

The Errors in Korea's Constitution and Liberal Constitutionalism

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The subject of this paper is to explain errors in the economic constitution of Korea. Generally speaking, a constitution consists of two kinds of rules: organizational rules and the limiting rules. However, the economic constitution of our country attaches too much importance to the former while neglecting the latter that defines the limits of governmental authority. The reason for such a neglect is that the constitution starts from the false premise that government is omnipotent and moralistic, namely from the romantic Platonic-Hegelian view of the State. The economic constitution can be considered as one for an unlimited democracy, and our government is limitless in its political power; so the constitution suffers from "fatal conceit" (Hayek 1988). In order to limit the political power and to protect personal freedom effectively, limiting rules have to be introduced into the constitution. The Rule of Law, or the political ideal of liberalism, can be proposed as the rule that effectively constrains the arbitrary power of government. It makes it possible for human beings to live together in prosperity, freedom, and peace.

Keywords: constitutionalism, liberalism, limiting rule, unlimited democracy, knowledge problem, constructivistic rationalism

Introduction

How can we achieve a social order in which everyone can live together freely in peace and prosperity? If this question is to be dealt with either in theory or in practice, there are two undeniable premises which must be taken into considera-

tion. They are related to human nature.

The first is the premise that knowledge shared by every human being is incomplete and uncertain. That is, human reason is limited. One who claims to know everything completely is one who denies being a human. Every human being has limitations in his/her knowledge. “Knowledge problem,” so called by the Nobel Prize winner Professor Hayek (1952),¹ is so fundamental to human life that life itself is considered a process of acquiring knowledge.²

The other is the fact that there is nobody that can be an angel: If one pretends to be an angel, it would be equivalent to denying being human. One may be altruistic, but an altruistic action itself is selective. There is a limit to altruism (Epstein 1998: 136).³ Universal altruism is never possible. Fundamentally, human behavior is based on incentives.

These two facts are obvious and undeniable. These are the elements that constitute human nature and the irreversible human condition. Refuting them would be a pretense of knowledge and moral arrogance.

When examining the constitutional law of a nation as a superstructure, theoretically or practically, one must start from these two facts. A constitution based on the presumption that the government is pure and saintly—devoid of self-interest and devoted to the “national interest,” whatever it may be, and on the premise that the government is so omniscient as to plan, to modify and to control the economy and society in the best direction—is founded on romanticism (Buchanan 1998: xi) and unrealistic, infested with critical flaws. Such a constitution suffers from “fatal conceit” (Hayek 1988).

The purpose of this article is to analyze Korea’s economic constitution on the basis of these views. The main arguments of this paper are as follows:

1. Korea’s economic constitution does not take the knowledge problem into consideration. On the contrary, it is based on the assumption that the state (government) is omnipotent as well as virtuous. This Hegelian theme

1. Knowledge problem is absolute since we can never fully explain our own mind. Therefore, Hayek argues “there also exist[s]...an absolute limit to what the human brain can ever accomplish by way of explanation” (1952: 185).

2. Riedl refers to “das Leben als erkenntnisgewinnender Prozess” (Riedl, 1987).

3. Epstein maintains rightly: “The practice of universal benevolence generates an ideal distribution of goods... Unfortunately, that level of benevolence is unattainable in a real world setting”(1998: 136). He holds that altruism is not universal but selective, so that it is of an egoistic nature in a real world setting.

- underlies Korea's economic constitution and provides the reason why the constitution has not been able to contain effective apparatus to check discretionary government power.
2. Because of these two fallacies, it is not "politics by principle" but "politics by interest" (Buchanan 1998) that prevails in our country. That is, our democratic government is unlimited. This aspect is due to the errors of the constitution, which is due to "constitutional failure."
 3. What is most urgently needed in our country is constitutional reform so that the democratically elected government's power can be effectively leashed. Liberalism and democracy are compatible when the power of a democratic government is effectively limited. The third point is that the principle of the rule of law is so important in limiting the political and legal authority of our government that constitutional stipulation of this principle is urgently needed for the economic growth and stability of the Korean economy.

Before dealing with these three points, we shall outline the economic constitution of Korea.

The Constitution of Korea and the Platonic-Hegelian View of the State

Korea's constitution guarantees equality before the law: freedom to choose jobs, to move, freedom of the press and to publish; the right to privacy in communication; to pursue art and research; and private ownership. These rights to liberty construe from the supreme value of the constitution that is human dignity. The constitution also includes that personal economic creativity and activity must be respected. These values are the foundation not only for exchange in the market but also generally speaking for human civilization.

As long as the State upholds these rules of conduct and does not fail to protect individual freedom and private property, from outside or inside, a free market economy can be sufficiently established. That is because these rules of conduct are the most important conditions for allowing the formation of a "spontaneous order" of market without intervention.

However, these are not the only clauses that make up the constitution. There are many other articles regarding exchanges in the market economy. What these have in common is that they connote the intention to artificially re-direct and

change the distributive and allocative outcome spontaneously resulting from innumerable interactions of individuals and groups participating in the market economy. In fact, every legal-economic concept used to form constitutional articles points at the result of the market mechanism.

Thus, it is important to know how the economic constitution perceives human beings and how it sees the market economy and state. To deal with this question, we shall take a closer look at the constitution of Korea.

1. Distrust of the Market Economy

How does Korea's economic constitution view the free market economy? We may derive an answer from the constitutional articles' concepts and the legislative and economic policy targets of the constitution.

As the constitution attempts to support the state's purposes through modification or changes of the market mechanism, it is inevitable that law and policy based on that constitution have restraints and regulations on freedom of investment, use and disposal of one's wealth, freedom of exchange and so on.

As we can see from the list of Constitutional Articles (see following box), there are too many articles that contradict the important values of a free economy. It is because the market economy is under suspicion while the government is blindly trusted.

Our attention, especially, is on the fact that government regulations and plans serve heavily to carry out the purpose of bringing equality in distribution among individuals, regions and industries.

Constitutional Articles:

- Prevention of the concentration of economic power and the abuse of it.
- Government intervention for the promotion of a balanced economic growth and stability.
- Promotion of national economic growth through the innovation of science and technology and the development of information and human resources.
- Limitation of property ownership to achieve efficient and balanced development of land and resources.
- Promotion and protection of medium and small businesses.
- Promotion of regional economies to achieve balanced economic development among regions.

- Realization of economic democracy.
- Advancement of labor rights and a national effort to increase employment.
- Sustenance of the optimum income distribution level.
- Provision of housing for people through a housing development policy.
- Provision of social security and an increase in social welfare.
- Equality in education.
- Support for farmers and fishermen.
- National support for every citizen's health.
- Promotion of women's rights and welfare.

First, in Korea's constitution, market participants are dichotomized as follows: farmers and fishermen vs. city residents; workers vs. employers; regions vs. the center; small and medium businesses vs. larger businesses; female vs. male; youths vs. adults; the poor vs. the rich and so on. In general, the division is between the weak and the powerful.

Second, Korea's constitution sees that the free market breeds a lot of undesirable results: They are problems with monopolies, disproportional development between regions and industries, inequality in income and cyclical instability, depression, and environmental concerns.

Third, disorder prevails in the market economy because there is no government plan and regulation, so that irrational outcomes arise. This means that the distributive and allocative outcomes that resulted from free interactions of human beings cannot be taken as they are, but need correcting and changing

Korea's economic constitution reflects this critical view of market order, and the constitution demands that the government plans and controls accordingly the "disorderly" market system with certain public purposes.

The pessimistic viewpoint of Korea's constitution on the market economy can be summarized as follows: As a market economy is disorderly and anarchistic based on the self-interest of business people, if it is unplanned and left alone, cyclical depressions will be inevitable;⁴ As capitalism expands, the economic

4. This is theoretically similar to Marx's and Keynes' views on capitalism. Korea's constitution also shares characteristics with other criticisms of capitalism. For example, Veblen argued for a direct control of the economy by specialists and engineers while disapproving of the spontaneity of the market process. There were others who followed this fashion. The most notable would be K. E. Galbraith. He also regarded the price system as something devised by the powerful and very inappropriate. Korea's constitution was consistently influenced by these.

status of farmers and fishermen will become relatively lower, and due to the economic concentration and monopolies by larger companies, small and medium companies will face bankruptcy; Thus, special protection has to be provided to farmers, fishermen, and small and medium companies.

While Korea's constitution harbors a severe distrust against a market economy, it holds an unlimited trust in the government. So the constitution authorizes unlimited power to the government allowing it to redirect and control the market-driven distribution and allocation of resources.

2. Korea's Constitution and Its View of the Paternalistic State

Two conditions have to be fulfilled if a government is to be able to successfully "manage" and direct market mechanism. The first condition is that the government has to hold complete knowledge required for planning and control. What we must note here is that knowledge not only takes the form of science but is also one pertaining to concrete socio-economic circumstances. A specific market outcome is knowledge in connection with a specific time and place.

The second condition is that the government has to disregard its self-interest entirely and must have a purely altruistic motivation. It means that politicians and bureaucrats are moral persons who have devoted themselves to the common good which is outcome-oriented

Korea's constitution starts from the assumption that government people, or the rulers, do have perfect knowledge and an altruistic motivation.⁵

Then, how does Korea's constitution see individual citizens, the ruled? It divides the ruled into the strong and the weak. It considers the weak as stupid and unable to feed themselves while the strong are selfish, in pursuit of profit, and immoral. Therefore, the constitution requires the government to protect the weak from the strong.

Interestingly, the economic constitution brings about another class. It is the group of bureaucrats, politicians, and intellectuals that hold the power to control

5. This paper may be viewed as containing the assumption (in the constitution) that policy makers are to be moral and altruistic and they always pursue the best public interest. This assumption is sometimes criticized as being a very outdated view and against the modern theory of representative democracy; but what I attempt to do here is only to explicate the facts that Korea's economic constitution assumes moral and altruistic motivations by its policymakers, the same as an assumption of welfare economics.

and plan the market process on the pretext of the common good such as protection of the weak and economic development. This group can be called “social engineers.” They are treated as the owners of omnipotent ability and as moralists. One can say Korea's constitution is based on Hegel and Plato's ideal State.

That workers are stupid and capitalists are sinful, while intellectuals are so all-knowing and saintly as to seize political power is elitism, which is characteristic of the French Enlightenment. So for example, Rousseau saw the masses of the people as “a stupid pusillanimous invalid” (Sowell 1987: 136).

Korea's Constitution and Knowledge Problem

Are people in the government and experts really omnipotent? Are participants of the free market intellectually inferior? The most important problem for people's lives is the knowledge problem. This is the inevitable problem for every human being. The knowledge problem was proposed by Hayek in the famous “Socialist Calculation” debate. The knowledge problem can be outlined as follows:

1. Knowledge is not concentrated at any one point but exists in each individual at work. Hayek called this the dispersion of knowledge.
2. In order for one to achieve his/her goal, one must obtain the knowledge possessed by others. But one cannot obtain all existing knowledge existing because it is dispersed throughout society.
3. Human knowledge is always incomplete and selective. In this sense, people are incapable of knowing the whole, and this incapability applies to all human beings.

These are the theoretical positions from which we assess and criticize the economic constitution of Korea.

1. Planning and Control, and the Knowledge Problem

In order for a social reformer to correct market outcomes, s/he needs to have complete knowledge about specific economic circumstances. That is because distributive and allocative outcomes are determined by the economic circumstances of a specific place and time. But obtaining all local knowledge in society is impossible.

Why is it impossible? Because local knowledge exists but is scattered among millions of people who work in different time and places. While one economic subject would have knowledge of circumstances in her/his specified field, another's knowledge would be different and pertaining to her/his own specific circumstances (Hayek 1937).

There are types of knowledge that can be statistically measured, but some will not only be impossible to measure but also impossible to be articulated in words. This is implicit knowledge, but what is more significant is this type of knowledge. Some of this knowledge exists beyond our conscious realm. Traits and talents, spontaneous (re)active ability, and inspiration belong to implicit knowledge. It is basically impossible for government bureaucrats and politicians as well as experts to collect and process it all.

Because of this, socialist planning and control of the economy is impossible rather than inefficient.⁶ This stance applies not only to “wholesale socialism” but also to partial planning and control of the market and to market based interventions. In this sense, arguments that government intervention of private companies, hospitals or education is needed in order to mend the so-called “market failures” is not correct at all because they are overlooking the knowledge problem, so maintains Richard Epstein.⁷ An economic subject in a certain field has knowledge of that field only. There is no one in the world that possesses all the knowledge scattered everywhere.

The same goes for the social scientist. S/he is not able to foresee concrete outcomes resulting from the interactions of millions of people. This is because s/he cannot know all the individual factors that shape the outcomes. Hayek, therefore, argues that the only thing that a social scientist can do is to explain the

6. Although the incentive-oriented and opportunistic behavior of bureaucrats and politicians did have a role in the collapse of socialism, what we are emphasizing here is the fact that it was impossible for the social reformers to acquire the knowledge needed in its perfect form. Generally speaking, even a controlling measure specifically implemented to achieve a specific result cannot be successful due to the knowledge problem.

7. Some may argue that using Hayek's knowledge problem to criticize socialist economy cannot be used to criticize government interventions in a market-based economy. Professor Richard Epstein of Chicago Law School, however, makes an interesting point: “In my view there is no sharp dichotomy between government regulation of wages and prices on one hand and government ownership, on the other hand. If the downfall of socialism comes, the inherent gaps in information available to public officials and from the inability of legal rules to constrain their self-interested behavior, *“the forms of modern regulation are subject to the same criticism”* (Epstein 1995: xii-xiii). The Forms are, of course, government interventions in a market-based economy.

principle or do predict the pattern.⁸ What is derived by the scientist cannot help the planning and control by the government. It only shows that government planning and control of the market economy is impossible because it is not a positive prediction about what will happen but a negative one about what does not happen.

If the government admits to being incapable of collecting all the local knowledge of individuals, it is simple for them to overcome the knowledge problem: They must allow the individuals to utilize her/his knowledge. The best will be brought out when each economic person uses her/his knowledge freely.

This is what freedom means: the *raison d'être* of freedom. The liberal economic principle that government planning and regulation must be limited to the minimum is based on the fact that dispersed knowledge needed to plan and regulate the national economy cannot be collected and processed.

2. Korea's Constitution and Spontaneous Order

There is no criticism more frequently used about the market economy than about its lack of national economic plan and its anarchistic character. Accordingly, the market economy is believed to be planned and regulated by a visible hand. There always has to be someone to keep everything in order. This is based on the belief that order is something that can be maintained by an outer force, one that must be omnipotent. Is this belief correct?

Order is very important. Without order individuals would not be able to carry out their lives because predictions about other people's behavior would not be possible. A world without order can not be perceived or conceived, and it is meaningless. Inference is possible only when there is order.

If government regulation and planning is necessary to establish order, one could say that the less government control, the more chaotic and less prosperous the economy should be expected to be. However, the reality is entirely different. All nations with a market economy have prospered without exception. Korea is one of them as is the U.S. and Europe. How can this be explained?

There must be order in capitalism. It is not a concrete but an abstract order, an unplanned order: it is what Hayek called "spontaneous order." But we can not

8. The best we can do is to understand some of the rules by which the mind operates and offer an "explanation of the principles" (Hayek, 1967).

observe it directly with our own eyes. We can only construct it theoretically.

We can confirm here that the economic constitution of Korea overlooks the existence of spontaneous order as an important category of social order. The constitution commits the same error as the Western way of thinking based on the dichotomy since Sophist and Aristotle: the division of all phenomena into “natural” and “artificial.” This dualism neglects the order, neither natural nor artificial, namely spontaneous order. The spontaneous order is “the result of human action, but not the execution of any human design” such as language, custom law, moral rules, and market order.

The Constitution of Korea knows only the “artificial” order, the order that is planned, man-made, intentionally designed, such as a regulated market order and a central plan economy. Therefore, the Constitution suffers from the superstition of “constructivistic rationalism.”

Then how can order be possible when it is not planned? The order of a market economy is formed through two mechanisms. One is self-coordination and the other is self-control (Kasper and Streit 1998), both of which are run by millions of economic agents without the need of outside help. Through these two mechanisms, a large number of people are coordinated with their interests and at the same time controlled through punishment and reward for their actions. The order in a market economy is established autonomously because of these two mechanisms.

The reason a large number of people can coordinate unintentionally is due to the mechanism that collects and transfers knowledge to everyone, the knowledge that cannot be collected at all in its entirety by individuals and groups scattered around the world. This mechanism consists of two parts: one is the price system and the other is the behavioral code, or rules of conduct.

The price system reflects the local and personal knowledge of millions of economic subjects. The behavioral code provides the boundary within which an individual can act freely. Rules of conduct transfer knowledge about what actions cannot be taken by individuals. They do not contain the purposes or motivation for actions; they do not prescribe but proscribe particular actions so they transfer the knowledge of what people should not do.

Thus, we need to focus on the fact that in spontaneous order there cannot be commonly held national purposes such as distributive justice, economic growth target, and balance in development. Instead, there are only behavioral codes commonly observed. Spontaneous order can be called “private law society.”

The price structure and behavioral code system work as a control mecha-

nism. The market economy will be in disorder if the use of erroneous or obsolete knowledge is allowed. Thus, in a market economy, the working of this mechanism is that erroneous knowledge faces penalty and new and successful knowledge is created and rewarded. This is the control mechanism.

Whether a particular knowledge is right or wrong becomes clear through the incentives of profit and loss. Because of the risk of incurring loss or being ousted from the market, economic agents eliminate errors in knowledge, discover new ones, test them, and attempt to copy what has been successful.

And those who breach the behavioral codes receive a negative reputation or face exclusion as business partners. This mechanism, capable of persisting without recourse by the government force, is an important research subject in institutional economics.

3. True and False Criticisms of the Market Economy

Now we will look at what the true and false criticisms of the market economy as reflected in the economic constitution of Korea. Although not every criticism against the market economy can be analyzed here, we can highlight a few.⁹

The Constitution is based on the criticism of its instability and on the concern about the possible market crisis. This is not to deny certain markets have shown instability and fluctuations at times. Also we do not deny the fact that technological breakthroughs and cultural changes may even debase the pattern of existing economic activities. When the market economy cannot accommodate shifts in people's preferences, the choice system and knowledge, we agree that instability can be triggered.

The Constitution is founded on the argument that government planning and control is needed to overcome this. But we must be aware that government intervention can achieve not only the political targets, but also it may end up bringing in yet more trouble because of the knowledge problem. When there is a crisis, it is especially important that the government lifts regulations which have restricted the economic agents' actions. It is important to broaden the boundary where one can develop and experiment with new actions.

The economic constitution of Korea conceives the ideal state of market as an

9. See Jeong Ho Kim (2004: 126-32) for interesting criticisms which are entirely different from the ones presented in this paper.

equilibrium state: balanced economic growth, balanced development of land and resources, and balanced economic development among regions. That the market moves toward an equilibrium state means that it is in the process of being homogeneous. The equilibrium is a static state. But what we need to understand is that the market is very diverse and dynamic. The very dynamism of the market is the motor for prosperity and development. In the world of dynamism, equilibrium cannot be achieved.

The effort of bringing balance, notwithstanding, by implementing government policy will never be successful. The market and social process is a process of creating and imitating successful knowledge, not a process toward equilibrium. It is an evolutionary process.

Although better described with Lamarckism than with Darwinian biology in its evolutionary process, the market is similar to a natural organism. Its adaptability to outer changes is excellent in that it solves the problem of knowledge most efficiently.

When there is change in the external environment, an organism starts operating to accommodate to the change. The same is true with a market economy. Self-coordination and self-control mechanisms accommodate and digest environmental changes and solve the problems that these changes pose to the market economy. Of course, the very foundation of this mechanism is freedom of action.

Korea's Constitution and Constitutional Failure

The second critical flaw of the economic constitution of Korea is its assumption that the politicians and bureaucrats will be extremely altruistic, devoting themselves to the public interest while obstinate to their self-interests and that they are bestowed with far too much power to plan and control the market economy.

We have to focus on where this approach sees the core problem of politics. This approach sees the problem of politics two different ways. One is Plato's question of "Who shall rule?" and the other is "How shall we change the ruler?" as Popper suggested.¹⁰ But we come to see that these questions are wrong from outset. Instead, the core problem of politics should be the question of how to

10. Popper suggested "social engineers" (*Sozialtechniker*) as an answer to this problem. His 'gradual social engineering' explains how he thought of government planning and control of the

limit as much as possible the power of the ruler.

1. Unlimited Democracy in the Constitution of Korea

How does the economic constitution view democracy? This question is connected to the core problem of politics that the Constitution represents: the question of who shall rule. The answer is clear since everyone will say “the best and the wisest.” This answer comes from John Stuart Mill who emphasized the importance of planning and controlling, thus, that of the elite.¹¹

Korea's Constitution understands democracy as a system to elect moralistic and well learnt people who will devote themselves to the common good.¹² This is the first stance that the economic constitution of Korea holds for democracy: Through the democratic method, it is intended that people should elect the “right people” as president and as lawmakers. The various clauses in the constitution, i.e., on the method of election, on state institutions in charge of planning and controlling of economy, as well as on the majority vote system are related to this intention.

The reason that the economic constitution of Korea upholds the “idealistic elites” is the belief that the best motivation and intention will bring about the best politics. Abuse of power is caused by the quality of a politician. For the Constitution, motivation is important.

The other view of how the Constitution sees democracy comes from the question raised by Popper. This view contends that democracy is a function of changing an undesirable ruler to another without shedding blood (Popper 1956: 144). Democracy's function of regime change goes together with a democratic election. It is believed that, in democracy, the ruler should satisfy the voters because of the threat to a change in the regime. This view understands democra-

market economy. He was an opponent of a free market economy and stressed the need for government planning and control for equal opportunity and public welfare. In this sense, Popper is an ‘enemy of the market economy as an open society.’

11. John Stuart Mill uses other expressions. They are “the most cultivated intellects” (Mill, 1977: 86), “thinking minds” (Ibid, 121), “the really superior intellects and characters” (Ibid, 139), quoted from Sowell (1987: 47).

12. This type of democratic theory belongs to the theories that study the source of power, such as the theory of sovereignty. For example Rousseau's thought of principle that sovereignty rests with the people. The theories on the source of law are of a similar kind. These are democratic theories related to the rule of the majority.

cy not as the rule of the majority but as a check system for the powerful. According to this view, democracy is a means to control the ruler by the voters.

However, the theory that sees democracy as a function of changing politicians can not totally evade the question of who should rule. It is because the core question always has to be to whom political power has to be handed. The answer is always “to the best and the wisest.”

Is this understanding of democracy by Korea’s economic constitution correct? The Constitution sees that the world is made up of the weak, the strong and rulers. The weak are stupid and always manipulated and sacrificed by the strong. The strong are very wicked. Although stupid, the strong are very talented in serving their self-interest. These two are the voters. And then there are the rulers. These people are morally and intellectually superior.¹³

How is it possible for these utterly ignorant people, the weak and the strong, to possess the ability to choose morally and intellectually superior leaders? How can they check the power of their rulers when they are so stupid? This is a contradiction.

In the world where morally and intellectually omnipotent elites exist, there is no need for a market economy or democracy. The omnipotent and super human can find what is the best law, morality and public interest for everyone and the ruled can just follow them. Thus, if we see as the economic constitution sees we do not need a democratic government.

If we see as the classical liberalists saw that every one of us has limitations in morality and intelligence, and as far as this limitation goes we are equal, it would be insane to empower the enormous number of government tasks to rulers who are not much different from us. What we are most afraid of is the politicians and intellectuals pretending to be intelligent and moralistic while in fact they are not because they force us to follow their legislation while disguised under the mask of intellectuals and moralists (Epstein 1998: 149).¹⁴

13. Democracy is a system where multiple parties freely compete to gain or retain power. Limitless democracy can be called “procedural democracy.” The significance of Public Choice (New Political Economy) is to clarify what legislation and policies take place when parties compete freely.

14. Epstein argues rightly: “The greatest danger with altruism stems not from its presence, but its presumed presence—that is, from the false belief that it plays a robust role in many political contexts.... It is...bolstered by the deep conviction that some government officials are well-trained, well-intentioned guardians of the public goods” (2001: 149-50).

2. Danger of Unlimited Democracy and the Failure of the Constitution

To change a regime without shedding blood is very desirable. The function of democracy to change the ruler as a means of checking the politicians' deeds and preventing abuse and misuse of political power is very important. But there is a limit to this type of control mechanism that works on a threat of dismissal.

1. Is a democratic regime change always good? For the one who is just replaced by another, it would be better than a revolution. But it is not guaranteed that the ruled benefit from a change of rulers; they could have a worse ruler. For Korea, what benefit did the people gain by changing the ruler? Has individual freedom increased? Has government control and regulations been reduced? Is the present president superior to the former ones intellectually and morally? No qualm against a peaceful regime change since it is very important indeed, but one must know that this is not all.
2. Does not the risk of losing their seat make politicians more immoral than moral? In the democratic system, politicians tend to prefer short-term policies to long-term ones. Political competition tends to drive politicians to opt for discriminative policies. Politicians throw special favors to voters' groups that would help them win their seats. They prefer spending rather than taxing, which results in a budget deficit. They prefer distribution to growth because growth is widely shared by a non-specific population while distribution is very visible to those who benefit from it. It has been well proven theoretically as well as empirically that democracy works this way (Min Kyung-Kuk 1993: 140-76; Kim Jeong Ho 2004).
3. The voters can not control and check deeds of the politicians in detail. Politicians therefore have monopolistic areas free from voters' watchful eyes. These monopolistic areas come about based on the institutional and information factors. The institutional factor can be explained as below (Min Kyung-kuk 1993: 119-39).

In a free market economy, consumer decisions are made every second. The time of choice is very much differentiated. In a democratic system, an election takes place every four to five years. As soon as an election is finished, there are substantial periods of time when politicians may stay out of the voters' vigilance. As a political process is characterized by its undifferentiation of a given time frame, control of politicians by voters is feeble. Because of undifferentiation of

political choice alternatives, the range of choices is very much limited. The items in election programs are supplied in a bunch rather than single pieces. There are likes and dislikes in those bundles. Those bundles contain different items designed to gain the majority of votes when it is summed up. The voters cannot choose only what they want. In contrast, in a market economy alternative choices are much differentiated.

The political process is also undifferentiated in terms of persons. In the political process, the quantity and quality of goods and services are supplied without considering an individual voter's preferences. Thus, political supply is uniform. In contrast, the market economy is very specialized according to individuals.

There is also the voter's lack of knowledge (Min Kyung-Kuk 1993: 85). One factor preventing voters from checking completely the politicians and government bureaucrats is that voters cannot acquire all the knowledge that politicians and bureaucrats have. Voters cannot go into their brains.

But besides that, there is another factor. Voters do not always necessarily profit from knowing completely about the politically supplied goods and services. It is because there are costs involved to gain this type of knowledge. The cost would be too much for one to gain a complete knowledge. Voters always lack knowledge because of information costs. This is called "rational ignorance" (Downs 1968).

The planners and controllers of government use their monopolistic areas in order to make profits for themselves. Corruption is an outcome of this autonomous area. People blame politicians for their stupidity, irrationality, immorality, corruption, uncertainty, short-term policies, inconsistency, and discrimination. They denounce these "unfavorable" phenomena for politicians' lack of historical consciousness or for their lack of will to reform. They argue that in order to eliminate the malfunction of the democracy, the election law has to be amended, or that more rational and moralistic politicians must be elected. They launch defeat campaigns against bad politicians or they join election campaigns for the wise and good ones. But all these efforts are not very useful. It is also not useful to change election laws and to restructure government bodies, parliament members, or decision-making processes.

There is a profound and basic reason for those malfunctions of democratic decision-making which are not removed by organizational rules. What is the reason?

The reason is simple. It is because there is no effective apparatus that limits the power of a democratic government, democratic legislation, and policy makings; democracy is not effectively limited. In this context we should give our

attention over to the question of what should limit democracy. The limitation of government power is the greatest task of a Constitution.

The economic constitution of Korea has failed to fulfill this task effectively. In the Constitution there is no efficacious brake on democracy, namely rules that limit the government (limiting rules). The chronic and ungraceful phenomena of the political system arise from constitutional failure, which means that the constitution does not limit democratic government effectively. Our democracy is an unlimited democracy.¹⁵ In this type of democracy, any law or any policy can be implemented, as long as it is accepted by the majority, although it may violate personal freedom and property rights.

The nucleus of the unlimited democracy is that legislation and policy makings are carried out by interest, instead of by principle (Buchanan 1998).¹⁶ Short-sightedness, discrimination, uncertainty, and inconsistency of a policy is made up, not of principles, but weaved out in the relation of interest, swayed by interests of specific interest groups or regions and ethnic groups in the process of securing supporting voters' groups.

Thus the central problem of politics is not "finding politicians who are the best and the wisest" or "how to change them to better people" but "how to limit the power of a democratically elected government." This is the core problem that liberalism has been struggling to solve for more than 200 years.

Constraining of Political Power and Constitutionalism

If we have decided to eliminate the question of "who should rule" as the core question of politics, we also shall overcome the politics and laws that are premised on moral and intellectual superiority. As the core problem is how to limit political power, the answer is to bind the government by principle. By what

15. Instead of asking the contents of the law and power, it puts weight on their source. Thus, unlimited democracy simply overlaps with the thought of the sovereignty-lies-on-people. Under this system, any decision-making based on the majority vote is recognized as justified laws, power and policies (Hayek 1979: 33).

16. The argument suggests strongly that whatever is done politically must be done generally rather than discriminatorily. The principle idea is that legislation should be general and non-discriminatory, that equals should be treated equally. This idea might be a constitutional principle, serving to promote political efficiency in the face of the scope for special interest politics that simple majoritarianism provides.

principle can the government be bound?

1. The Rule of Law and Constitutionalism

The “Rule of Law” is the principle for which the classical liberalists yearned. It is the condition in which a law gains its status as a law. This is the legal condition of spontaneous order. And only when nations enforce their laws that satisfy this condition are they entitled to use force. The condition includes (Hayek 1960; Hayek 1975):

1. The law should not be discriminative nor should it be applied discriminatively (generality principle).
2. The law must have a nature that is prohibitive to certain activities and should not contain certain purposes and motivations (principle of abstraction).

Only actions that breach others’ freedoms and property rights should be constrained by force. But actions that do not breach others’ freedoms and property cannot be subjected to the power of a state (Gerken 2000). All planning and regulation of the market process, distributive justice, and discriminative policies in favor of certain groups by the government are against the rule of law.

The rule of law is a principle to support policies and legislation that guarantee free exchange without discrimination. Economic policies such as tax and expenditure policies must comply with this principle. Flat tax system (as opposed to progressive taxation), non-discriminative environmental laws, and non-discriminative evaluation on public goods belong to this principle (Buchanan 1998: 147).

Only when the rule of law is stipulated in a constitution, then that constitution becomes a liberal constitution. And it carries out a dual function (Mestmaecker 1985). First, it is a guide for producing laws and policies. Whether the laws are produced by lawyers through their decisions or centrally produced by an Assembly is not important. What is important is this function of guidance for the lawyers and lawmakers.

Second, a liberal constitution has the function of limiting the act of producing laws by the politicians and bureaucrats, who always have the intention of being the master instead of being servant of the people.

Western nations that abided by this principle achieved a high standard of living through development in commerce and science accompanied by industrial

revolution. Their present prosperity should be seen to have emitted from the power of this constitutional principle. It made freedom, peace, and prosperity possible simultaneously.

We know well, however, that whenever they deviated from this principle, the West as the East had to face crisis and conflict as well as poverty.

2. The Rule of Law and Economic Success

There are benefits from the establishment of the Rule of Law:

1. Legislation and policies based on the rule of law may overcome the problem of knowledge since in the legislative and economic policy there is no requirement to analyze the cost-profit or predict the outcome of market process in detail. "Constructivistic rationalists" or "social engineers" are no longer needed.
2. The constitutionalization of the rule of law will not only be the guidance for the legislative process in the Assembly but also will help the common law in its self-sustainability, or self-organizing ability (Leoni 1992). Generally, laws are built up in a decentralized manner through legal suits and decisions. In this process, as is well known, previous cases play an important role in rulings. But if there is no guideline of the rule of law, the former cases lose their cohesiveness and consistency. It will be otherwise if the rule of law is upheld, self-organizing and sustaining ability of the law in the decentralized law production process will be increased (Buchanan 1998: 9).
3. In an unlimited democracy, the politician has to be corrupted even if he wants to refuse demands from interest groups and avoid "buying" votes by giving them special favors. It is because politicians who support policies without discrimination have to fall out. On the other hand, if the rule of law is stipulated in the constitution there will be no incentives to attract voters with preferential policies. Interest groups will also lose the incentive to demand policies in favor of their groups (Min Kyung-Kuk 2003: 262).
4. Under the rule of law, execution and management of laws will be easier. The proposition of Epstein (1995) that the simpler the regulation the better it is for a complex world can be applied to a constitution.

It will be very useful in execution and management of a constitution if so many clauses are discarded and switched to one, namely to the Rule of Law. The position that it is important to restrict political power with the rule of law, and it is

important to protect freedom, life, and property through this restriction is one that is held by liberal constitutionalism.

Constitutional Reform or Political Reform?

Numerous reform bills have appeared under the name of reform such as reform of election districts, realization of democracy within the political party, reform of the number of the lawmakers, change to the presidential re-election system and to the cabinet system, change in the number of proportional representatives, and the method in selecting candidates for the members of the National Assembly. Although these are separate bills they have one thing in common. They are bills focused on how to establish a political system to represent the interest of people in a better way. They belong to organizational rule, or the rule for government structure or political power structure, but not to limiting rule, namely rule for constraining the government. However, if we put a stronger restriction on the government activities and politics based on the rule of law, the problem with corruption and preferential policies can be solved. Activities of a rent-seeker can also be evaded.

Thus, the urgent task is not political reforms but the stipulation of the rule of law in the constitution. Without constitutional reform there is no way to solve the problems that have been tormenting us. Again, the series of political and economic problems we face today arose from the absence of the means to protect individual freedom by restricting government activities.

Democracy is in crisis not because of a lack of public participation but because there is no way for the constitution to put a limit on democracy. The participatory democracy theory does not see reality correctly.

The Participatory Government, People's Solidarity for Participation, and Participatory Democracy share their common purpose in achieving distributive justice or social rights. This is just unlimited democracy. Social right is one's right to steal from the other. Is not this democracy a plunder democracy?

This type of "snatching game" is never allowed in a market economy. The right that I have is possessed by others at the same time, thus my rights include the duty to respect others' rights (Boaz 1997: 59).

The "ideal speech situation" of Habermas and "discursive democracy" of Held represent the same theory with different names. They both uphold the position that politics is superior to the market. They all see that politics is a process in which

human beings find themselves progressing as moral beings. This is not only doubtlessly a romantic view but also a theory supporting hypocritical altruism.

The question of who should rule is of no much importance, as long as government activities can be restrained by the rule of law. That is why the wise thinkers of classical liberalism did not put much weight on what political bodies and processes were installed, that is the organizational rule. To them, what was important was to draw a line for the government not to cross, namely the limiting rule. How to elect the ruler was outside their interest. Without a system that puts harsh restrictions on the government, division of the three powers is meaningless.¹⁷

In the introductory section of the first book of his trilogy *Law, Legislation and Liberty*, Hayek declares that the division of the three powers has failed in modern society. For him, despite its purpose of protecting individual freedom when adopted, the division has not been effective in doing so.

His statement emphasizes how important it is to limit democracy through the Rule of Law. Buchanan, diagnosing the modern society as being in “constitutional chaos,” (Buchanan 1978) strongly urged reforming the constitution by introducing the rule of law into the constitution.¹⁸

The lessons that these great scholars want to show is the importance of the constitution in limiting the government's actions. Especially at the high tide of populism, the constitution should play an important role.¹⁹

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17. Many Korean philosophers are trying either to articulate the Confucian view of State minus its authoritarian element or re-interpret Confucianism by bringing out democratic elements in it. However, it will be fruitless if a constitutional device is not made that constrains the democratic system. It would only end up being a Confucian interpretation of the relationship between a democratic government and economic constitution within the framework defined in the constitution.

18. The constitutions of European states are based on the French Enlightenment tradition of taking the knowledge problem into consideration very weakly relative to Anglo-American ones that stemmed from the tradition of Scottish Enlightenment.

19. This article is the first step toward cross-country comparative analyses. This paper can be further developed to compare, for example, the constitution of the USA, Germany, or Japan.

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