, statutory provisions are declared unconstitutional or repugnant to the constitution either in their entirety or partially.

Table 1 shows succinctly how Korea underwent a societal change in the last four decades. In 1960, around 60% of the war-torn nation's 25 million were farmers whose per capita income was less than \$100. In 2000, less than 10% of the population of 47 million were in the farming sector, and per capita income was around \$10,000. Today, Korea is the 12th largest trading nation in the world. In 1960, there were 450 practising lawyers and in 2000 there were 4,228.

1. See Dai-Kwon Choi, "Development of Law and Legal Institutions in Korea," in Bong Duck Chun, William Shaw and Dai-Kwon Choi, *Traditional Korean Legal Attitudes*, (Berkeley: University of California Institute of East Asian Studies Center for Korean Studies, 1980), pp. 87-98; Dai-Kwon Choi, *Beopsahoehak* (Sociology of Law), (Seoul: Seoul National University Press, 1983), pp. 85-89.

Table 1.

	Estimate of Mid-Year Poulation in thousands of persons	Percentage of Farm Population to Total Population in %	Per Capita GNI in Dollars	Numbers of Practising Lawyers(and Judges in parentheses)
1960	25,012	58.2	79	450 (296)
1965	28,705	55.1	105	662 (372)
1970	32,241	44.7	249	719 (413)
1975	35,281	37.5	592	809 (517)
1980	38,124	28.4	1,598	940 (562)
1985	40,806	20.9	2,229	1,179 (769)
1990	42,869	15.5	5,886	1,803(1028)
1995	45,093	10.9	10,823	2,852(1212)
2000	47,008	8.6	9,628	4,228(1393)

Sources: Hankuk tongkyeyonkam (Korea Statistical Yearbook) 1983 and 2001.
Korean Federation of Bar Association.

Since 1948, the constitution has been amended nine times. The last constitutional amendment of 1987 is popularly regarded as the culmination of the democratization process in Korea. Now an undertaking will be made to follow what changed the constitution and how they proceeded.

2. Democratization

(1) The Korean constitution has been one of the liberal democratic constitutional documents of the world since its inception. It has all the features of a liberal democratic constitution: fundamental human rights provisions, the pluralism of political parties, the separation of power, the principle of responsible government, judicial independence, judicial review of state actions, and the principle of national sovereignty. However, their practices have fared unevenly while failing to meet many expectations.

Definitions of the terms constitution and constitutionalism might be in order at this point of enterprise. The word constitution can be used in several ways. Any state, a monarchical, an authoritarian, and even a totalitarian one, as well as a liberal democratic state can possess their constitution as their “basic law,”

whether it is written or unwritten. Another usage of the word constitution is that a state does not have a constitution unless its basic law, whether written or unwritten, contains all those liberal democratic constitutional features, including the protection of fundamental human rights and the separation of power, among others as mentioned above. This usage is no doubt in the tradition of the French Declaration of the Rights of Man and Citizen(1789). The essence of constitution in this usage lies in the restraints placed on power in the form of constitutional rules and principles. All those liberal democratic constitutional features amount to nothing more than the power-restraining rules and principles of a constitution. The term constitutionalism is reserved to the constitution here. The point being that the formal Korean constitution has been one built on constitutionalism from the beginning.

During the *Choson* dynasty, Koreans lived under a monarchical form of government with the king and his *Yangban* Confucian-scholar-bureaucrats at the top until Korea was forcefully colonized by the Japanese in 1910. The dynastic rule was, however, subjected to Confucian constitutionalism mixed with the censorial institutions and the functional equivalents of the freedom of speech among *Yangban* scholars.² The Japanese rule of Korea was nothing but that of harsh repression and economic exploitation(1910-1945)³ that was neither subjected to Confucian constitutionalism nor to modern constitutionalism.⁴ Even the Japanese *Meiji* Constitution(1889-1947) which was itself far from being liberal-democratic did not apply to Korea. The Civil Law tradition was introduced to Korea through Japanese rule. That is how Korea came to belong to the Civil Law family. None of those liberal democratic rules and principles of constitution were, however, introduced after all. The overwhelming national aspirations of Koreans under Japanese rule were freedom and independence. It is only natural that Koreans were determined to adopt an undoubtedly liberal democratic constitution when they founded their independent government in 1948 following the Second World War. To an extent, the liberal democratic nature of the Korean

2. Dai-Kwon Choi, "Development of Law and Legal Institutes in Korea," pp. 55-72; Dai-Kwon Choi, *Bopsahoehak*, pp. 59-72; Chaihark Hahm, *Confucian Constitutionalism*, Harvard JSD dissertation(2000).
3. For the nature of the Japanese rule of Korea, see also Un-Tae Kim, *Ilbonjaekukjuui ui hankuk-tongchi* (Japanese Imperialist Rule of Korea), revised and expanded ed., (Seoul: Pakyongsa, 1999).
4. Dai-Kwon Choi, "Development of Law and Legal Institutes in Korea," pp. 73-87; Dai-Kwon Choi, *Beosahoehak*, pp. 73-85.

constitution can be ascribed also to the fact that the Republic of Korea was inaugurated under the auspices of the UN.⁵ Another factor may be the American influence, including the adoption of liberal democratic constitutional ideas under the American Military Occupation Authority(1945-48).

The political realities, however, did not greatly live up to the liberal democratic constitution until at least 1987 when democratization was realized, as already mentioned. Thus the period of time from 1948 up to 1987 is usually pictured as the dark, “authoritarian period”(kwonwiju-ui sidae), and that from 1987 on is known as “the period after democratization”(minjuhwa ihu) in Korea. Obviously, this two-color picture is too simplistic, however, for Korean constitutional history. Korean authoritarianism from 1948 up to 1987 revealed itself in political practice that did not meet the standard of what was expected of the written liberal democratic constitution. The authoritarian realities had always been played out against the backdrop of the formal constitution that aspired toward liberal democratic ideals. Naturally, the Korean authoritarian phase was always accompanied by all different kinds of democratic trends, including human rights and labor movements. Consequently, the very presence of a written liberal democratic constitution seems to separate Korean authoritarianism from that of other countries (e.g., China) whose constitutions lack such liberal democratic constitutional features as the principles of separation of powers, political pluralism, and the protection of human rights. It also separates Korean democratic movements from those under other authoritarian countries. Koreans were involved in democratic movements only to claim what the constitution manifestly promised them. Liberal ideas, including those contained in the written constitution, were widely instructed to students without inhibition through formal education and circulated freely among professors and intellectuals. Consequently, even denials of what the formal constitution promised, such as freedom of speech, had the reverse effect of being lessons in democracy as they convinced the people that their situation was temporary and that constitutional ideals would eventually be realized. Certainly, Korean lawyers had a role to play in those democratic movements in reliance on what the formal constitution provided, largely a role as an attorney, for example, in numerous criminal proceedings against democratic activists .

5. See Dai-Kwon Choi, “A Legal Analysis of the Division, the Present State, and the Future Courses of Korea,” in Myoung-Kyu Kang and Helmut Wagner, *Korea and Germany: Lessons in Division*, (Seoul: Seoul National University Press, 1990), pp. 27-104, esp. pp. 30-35.

(2) What accounts for the authoritarian political realities that played out against liberal democratic constitutional provisions? A number of factors may be suggested to explain the emergence of authoritarian practices despite the existence of a liberal democratic constitution. Perhaps a “cultural lag” theory offers at least one explanation for that. Koreans had never had the experience with a liberal democratic form of government before 1948. Thus it can easily be presumed that the “authoritarian” political culture of the past still persisted and therefore provided a favorable atmosphere for the emergence of ambitious authoritarian personalities (such as Presidents Rhee and Park). Confucianism had certainly prevailed in the past. It is doubtful, however, that prevailing Confucianism was the cause of modern authoritarian culture or that Confucian culture was identical to authoritarian culture, just as Christian culture could not be regarded as being the major cause of past European dictatorships.

A second factor that can be suggested is closely related to the immediate past of Korea, that is, Japanese rule and its closely related, avowedly obscurantist policy implemented to justify their rule of Korea on the pretext that Koreans lacked ability to self-rule. They intentionally did not train Koreans as scientists or engineers, nor manager-level personnel, or ranking army officers beyond the bottom-level of man-power administration to the end of their rule. Consequently, the lack of well-trained professionals to run Korea was apparent when the new Korean government was founded so they had to rely on former Japanese-trained low-ranking personnel to man its administration and army because they were the only persons available. Those former Japanese trained low-ranking officials and soldiers (e.g., clerks, lieutenants and sergeants) were soon highly appointed as section and bureau chiefs, managers, captains, colonels, and so on, especially in the newly formed Korean administrative areas such as the police, prisons, and the army. Accordingly, their work habits and the accustomed practices they had experienced as functionaries and instruments of Japanese imperialism (the ready resort to political expediency, insensitivity to procedural proprieties, tricks, and a wide use of the third degree, notoriously inhumane investigative methods) were carried over into the new administration, police, prison, and army. It was apparent that Koreans of younger generation in turn had acquired the authoritarian practices and methods of their experienced superiors.⁶

6. Dai-Kwon Choi, “Development of Law and Legal Institutes in Korea,” pp. 84-87; Dai-Kwon Choi, *Beopsahoehak*, pp. 84-85.

A third factor that also militated against liberal democratic practices is of nation-wide Communist subversive action ranging from innocent looking protest meetings and rallies to arson, explosions, armed riots, and guerrilla warfare in mountainous areas. Such activities, which were grave even before the outbreak of the Korean War(1950-53), were designed to topple the newly established democratic order and eventually set up a Communist controlled unified government. These Communist subversive activities resulted in quite a chaotic situation that necessitated various emergency measures to maintain law and order. The high-handed tactics and methods of the Japanese that were effectively used to capture patriotic, anti-Japanese leaders and activists in the past were now utilized by the new Korean police force to arrest Communist agitators, activists, and their supporters. In a convenient marriage, former Japanese trained functionaries had readily lent their hands to the new government leaders who needed experienced administrative officials, police and soldiers to maintain law and order. In the meantime, even notorious former Japanese police detectives were able to escape from the wave of arrest and prosecution designed to punish pro-Japanese traitors that had started as a nationalist measure with the establishment of the new Korean government. The Korean War and the Cold War that continued thereafter throughout the 1950s, 1960s, and 1970s provided further urgency to high-handed emergency measures and political expediency for survival

Perhaps the extreme poverty that had prevailed in the 1950s and 1960s was a fourth factor that also contributed to the authoritarian practices in that the urgency to overcome poverty and develop the economy had made the expedient authoritarian practices seem rather tolerable. Ambitious authoritarian political leaders readily resorted to ever more repressive measures for their political survival relying on the toleration and justification that the necessities of the time provided. Anti-Communism, national security, and economic development were some of the slogans used to justify non-liberal governmental measures throughout the authoritarian period. The military and political tensions along the Demilitarized Zone, North Korean armed infiltrations into the South, the assassination attempt on the life of Southern president, the North Korean kidnapping and downing of the Southern civilian aircraft, the USS Pueblo incident, and others, all made the justification for authoritarian measures rather straight forward.

Rapid economic development was attained during the authoritarian period of Korea in the 1970s and 1980s. It seems clear that the authoritarianism provided to Korean society the functional equivalents of what the rule of law would otherwise provide for economic development, that is, the kind of stability and pre-

dictability that are necessary for a market economy to grow. Particularly in the Korean case, it also provided strong political leadership in directing economic development and in making the most efficient, concerted use of available resources. Along with economic growth, however, there emerged a middle class, and the liberal democracy that had been suppressed thus far came to blossom and eventually to fruit, in part despite the authoritarianism, and in part, perhaps, because of it. It is still hotly debated between liberals and conservatives in Korea whether anti-libertarian measures taken by the authoritarian regimes had been indeed necessary and thus justifiable to stop Communist subversive activities to defend liberal democracy or had been only a pretext for continued dictatorship. It is also debated whether a dictatorship, especially that of President Park, was a necessary evil for quick economic development from scratch, or that successful economic development was needed to justify his high-handed rule. The truth is that national security problems were genuine and at the same time the dictatorship thrived on its anti-democratic practices and emergency decrees that worked against freedoms of speech and assembly and suppressed political opponents. The same dictatorship also contributed greatly to economic development that was far faster than it would have been if Korea had followed a liberal democratic course amidst the serious security concerns and the problems of poverty in the 1960s and 1970s.

(3) Ironically, the dictatorial measures that were taken in various forms by authoritarian regimes were always impregnated with democracy in that they were justified as necessary to defend the liberal constitutional order to survive from subversive North Korean threats and actions. All the paraphernalias of democracy such as elections, the National Assembly, the existence of opposition parties, the free press, and the freedom of speech and assembly were there, however, although they were variously suppressed, some times more, and some times less so. And ideas and ideals of democracy written in the liberal constitutional document had been instilled in the minds of the people through formal education in schools, particularly universities as already mentioned above. Furthermore, the dictatorial measures had the reverse effect of strengthening the democratic resolve of educated Koreans, particularly university students. Such measures were always accompanied by various forms of anti-authoritarian, pro-democratic movements led by opposition politicians, intellectuals, university students, and/or workers. In fact, the gap between the democratic Constitutional ideals and political reality was further widened until the point of the “democrati-

zation” of 1987 occasioned by the rise of the people’s power that thwarted the regime’s attempt to stay on. The slogan of the citizens who had assembled then in front of the Seoul city hall was a Constitutional Amendment for the “direct election” of the nation’s president.

The democratization movements and incidents that preceded that of 1987 include the students revolt of April 19, 1960 that toppled the authoritarian Rhee government. That so-called April 19 revolution is remembered romantically as having brought about Korea’s first liberal democracy with a parliamentary form of government. The democratic experiment was, however, saddled with wide spread unemployment, poverty, and social unrest, let alone the threats from North. The experiment was ended by the military coup d’état of 1961, which heralded President Park’s authoritarianism. In 1972, however, the authoritarianism was notched up a step by a Constitutional amendment by which, among others, an indirect election method was adopted for the election of the president to guarantee unopposed reelection. In the 1970s, the Korean economy was frog-jumping with the government’s economic drive and yet its politics were colored with incessant and nation-wide anti-regime, pro-democracy, and pro-labor movements with a number of declarations, rallies, arrests and imprisonments, and also with North Korean armed provocations and tensions along the DMZ. In the 1980s, the former army general turned president and other magnates somewhat relaxed their grip on power in terms of constitution but not in practice, as they were brutal and extremely unpopular. At that time, anti-“military government”, pro-democracy, and pro-labor rallies and demonstrations, violent confrontations in city streets between university students with fire-bombs and anti-riot police with teargas, arrests of protesters and their imprisonments became almost everyday incidents, some tragic examples of which included the Kwangju incident of 1980 that resulted in several hundred deaths. All those decades-long pro-democracy movements had culminated in the democratization of 1987, which ushered in liberal democracy while ending authoritarian rule finally to the spirit of the liberal democratic written Constitution. Another coup d’état has become unthinkable today.

(4) What has been happening significantly since the democratization of 1987? First of all, an explosion of the freedom of expression should be pointed out. For the first time people began to enjoy the freedom of unregulated or unintimidated expression of ideas in history, except during that short democratic experiment following the April 19 Revolution of 1960. Today, Koreans have

been experiencing a Renaissance of press, book publications, songs, movies, drama, and other forms of political, scholarly, artistic and entertainment expression and communication that inundate streets, theatres, art halls, TVs, computer monitors, and even cellular phones. They have also been enjoying unprecedented freedoms of assembly and association, which are expressed in political, cultural, academic, social, and commercial, and all other kinds of meetings, rallies, demonstrations, seminars, clubs, associations, and societies, including political organizations. People have already become accustomed to the peaceful change of power.

Along with the full enjoyment of those freedoms, however, regional, generational, ideological, class, and interest differences and divisions that were hidden, suppressed, or unknown in the past have now begun to appear and be expressed as society has become further industrialized, urbanized, globalized, and complex. The increased social diversity and divisive tendency came side by side with the weakening of the traditional communal ethics.⁷ These developments have further necessitated the rule of law for society.⁸ Korea had once been characterized as an *alegal* society⁹ where litigiousness was looked down upon and harmony was particularly emphasized as Confucian teachings were instilled in the minds of Koreans. Emotionally, the traditional aversion to the law still persists. And yet litigiousness has definitely increased.¹⁰ Accordingly, the law has clearly increased its social relevancy as well. Cognitively, today, the rule of law is widely accepted as a prerequisite to a healthy liberal democracy and burgeoning market economy. The rule of law has been one of the noticeable social phenomena that has emerged since the democratization of 1987 as the market economy is maturing. The Korean Constitutional Court could probably be recorded

7. Dai-Kwon Choi, "Beopgyubeomui sahoejeok gicho-Sahoetongjaeui munjaejeom" (Social Basis of the Legal Norm-Problems of Social Control), in Hanguk sahoegwahak hyeopuihoe (Korea Social Science Research Council), ed., *Sahoebyeonhwawa yulli* (Social Change and Ethics), (Seoul: Bopmunsa, 1990), pp. 67-96; Dai-Kwon Choi, "Wigiui gyoyuk"(Education in Crisis), *Hyeonsangwa insik*, v. 25 no. 4, pp. 9-25 (2001), etc.
8. Dai-Kwon Choi, "Seonhan sahoeui jogeon-Beopchijuiireul wihan damron" (Prerequisites of Good Society-Discourse for the Rule of Law), *Seoul Law Journal*, v. 40 no. 3, pp. 62-87 (1999).
9. Hahm Pyong Choon, *The Korean Political Tradition and Law* (Seoul: Hollym, 1967), p. 6; Hahm Pyong Choon, *Korean Jurisprudence, Politics and Culture* (Seoul: Yonsei University Press, 1986), p. 95.
10. Kim Do-Hyon, "Hangukui minsasosong jungkachui wa woninbunseok" (Increase Trend of Civil Litigation in Korea and Causal Analysis), *Beopsahoehakyongu* (Sociology of Law Studies), v. 1, pp. 183-194 (2000).

as one of the success stories of its kind in judicially restraining political power since its introduction along with the democratization of 1987.¹¹ The Constitutional Court has been remarkably active in its constitutional policy making, particularly as compared to the record of the Japanese judicial review.¹²

(5) Mentioning a few problem areas with democratization may be in order. Today, a national consensus or a workable majority has thus far proved hard to find to lead the nation towards another leap forward to an era of per capita GNP \$20,000 from the present \$10,000, for a sensible nation-wide labor-management policy, or for a rational unification policy or de-nuclear policy toward the North. This difficulty is of course derived from that of putting together the various rival group interests and divisive tendencies of society. A strong contributing factor may be weak political leadership. No president that was democratically elected since democratization has commanded the majority popular vote, but only the plurality of votes, at presidential elections. Constitutionally speaking, therefore, another constitutional amendment may be necessary to require a majority vote for the election of the nation's president. Another problem area with democratization lies with in-party democracy.¹³ The prevalent pattern of political parties has been thus far that of boss-controlled political parties, in which party platforms and other major party decisions, party nominations of all the candidates for the public elections, presidential, congressional, and local councillor have been determined practically by the party boss, after which time approvals of

11. Dai-Kwon Choi, "The Structure and the Function of the Constitutional Court: The Korean Case," in Graham Hassall and Cheryl Saunders, eds., *The Powers and Functions of Executive Government* (Carlton, Australia: Center for Comparative Constitutional Studies, University of Melbourne, 1994), pp. 104-115.
12. Dai-Kwon Choi, "Heonbeopjaepanso gyeojeongui jeongchijeok uimi," (The Implications of the Constitutional Court Decisions in the Political Process-Particular with a Focus on the Recent Election Law Related Decisions), *Seoul Law Journal*, v. 42 no. 3, pp. 5-6 (2001); Dai-Kwon Choi, "Heonbeopjaepansoui jeongchihak-ui gujowa gineungeuljungsimeuro" (Politics of the Constitutional Court-With the Focus on its Structure and Functions), *Seoul Law Journal*, v. 34 no. 1, pp. 106-127 (1993). For Japan's judicial passivism, see Ito Masami, *Saibankanto gakusya aida* (Between the Judge and the Scholar), an autobiography by a former Japanese law-professor-turned Supreme Court Justice, (Tokyo: Yuhikaku, 1993), pp. 106-144; M. Ichikawa, T. Sakamaki and K. Yamamoto, *Gendaino saiban* (Contemporary Judicial Decision-Making), 2nd ed., (Tokyo: Yuhikaku, 2001), pp. 227-233; Masato Ichikawa, "Ikensinsaseino kiisekito denbou" (The Conducts of the Judicial Review System and its Prospect), Masako Kamiya, ed., *Nihonkokukenpo o yomizikisu* (Correct Readings of the Japan's Constitution), (Tokyo: Nihonkeizai sibun, 2000), pp. 167-184.

party congress were only a formality. The phenomenon of boss-centered political parties is about to yield to change toward that of political parties in which the principle of majority rule and protection of minority rights prevails. The present President was for the first time in history nominated as the presidential candidate with a competitive in-party election by party members. The methods by which to select congressional and local councillor candidates and various in-party positions are yet to be determined.

3. Nationalism

No doubt, the Constitution is one of the leading Korean nationalist documents that incorporated the spirit of the Declaration of Independence of 1919, which was proclaimed by the Korean people to the world in their nation-wide revolt against Japanese rule. Soon after, the constitution of the government-in-exile was established in Shanghai in the same year following the Declaration. The major themes in the Declaration of Independence may be summed up as follows: National self-determination, independence, and freedom. The Korean people were very much inspired by President Wilson's principle of national self-determination. Both the principles of national self-determination and independence are now clearly expressed in the national sovereignty clause of Article 1 Section 2 of the Constitution. Accordingly the national sovereignty clause is understood as denouncing not only monarchical rule but also foreign rule, faithfully adhering to the Korean national experience.¹⁴

Korean nationalism was manifested in Article 101 of the Constitution of 1948 that was designed to justify legislation to punish former pro-Japanese Korean collaborators for their traitorous activities of the worst type committed

13. For a constitutional study on in-party democracy in Korea, see Dai-Kwon Choi, "Jeongchi-gyehyeokeul wihan myeotgajisaenggak-jeongbuhyeongtae · jeongdang · jeongchijageum · seongojaedo deungeul jungsimeuro I" (Some Thoughts on Political Reforms-With the Focus on Form of Government · Political Parties · Political Financing · Electoral System I), *Seoul Law Journal*, v. 33 no. 1, pp. 171-180, esp. pp. 174 ff. (1992); Dai-Kwon Choi, "Heonbeop-gwa dangnaeminjujuui" (The Constitution and In-Party Democracy), *Seoul Law Journal*, v. 42 no. 1, pp. 1-22 (2001); Dai-Kwon Choi, *Heonbeophak gangui* (Lectures on the Constitution), 2nd expanded ed., (Seoul: Pakyongsa, 2001), pp. 173-174.
14. Dai-Kwon Choi, "Minjokjuuiwa heonbeop" (Nationalism and the Constitution), in Dai-Kwon Choi, *Heonbeophak-Beopsahoehakjeok jeopkeun* (Studies on the Constitution-From Sociological Approach), (Seoul: Pakyongsa, 1989), pp. 106-143, esp., pp. 132-133.

before August 15, 1945. The clause was adopted as one, clearcut exception to the constitutionally proclaimed general principle of *nullum crimen nulla poena sine lege*(Articles 9, 23 Section 2, etc.). Accordingly, the special legislation of Anti-National Activities Punishment Act was adopted as legislation of the first priority to be enacted by the newly established Korean National Assembly. And a special investigation committee, along with a special court and a special prosecutors office, were formed to perform the functions assigned to them by the legislation. A number of factors such as the problems with the legislation itself including definitional ambiguities and systematic obstructions offered by the former pro-Japanese Koreans who were now highly positioned in the cabinet, the police, and elsewhere resulted in the tasks of the special investigation committee petering out with the result that only a small number of people were handed lenient sentences and eventually released not long afterward. The largely unfinished job of purging the pro-Japanese traitors is still talked and lamented over.

Article 3 of the Constitution, which proclaims “the Korean Peninsula and its Adjacent Islands”, including the North as the territory of the Republic of Korea, has been among those that were most controversial. The article is definitely an embodiment of Korean nationalism.¹⁵ When they enacted a written constitution they dreamed of an independent Korea; it must have been unthinkable for the Korean founding fathers to establish the republic of Korea only in the South, for they had been so strongly aspiring to establish a free, independent Korea for many long hard years and had never imagined a division of Korea, much less by foreign hands. They surely intended independent Korea to be the direct descendant state of the Empire of Korea, the last state before Japanese rule, through linkage of the government-in-exile in Shanghai. With Article 3, North Korea has been regarded *de jure* as an integral part of Korea in the South by the court,¹⁶ although the North is not under the *de facto* control of South.¹⁷ And North

15. Dai-Kwon Choi, *Heonbeophak-Beopsahoehakjeok jeopgeun*, pp. 134-135.

16. A series of judicial decisions have been handed out on the premise that North Korea is *de jure* an integral territorial part of the Republic of Korea. See Supreme Court of the American Military Government Decision of March 24, 1948(1948 Hyongsang 10); Supreme Court of the Republic of Korea Decision of September 26, 1958(1958 Hyongsang 352); Supreme Court of the Republic of Korea Decision of March 22, 1983(82 To 3036), Constitutional Court Decision of April 2, 1990(89 Honka 113), etc. For those cases above and others, see Chong In-Sop, ed., *Hangukpanryegukjaebeop* (Korean Case International Law), (Seoul: Hongmunsa, 1998), pp. 97-108.

17. Dai-Kwon Choi, “Hanguk heonbeopui jwapyo-‘yeongtojohang’ gwa ‘pyeonghwajeok tongil

Koreans are as a matter of law, Korean nationals. The first National Assembly had 100 or so empty seats reserved for its Northern members, in case free elections became possible there as well.

A few scholars have challenged the wisdom and validity of Article 3. They argued that, since the North had effective control over north Korea, the clause did not carry legal validity, and was rather a practical command to recover the North by marching on it to realize unification. Consequently, they argued that the command to march north was not only impractical, but also caused a head-on clash with Article 4, which requires Korean unification policy to be peaceful, formulated and implemented on the basis of “the free democratic basic order.” They further argued that Article 3 was the constitutional basis of the National Security Act, which they interpreted as unconstitutional. They argued for the abolition of the Act, and also for the abolition of Article 3 by means of constitutional amendment, particularly since it obstructed peaceful unification, or at least because it has lost validity through evolutionary changes.

What the South claims it has over the northern half of Korea with Article 3 is a *de jure* claim of sovereignty, not a *de facto* claim of effective control, as already indicated earlier. This claim practically amounts to the argument that eventual unification will be realized under the Constitution so that no new constitution making is necessary for a reunified Korea, unlike what those who challenged the clause had argued. This conclusion can be obtained logically from a combined, harmonious interpretation of both Articles 3 and 4 together. Unification is nothing but a realization of Article 3 over the northern half of Korea. And unification should proceed peacefully on the basis of liberal democratic order. In answering the question of what kind of unification, it should be also a liberal democratic one in content. That is what Article 4 demands. Consequently, there is no conflict between Articles 3 and 4 at all.¹⁸ According to Article 3, the South denies North Korea its stateness, as does the North to the

johang” (The Location of Korean Constitution-‘Territory Clause’ and ‘Peaceful Unification Clause’), in *Saryejungsim heonbeophak* (Constitutional Law with Cases), 2nd expanded ed., (Seoul: Pakyongsa, 2001), pp. 557-579; Dai-Kwon Choi, “「Nambukhapuiseo」 wa gwanryeondo en jaeban beopmunjae-teukhi 「teuksugwangye」 ui uimireul jungsimeuro” (Legal Issues Related to the South-North Agreement), *Seoul Law Journal*, v. 34 no. 3°§4, pp. 1-38, esp. pp. 10-11 (1993); Dai-Kwon Choi, *Heonbeophak gangui*, p. 94.

18. See Dai-Kwon Choi, “Hanguk heonbeopui jwapyo-‘yeongtojohang’ gwa ‘pyeonghwajeok tongiljohang’; Dai-Kwon Choi, “「Nambukhapuiseo」 wa gwanryeondo en jaeban beopmunjae-teukhi 「teuksugwangye」 ui uimireul jungsimeuro.”

South (not only in practice but also on the probable basis of their constitution of 1998 articles 1 and 4). It is interesting that both South and North are members of the United Nations, however, in that the UN membership is open to all “peace-loving states” alone.

The National Security Act is constitutional to the extent to which, in a strict interpretation, only an action whose subversive nature(danger) to the liberal democratic order or to the legally established government is clear can be subject to punishment provided by the act. This interpretation is actually what the Constitutional Court approved with its decision of “partial constitutionality” in a National Security Act case.¹⁹ The National Security Act is constitutional, not on the basis of Article 3, but on the basis of Article 37 Section 2. If we stick to a strict interpretation of the National Security Act, furthermore, Article 3 of the South-North Exchange and Cooperation Act is not necessary.²⁰ Previously, however, many thought that any contact with a North Korean would be constituting a technically punishable crime under the National Security Act. Thus exchange or cooperation with a North Korean is made legal by Article 3 of the South-North Exchange and Cooperation Act, as they thought, if it is undertaken with governmental permission. This legislative measure was regarded necessary as the actual need for varied South-North exchange and cooperation has increased.

What will unfold in terms of nationalism and how is difficult to predict. But unification, however it may proceed, will no doubt offer a number of challenges to the Constitution. Having lived under the liberal democratic constitution, the majority believe that free democracy precedes the nationalism that embraces the North Korean government. A significant minority whose number is increasing particularly among young Koreans, however, appear to prefer nationalism to free democracy. Many of those who challenge the wisdom of Article 3 of the Constitution naively think that a new constitution-making, the so-called *Tongil honbop*(unification constitution), is necessary in order to accommodate both North and South in case of unification. It is hard to envision, however, what kind of political order would be produced from accommodating both the South Korean liberal democratic order and the North Korean totalitarian party political order. Unfortunately, however, there is no third way between pluralism and total-

19. Constitutional Court Decision of April 2, 1990 (89 Honka 113).

20. Dai-Kwon Choi, “Hanguk heonbeopui jwapyo-’yeongtojohang’ gwa ‘pyeonghwajeok tongiljohang,’ p. 576; Dai-Kwon Choi, “「Nambukhapuiseo」 wa gwanryeondoan jaeban beopmunjae-teukhi 「teuksugwangye」 ui uimireul jungsimeuro,” p. 27.

itarian single party system. Besides, such a position(for new constitution-making) will obviously be against the Constitutional commands of Articles 3 and 4. In particular, Article 4 constitutionally requires unification policy to be peaceful and based on the liberal democratic basic order of which pluralism is an integral part, as already mentioned.

4. Market Economy

Economic developments have proceeded along with Constitutional ones. The Constitution of 1948 was quite a socialist one in its provisions on economy, as compared with the one of today.²¹ The term “socialist” is used here in the sense that the means of production are owned or controlled by the community. The so-called economic constitution was composed of two parts: A few provisions in Chapter 2 on Fundamental Rights, and five provisions in Chapter 6 on Economy. The Korean Constitution is unique in that it has a chapter on economy. Among others, Article 18 Section 2 of the Constitution of 1948 is striking in that it provided for “the workers’ right to have equal shares in division of profit in money-making private enterprises as provided by the law,” along with the workers’ freedom to organize, bargain collectively, and collective action in Section 1. The guarantee of property rights clause of Article 15, which originated from the German Constitution of 1919(the so-called *Weimar* Constitution), is also unique in its emphases on the public nature of private properties. It provided: “① The rights of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by law. ② The exercise of property rights shall conform to public welfare. ③ Expropriation, use or restriction of private property for public necessity may be carried out by law, but compensation thereof shall be made with payment of appropriate compensation as determined by law.”

Chapter 6 provided for the basic constitutional principles of economic order. They were more a blue print for the future rather than the guiding, binding principles for the present at that time in that the Korean economy was yet to be built. At the outset, Article 84 provided the basic basics for economic order: “The economic order of the Republic of Korea shall be based on the principle of the real-

21. Dai-Kwon Choi, *Heonbeophak gangui*, pp. 152-154.

ization of social justice and for the balanced development of the national economy to fulfill the basic living requirements of all citizens. The economic freedom of the individual shall be guaranteed within the limitations.” Article 85 provided for the principle of state ownership of the mines and all other important underground resources, marine resources, water power, and natural powers available for economic use; Article 86 provided for land reform(the principle of lands to tillers); Article 87 provided for the state or public run principle of important transportation, communication, banking, insurance, electricity, water supply, water use, gas, public interest businesses, and the state control principle of foreign trade; Article 88 provided for the transfer to the state or public ownership of private enterprises or the control or supervision of their management according to the necessities of national defense or the living requirements of citizens as provided by the law; and Article 89 provided for the principle of compensation in case of the expropriation, use, or restriction, of licenses related to Articles 85 through 88.

The question arises of why the Constitution of 1948 had prescribed a socialist economic order for Korea. Perhaps a multifold answer may be in order. North Korea was an industrial area whereas South Korea was largely agricultural when Korea was divided. Extreme poverty had prevailed throughout Korea during Japanese rule, especially so in the latter years since Korean resources, human and natural, were heavily extracted for the Japanese war effort. The poverty continued for years following the end of World War II because most public and private enterprises and factories in Korea that had been owned and run by the Japanese stopped running and producing even daily necessities due to shortages of raw materials, skilled workers, and entrepreneurs following the Japanese departure. Particularly in the South, there were not many Korean manufacturing enterprises worthy of such name, except for formerly Japanese owned ones. Those formerly Japanese owned factories, businesses, and lands were now placed at the hands of the government.

At the backdrop of the dire economic situation, therefore, it seems natural for many, especially intellectuals, to dream of socialist ideals, among others, state leadership and equal provision of living requirements, to quickly build the national economy of Korea. In fact, the origins of socialism in Korea went back to the Japanese period during which many of the nationalists were also socialists for whom socialism was the favored way of the nationalist movement against Japanese capitalism. Under the tutelage of the Soviet Russian military occupation authority, moreover, a socialist society, a Stalinist one at that, was created in

the North in a keen competition with its Southern capitalistic counterpart. Consequently, the founding fathers of the South Korean Constitution must have been aware of this fact. Such awareness must have influenced them in their constitution-making task. For example, socialist land reform according to the principle of expropriation without compensation and distribution without payment, had already been undertaken in the North in 1946. Of course, land reform was absolutely necessary in South as well. During the Japanese period there were only two classes, a small number of Japanese and their collaborating Korean landlords and the majority Korean tenants in a largely agricultural society. The land reform in the South was conducted following the principle of expropriation with compensation and distribution with payment as a major socio-economic project of the first priority by the newly established government in 1948-1949. With the land reform, the landlord class has completely disappeared from the Korean social scene.

Other socialistic constitutional provisions, however, eventually gave way beyond recognition to the present ones of the market economy as the strong need for building the national economy arose both in competition with the North which was ahead of South until the early 1970s and for the national aspiration to be a self-reliant country in the world. The change of the economic constitution was accomplished by way of the years of Constitutional Amendments. In 1954, Article 85 has changed to the provision "Licences to exploit, develop or utilize mines and all other important underground resources, marine resources, water power, and natural powers available for economic use may be granted for a limited period of time in accordance with the provisions of law"; the foreign trade Section of Article 87 changed to, "Foreign trade shall be placed under the control of the state in accordance with the provisions of law"; and Article 88 became, "Private enterprises shall not be transferred to the state or public ownership or their management shall not be controlled or supervised except as specifically provided for by the law for the necessities of national defence or the living requirements of citizens."

In 1962, Section 2 of Article 18, "the workers' right to have equal shares in the division of profit in money-making private enterprises" was completely deleted from the Constitution; in the principal provision of economy in Article 84, its second section principle of "the economic freedom of individuals" has now moved up to the first section of Article 111 of the new Constitution and the first section principle of the economic regulation and control for social justice and the balanced development of economy has moved down to section two of

Article 111; and the former foreign trade clause changed to Article 116 of the new Constitution, “The state shall foster foreign trade and may regulate and coordinate foreign trade.” Since then, the economic constitution has further changed a number of times up to the present. Chapter 9 of the Constitution is now on economy, and Article 119 is the constitutional principles clause of economy with its Section 1 providing for the principle of respect for the freedom and creative ideas of individuals and enterprises in economic affairs and its Section 2 providing for the principle of economic regulation and coordination for maintenance of the balanced growth and stability of the national economy, for ensuring of proper distribution of income, for prevention of the domination of the market and the abuse of economic power, and for democratization of the economy through harmony among the economic agents.

Specifically with its provisions, the present Constitution has heeded the emerging socio-economic requirements of Korean society other than what were mentioned above as economic growth has further progressed. They include Article 35 for environmental protection in the form of human rights, that is, the environmental right; Article 122 for the efficient and balanced utilization, development, and preservation of the land of the nation; Article 123 for the comprehensive development and support of the farm and fishing communities and for the protection and fostering of small and medium enterprises; Article 124 for consumer protection; and Article 127 for the protection of science and technology and the system of national standards. No doubt, they are the constitutional responses to the political and socio-economic demands that Korea and any industrialized and post-industrialized society of the world would make to have a living environment deserving of human dignity: Environmental protection, consumer protection, development of science and technology as well as sustaining economic growth.

Through the 1960s, 1970s, and 1980s, the Korean economy has attained gigantic growth with a series of government-led economic plans. In the 1990s, the state intervention into the market economy has now begun to be a liability. Today, the new creed of neo-liberalism has become the prevailing theme for the economy, and accordingly the relaxation or the elimination of economic regulations has been the motto for the sake of the market economy. The economic crisis of 1997-98 at the level of per capita income around \$10,000 has forced the government to reassess its leadership role in economic growth. The economy is now too big and complex for the government to intervene in the ways that they were accustomed to in the past. Now the catch phrase of “law and principle” is

for the government, and that of restructuring, transparency, and corporate ethics are for business to take on board. In the meantime, the power of organized labor has grown to such an extent that it now makes itself an acknowledged partner of national affairs. Today, the labor-management-government committee, a functional representation institution, has become a fixed institution in Korea in setting the national agenda, including wage and labor-related economic policy matters.²²

Naturally, the Constitutional Court has been playing an important role for the sake of law and principle or the rule of law in economic law matters including regulatory legislation and labor law. Numerous constitutional decisions have been handed out to determine the constitutionality or unconstitutionality of regulatory economic legislation at issue. And jurisprudentially, the equal protection of law clause of Article 11, the freedom of occupation clause of Article 15, the property right clause of Article 23, and the legislative restriction of freedoms and rights in case of necessity clause of Article 37 Section 2 have been the most frequently relied-upon constitutional clauses on which to review the constitutionality of economic legislation. Along with the economic rights clauses and Article 37 Section 2, the theory of legislative discretion, the so-called double standard for the economic rights vis-a-vis political rights, the rule against excesses, the doctrine of proportionality and/or the protection of confidence(trust) doctrine has been mobilized by the Court for its constitutional decision-making involving economic law.²³ It is hard to claim, however, that consistent theories or doctrines have emerged from its decisions. The nature of Chapter 9, particularly that of Article 119 Section 1 and Section 2, in their relationship with those economic rights clauses is not clear-cut, despite its constitutional decisions.

Here we have the four groups of the constitutional clauses to interrelate with each other when determining the constitutionality of economic legislation: the economic rights clauses, Article 37 Section 2, Article 119 Section 1, and Article 119 Section 2.²⁴ When the property right is involved, not just the four, but the five with the four above plus Article 23 Section 1 Paragraph 2 and Section 2, have to

22. Dai-Kwon Choi, *Heonbeophak gangui*, pp. 165-166.

23. See Ji-Sung Chong, *Gyeongjaegyujapbeop gwa wiheonsimsa* (Regulatory Legislation of Economy and Constitutional Review), Seoul National University doctoral dissertation(2001); Sok-Wan Kang, *Gyeonjaeipbeopui hapbeopseongsimsagijunae gwanhan yeongu-heonbeop-jaepansoui gyeoljeongryeul jungsimewo* (Study on the Tests for the Constitutional Review of Economic Regulatory Legislation-With the Particular Focus on the Constitutional Court Decisions), Seoul National University Master of Law Theses(1997).

be interrelated with each other for a meaningful constitutional interpretation. Particularly, the relationship between Article 119 Section 1 and its Section 2 is thorny. The problem of which one of the two Sections should be relied upon is not capable of being solved automatically with any of the interpretational rules, especially that of literal interpretation alone, in a particular constitutional case involving economic law. If you are a neo-liberalist, your reliance will be more on Section 1, and if you are in favor of regulation, you can just as well rely on Section 2 to accept the justification of the particular regulatory legislation at issue. Then, not jurisprudence but your ideology or your economic conviction or theory will determine the outcome.²⁵ More or less similar interpretational problems are yet to be solved with the four groups of constitutional provisions on economy. One thing that has been made clear thus far is the fact that economy became a major area of human activities that has become subject to the rule of law rather than the rule of man (e.g., personal ties, etc.) in the Korean social scene. More and more litigation cases are expected to be filed at courts and at the Constitutional Court to test the legality and/or constitutionality of economic actions taken.

5. Concluding Remarks

Above, we have surveyed the constitutional developments on the three fronts

24. Thus far, debates have been conducted more on the nature of the economic order which the Constitution envisions in its provisions than on the validity, especially the legal binding force, of the provisions of the Chapter 9 (on economy) and on the four-way interrelationships of the Article 119 Section 1, Article 119 Section 2, economic freedoms and rights provisions, and Article 37 Section 2. The nature of the economic order envisaged in the Constitution has been characterized variously as that of social state, social market economy, or mixed economy. See, for example, Mun-Hyon Kim, *Jaesangwonui sahoejeokgusokseongae gwanhan yeongu-Sahoegukgaui gyeongureul jungsimeuro* (A Study on the Social Restraints on Property Rights-With the Focus on the Case of *Sozialstaat*), Seoul National University Doctoral Dissertation (1987), pp. 122-130; Jok-In Hwang and O-Sung Kwon, *Gyeongjaebeop* (Economic Law), 5th ed., (Seoul: Bopmunsa, 1996), pp. 31-45; Sun-hun Chong, *Gyeongjaecheonbeop* (Economic Constitution), (Seoul: Bopmunsa, 1993), pp. 219-233, etc. Consequently, the legal binding force of the provisions of the Chapter 9 either in their own right or in their relationship with the economic freedoms and rights provisions and the Article 37 Section 2 is yet to be seriously researched, however. It is because constitutional litigation has become quite active so that we should have the binding or the guiding principles for constitutional decision making.
25. See Herbert Hovenkamp, "Fact, Value and Theory in Antitrust Adjudication," *Duke Law Journal*, v. 1987, pp. 897-914.

of democracy, nationalism, and market economy in association with the political and socio-economic developments in Korea. Following the Second World War Korea started its existence with its undeniably liberal democratic written constitution. The gap between the written constitution and the non liberal, non democratic, authoritarian practices were one of the outstanding features for almost four decades. Today, the written constitution has become a living document for Korean democracy. In the meantime, a thriving market economy has also successfully been built on the war-torn, poverty-stricken Korean soil with the full backing of the written, market economy oriented constitution, which once prescribed a socialist economy, and with that of the Constitutional Court. National unification, which the written constitution prescribes to be proceeded peacefully and on the basis of liberal democratic order in terms of policy and content, has, however, yet to be realized. Nevertheless, what stands out is the fact that the rule of law has become a far more important and relevant force of society today than in the past, although the rule of man has not completely disappeared from the Korean legal culture yet.

Choi Dai-Kwon teaches graduate constitutional law and sociology of law courses at the Seoul National University. Choi is Professor Emeritus of Seoul National University. Choi also teaches undergraduate and graduate constitutional law and sociology of law at Handong University, Pohang, where Choi is Chair Professor. He published a number of books which include *Beopsahoehak*(Sociology of Law, 1983), *Yeongmibop*(Anglo-American Law, 1986), *Heonbeophak-beopsahoehakjeok jeopgeun*(Constitutional Law with Sociological Approaches, 1989), *Tongilui beopjeokmunjae*(Legal Problems with Unification, 1990), *Beopkwa sahoe*(Law and Society, 1992), *Heonbeophak gangui*(Lectures on Constitutional Law, 2001), *Saryejungsim heonbeophak* (Constitutional Law with Cases, 2001), and *Beophak gyoyuk gwa beophakbangbeopron*(Legal Education and Legal Methodology, 2003). He has also written a number of articles which include “Jeongchikaehyeokeulwihan myeotgaji saenggak”(Some Thoughts on Political Reforms, 1992), “Hangukheonbeopui jwapyo-’yeongtojohang’ gwa ‘pyeonghwajeok tongiljohang”(The Location of Korean Constitution-’Territory Clause’ and ‘Peaceful Unification Clause,’ 1992), and “Seonhan sahoeui jogeon-beopchijuuireul wihan damron”(Prerequisites of Good Society-Discourses for the Rule of Law, 1999), “Heonbeopgwa dangnaeminjuui”(The Constitution and In-Party Democracy, 2001), “Heonbeopui yeonsokseonggwa pyeonhwaegwanhan damron-Jeontonggwa sahoejeok paeseupeul jungsimeuro”(Continuity and Change in Constitution-With the Particular Focus on the Traditional Culture and Bad Usages, 2003), etc. Choi’s current research interests lie in legal education reform, legal-Sociological methodology, community and state.