

CAPÍTULO II.

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Historia y naturaleza del Derecho coreano

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Introduction to Korean Law

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I. THE ORIGINS OF KOREAN LAW

Nowadays the Republic of Korea (Korea hereinafter) is often called one of the most energetic and vibrant countries in the World. Strong and innovative manufactures, hyper information technologies, creative global entertainments, and successful democratic consolidation after military dictatorship are the representing features of Korean society at glance.

It is true that Korean people are very proud of their collective achievements. However, this does not mean that the living as a Korean citizen in Korean society is always easy and comfortable. Rather, Korea deserves to be regarded as the most competitive and stressful country in the World. As the rapid increase of suicide rate and the dramatic decrease of birth rate have together been occurring in the past 20 years, Korean people are exposed to higher socio-psychological pressures from everywhere.² No Korean can take relax freely in Korean society. For Koreans, being creative implies often the other side of being unstable.

Korean law and legal system is by no means the exception of this Korean distinctiveness. Undoubtedly it reflects the established and robust side of

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² From the statistics of 2015, Korea has been ranked No. 1 in suicide rate among OECD countries while its birth rate has been dramatically decreasing to the lowest in the same group. <http://data.oecd.org>

Korean society. But it also contains the uncertain and cracking side at the same time. In order to explain this complicated faces of Korean law and legal system, I want to bring a kind of geological

metaphor suggested by Hahm Byung-Chun, one of the prominent Korean legal scholars and political intellectuals from 1960s to 1970s, who wrote abundantly especially in the field of anthropology of law.³

Hahm's geological metaphor provided an interesting new way to view Korean law and legal system. Before 1960s, Korean legal history was basically understood with so-called a theory of 5 periods of time: pre-ancient, ancient, feudal, pre-modern, and modern. In this view, each period of time was thoughts to come only after the previous one goes like a stereotype story telling. Hahm's innovation was to see these 5 periods of time simultaneously as if they are co-existing together. Hahm thought that all of the historical stages co-exist by way of accumulating the latter layers upon the former ones like geological strata. In Hahm's understanding, the older layers never die but still function as bottom or basement of law and legal system.

As easily expected, the key point of this metaphor is to explain how those strata can co-exist. Hahm tried to relate law with its religious basis or the fundamental belief system and finally recognized five different couples between law and religion from Korean history: pre-ancient law/Shamanism; ancient law/the mixture of Confucianism and early Buddhism; feudal law/late Buddhism; pre-modern law/reformed Confucianism; modern law/Christianity.⁴ In this understanding, the earlier layers never vanish and remain like the older geological strata. Despite of becoming invisible at the surface, they continue to exist at the bottom and be consolidated more and more. The older strata become so fundamental that the oldest one consolidates itself as a part of Korean legal consciousness. Whereas the newer ones are functioning more at the institutional level.

Hahm thought that the older strata of Korean law were still working in the 1960s most specifically on the dimension of ordinary Korean's legal consciousness. Through a series of survey with questionnaires with Korean public, Hahm found that Korean citizens shared a tendency to prefer various kinds of mediation to lawsuits when they were in conflict with others. Hahm interpreted this a-legalistic attitude to social conflict as phenomenon representing the ordinary Korean's legal consciousness, which contained and stemmed from the long standing religious attitude of Korean people. According to Hahm, Korean legal culture is inclined to make a harmony rather than

3 Hahm Pyong-Choon, *The Korean Political Tradition and Law-Essays in Korean Law and Legal History*, The Royal Asiatic Society Korea Branch, 1967; *Korean Jurisprudence, Politics and Culture*, Yonsei University Press, 1986

4 Esp. See, Hahm, *Religion and Law in Korea*, in Hahm(1986), *ibid*.

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to break a peace, no matter whether law accompanied with the catchphrase of justice or not.⁵ Along with this line of thinking, sometimes understood as an harmony ideology, Hahm tried to explain the tension and contradiction between the religious soul of law of ordinary Koreans and the institution of modern and Western law in Korean society. If Hahm was familiar with Freudian term, he might make this connection extended to the dimension of ordinary Korean's legal unconsciousness.

Hahm Byung-Chun's thesis stimulated a hot debate among Korean legal scholars especially within the group of law & society people. For instance, Yang Kun raised a fundamental opposition in late 1980s by claiming that Hahm Byung-Chun did not care about the authoritarian conditions of Korean society.⁶ Since 1990s a number of law & society scholars tried to re-examine the relevance of so-called Hahm theses.⁷ Despite many different perspectives raised in these academic endeavor, it is common for all of them to conclude that Hahm theses are no longer valid at least after the mid of 1990s, when the number of lawsuits in Korean society began to increase in unprecedented large scale. For the cause of this interesting phenomenon, some discussions are still going on within the Korean law & society scholars.⁸

II. THE POLITICAL AND LEGAL CONTEXT OF MODERNIZATION

Hahm theses are basically about the historical complexity of Korean law and legal system. But, if we narrow down our focus to the newest stratum, the layer of modern and Western law at the surface, we can find another sources of complexity. In the history of Korean law, the 20th century should be named the age of receiving modern-Western law. At its beginning, Korean society gave up the Confucian legal system which had maintained more than 500 years and started importing modern-Western law and legal system. Looking at closely, we can recognize that two major interconnected factors have contributed to the complexity of Korean law and legal system since then: the Conflicts between Legal Traditions in Modern Western Law and the Legal Colonialism.

As many legal historians and theorists indicate, there are two different legal traditions in the Western law: Civil law tradition and Common law tradition. Within each legal tradition, a kind of further differences have been de-

⁵ Esp. See, Hahm, Ch.6 A Jurisprudence of Economic Underdevelopment, in Hahm(1967), *op.cit.*

⁶ Kun Yang, Law and Society Studies in Korea: Beyond the Hahm Theses, *Law & Society Review* Vol.23, No.5, 1989

⁷ Sang Hyeog Ihm, Lawsuit Avoiding Tradition in East Asia and Reconsideration of It in Korean Society, *Korean Journal of Law & Society* Vol. 25, 2003; Jeongoh Kim, Dr. Hahm Byong-Choon's Thought on Korean Legal Culture, *Yonsei Law Review* Vol.24, No.2, 2014; Kuk-Woon LEE, Jealousy and the Rule of Law, *The Korean Cultural Studies* Vol.37, 2019 etc.

⁸ LEE(2019), *ibid.*

veloped according to, for instance, whether the state is proactive or not in the field of law.⁹ If a non-Western country could enjoy a chance to start a process of Westernization of law and legal system, it was almost inevitable to choose a legal tradition or even a Western country as her model in order to reduce the cost of importing process. However, it was not the case of many other non-Western countries because they were forcibly colonized by Western imperial powers and enforced to follow a certain model of legal tradition. Each Western power has planted its own law and legal system with many modifications and manipulations for the sake of effective colonial governance.

During 1910-1945, Korean society was governed under Japanese colonial law and legal system. Japanese colonizers blocked Korean people's own attempts to choose a model country for their legal Westernization, but rather enforced Japanese version of colonial control, which was basically based upon a martial law and military legal system under the rule of imperial viceroy. Evidently, this colonial system of law had fostered a sort of asymmetrical manipulation of the Civil law tradition toward the direction of Ultra-Nationalism. The militarization of colonial law and legal system became much stronger in 1930s and later, when Japan entered into the war with China, USA, and U.K., and as a result, left a deep scar of emergency rule led by military commanders in the history of Korean law. After the Second World War, Korean peninsula was divided by the military occupations of USA and USSR, which resulted in the split of the South and the North since 1948. Around the Korean War between 1950-1953, Korean people had to be under military martial law and, in South Korea, this situation had revived several times until the democratic transition started in 1987. Meanwhile, South Korea had experienced a series of Military Coup d'états in 1961, 1972, and 1980 and the democratic rule was relatively short and vulnerable to the military threat. In this process, the bureaucratic, state-oriented, and authoritarian nature of Korean law and legal system became more solid.

This must be a background for Yang Kun to criticize Hahm's thesis in the late 1980s because it unfairly ignored the bureaucratic, state-oriented, and authoritarian nature of Korean law and legal system.¹⁰ But, even under the prevalence of this trend, a change toward opposite direction has paralleled in Korean law and legal system at the same time. First of all, the Independence Movement against Japanese colonialism after the collapse of Yi Dynasty has accompanied a strong emphasis upon the importance of civil and political society, because there was very little room in the colonial state apparatus allowed for Koreans to participate in. This is a part of the reasons why the

⁹ Mirjan R. Damaska, *The Faces of Justice and State Authority-A Comparative Approach to the Legal Process*, Yale University Press, 1986

¹⁰ Yang(1989), *op. cit.*

Korean Independence Movement could never be escalated to the degree of State-ism, despite it has always been oriented to nationalism. No one can deny that the combination of strong state and weak civil society has been the political condition for Korea people since 1945. However, very interestingly enough, the widespread political attitude among citizens was to regard the state something too much dangerous and risky. With a deep-rooted political concern against corruption among citizens, this political attitude has functioned to support the (re)vitalization of civil and political society for democratization. Therefore, at least in the level of political consciousness, an interesting combination of strong state and strong civil society has been co-existing together in Korean society. This has been repeatedly revealed in the process of political democratization in various forms, for instance, the uprisings in 1960, 1980, 1987, and still continued like Candle Light Demonstrations in 2002, 2008, and 2016-7.

Beside, it is also worth to mention that the American factor has been functioning as a basic trend. After the US Army Military Government took over the Japanese colonial rule in 1945, Korean society had to be exposed to an overwhelming influence of Americanism. In addition, the Korean War against Communism(1950-1953), where USA was the most important and strongest ally for South Korea, made the American factor a sort of decisive matter in every field of Korean society. It is true that South Korea took a relatively state-driven path of economic development, seemingly quite contrary to the American market economy, under the military government after 1961. But it can only imply that the American factor started functioning in a more indirect way such as buyer, investor, advisor, commentator, and critique, albeit whose role was as decisive as military ally and foreign aid provider.

In the context of law, it is more important that the intellectual hegemony of Korean society transferred to American initiative. Especially from the late 1970s, when the older generations who were familiar with Japanese colonial legacy retired, a large number of intellectuals who got influenced from American society began to take over the intellectual hegemony of Korean society. In the field of law and legal profession, this change became so vivid after 1980s in both of public and private laws. For example, under the influence of American constitutionalism represented by the judicial review system, Korean society adopted the constitutional court system in 1987, and with the catchphrase of less governmental regulation and more autonomy in the market, a number of large law firms providing corporate law services were established and started enjoying a rapid growth and success in business after 1980s.¹¹

¹¹ Kuk-Woon LEE, *Corporate Lawyers in Korea: An Analysis of the "Big 4" Law Firms in Seoul*, in Dai-Kwon Choi & Kahei Rokumoto eds., *Korea and Japan: Judicial System Transformation in the Globalizing World*, Seoul National University Press, 2007

In many aspects, Korean law and legal system has been faced with an unprecedented circumstances after the mid of 1990s. Although a great burden of the past still existed, the newer challenges have been emerging again and again. In political sphere, the legalization of politics became a representing feature of Korean society as dramatically shown in the trial and punishment of the former military rulers by the Supreme Court, the political party dissolution and the impeachment of incumbent president by the Constitutional Court, all of which had been investigated and indicted by the public prosecutors. This provoked a doubt on the relationship between rule of law and democracy among Korean citizens. In economic sphere, the trends of Globalization and Information Revolution conquered everything with a slogan of Neo-Liberalism, which emphasized more radical de-regulation as well as the need of law and order in the market place. But after 2008, when a Global financial crisis struck Korean economy as many other countries in the world, the need to expand governmental social welfare system has been growing year by year. In societal and cultural sphere, the situation of Korean law and legal system is more complicated. Law and lawyers have been sandwiched more and more between the demand of diverse minorities to value different moral viewpoints in terms of human rights and the demand of majorities to defend the main streamer's moral and ethical standards. In recent years, Korean law and lawyers seem to enter into the battle field of cultural war.

Of course, no matter how complicated the situation of Korean society is in nowadays, it is not comparable to the difficulties in the last century. Yet, there is one crucial difference between these two. At least from 1960s, Korean society have had one master key to solve any sort of political and social problems. That was the continuous expansion of national wealth and its gradual distribution to the common people. But after the Global financial crisis in 2008, this master key started not functioning any longer and Korean society began to enter into an unexperienced circumstance, such as shown two contrasting phenomena as already pointed out happened simultaneously; the dramatic decrease of birth rate and the dramatic increase of suicide rate. Korean law and legal system lies in this new and strange environment with the highest litigation rate asking more laws and lawyers.

III. THE LAW-GIVERS IN KOREAN LEGAL SYSTEM

With this understanding in mind, let us talk about the law-givers in Korean legal system first. For this purpose, it is inevitable to see the constitutional framework of Korean law. Since the 17th July 1948, Korea has been a democratic republic based upon the basic principles of liberal and democratic constitutionalism such as popular sovereignty, democracy, individual free-

dom, parliamentarism, the division and check & balance of political powers, the rule of law, and judicial independence etc. This means that the Constitution of the Republic of Korea legislated by the Korean people should be the paramount law and the parliamentary acts legislated by the National Assembly must be the main source of Korean law from that time on. However, in fact, the historical legacy as mentioned above cast shadow even until 1980s, because some of the colonial rules, the decrees of US Army Military Government, and their authoritarian descendants maintained legal effect.

It is undeniable that the military governments between 1961-1987 contributed significantly to overcome this confusing situation of law. Especially the three emergent legislative bodies like *Juntas* formulated by the leaders of military coup d'états in the years of 1961-3, 1972, and 1980-1 have tried to make the laws and regulations the integral part of administrative instrument of state bureaucracy. But these repeated efforts were only focused upon the rapid economic growth and the maintenance of political control, which were the foremost goals of military government. Concerning the constitutional framework of Korean law, the limit of military governments was on the attitude toward the Constitution. They regarded the Constitution as just one of the political tools and revised it for their own political purposes such as prolonging the term of incumbent president several times. Among those constitutional revision, the 7th one, often called the October Restoration, was to transform the original constitutional framework almost to the degree of the dictatorial regime. Under this constitution, the President rather than the National Assembly became the most powerful law-giver and promulgated a number of emergent presidential decrees having the effect of Act, many of which were decided unconstitutional by the Constitutional Court and the Supreme Court after more than 40 years later.

This was one of the reasons why the democratic transition in 1987 was to be accompanied by the constitutional revision. In the painful struggle for democratization against military government, Korean people raised a political agenda to revive the direct presidential election as a symbol of popular sovereignty, and successfully restored the original constitutional framework at last. In this sense, the 9th revision of Korean constitution, which maintains more than 3 decades until now, has profound and monumental meaning in the Korean constitutional history. Truly, it is a political landmark representing that the original constitutional framework of Korean law and legal system is restored finally.

But, very interestingly, this restoration resulted in an unexpected outcome sooner or later as the new law-givers have suddenly emerged in 1990s. The Constitutional Court and the Supreme Court produced so-called judge-made law or judicial laws by using their judicial power of constitutional and

legal interpretation. Especially, the Constitutional Court became the final decision maker in Korean society as shown in many landmark decisions including the cases of political party dissolution(2014) and presidential impeachment(2017). In addition, there were more unfamiliar law-givers emerging in Korean society. The foreign law-givers such as foreign governments and international organizations started functioning at least as a supplementary law-giver in 1990s. The representing examples for this phenomena must be the agreement on the IMF bailout in 1997 and the series of Free Trade Agreements with USA, EU, and other countries after 2000s. The emergence of these new law-givers, the judiciary and the foreign authorities, raised a great challenge to the constitutional democracy of Korea.

IV. THE HIERARCHY OF LAW

Now, let us limit our scope within the constitutional framework of current Korean constitution to see the hierarchy of law that the official law-givers legislate. It is clear from the constitution itself that Korean people is the only law-giver of the Constitution. Nonetheless, Korean constitution does not establish any institution of people's initiative including the power to propose a constitutional revision. Only a majority of the total members of the National Assembly or the President may propose a proposal of constitutional revision and the people's engagement is limited to the stage of final voting after the National Assembly passes the proposal with the concurrent vote of two thirds or more of the incumbent members. In addition, people's direct intervention to legislate Acts is not allowed either.

Instead of Korean people, the National Assembly is the law-giver of Acts. Korean constitution clearly declares that the legislative power shall be vested in the National Assembly. The National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens for the term of four years. The number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200. Except a short period of time in 1960-1, the National Assembly has maintained a single chamber system. Beside the power of legislation of Act, the National Assembly also has other constitutional powers such as the approval of the National Budget, the approval of President's appointment of Prime Minister, the passing of the motion for impeachment of President etc.

The President is the Head of the State as well as the Head of the Executive. In times of internal turmoil, external menace, natural calamity or a graver financial or economic, the President may issue presidential decrees having the effect of Act, only when it is required to take urgent measures for the maintenance of nation security or public peace and order, and there is no time to await the convocation of the National Assembly. When the President

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issues such presidential emergency executive order or presidential emergency financial and economic executive order, he or she is required to seek approval from the National Assembly immediately. If the President fails to obtain such approval, the presidential decrees shall become invalid. After the democratic transition in 1987, such emergency executive orders have never been issued except for an emergency financial and economic executive order and the ensued regulations in 1993, which aimed at introducing a real-name financial system.

Like any other countries having presidential system such as USA, the President has the veto power but it is executed in a very strict procedural condition in Korea. The President's role as a law-giver is basically restricted to issue the presidential decrees concerning matters delegated to him/her by Acts with the scope specifically defined and matters necessary to enforce Acts. Presidential Decrees consist of delegated orders and executive orders. Delegated orders deal with the matters that are delegated by Acts within the specific scope of such delegation. Executive orders deal with other matters necessary to enforce Acts. The jurisdiction of such orders extends over all administrative affairs under the jurisdiction of the Executive.

In a similar manner, the Prime Minister and the head of each Executive Ministry are empowered to issue ordinances, under the powers delegated by the Act or Presidential Decree, or *ex officio*, concerning matters within his/her jurisdiction. Ordinances of the Prime Minister are enacted with respect to matters under the jurisdiction of the administrative agencies under the direct supervision of the Prime Minister such as the Ministry of Government Legislation, the Ministry of Patriots and Veterans Affairs, the Financial Services Commission, the Anti-Corruption & Civil Rights Commission. Ordinances of the Prime Minister and Ministerial Ordinances are generally viewed to have the same power in their hierarchy.

Administrative rules, which are called as directives, regulations or public notices, are made for the purpose of assigning duties to officials of an administrative agency or allowing a higher administrative body to direct and supervise duties performed by officials of a lower administrative body or to set standards for performing such duties. In principle, the administrative rules are not binding on the general public or the court. In practice, the administrative rules have a nature of laws, because even such administrative rules, which are made for internal use of an administrative body, inevitably affect the general public and the court respects such rules as long as they are reasonable. Also, since it is difficult to specifically regulate matters of specialty or technology by Acts, the Presidential Decree, the Ordinance of the Prime Minister or the ordinance of ministry, an administrative body in charge of enforcing relevant Acts and subordinate statutes is often delegated to stipulate such matters.

Such administrative rules made under the delegation of Acts and subordinate statutes take the nature of laws. For example, the standards for compensating consumers for damages, which are issued under the Consumer Protection Act, and the foreign exchange transaction regulations, which are issued under the Foreign Exchange Transactions Act, are made in the form of a public notice by the Minister of Finance and Economy, but they take the nature of laws supplementing the substances of Acts and subordinate statutes.

The National Assembly, the Supreme Court, and the Constitutional Court may establish regulations for internal matters within the limits of the relevant Acts. Even if those internal regulations are not regarded as law, they sometimes become very important for the interested citizens. It is the case to the National Election Commission, which may establish internal regulations within the limits of the Act and subordinated statutes.

Despite the Republic of Korea is not a federal state, the Constitution guarantees local autonomy with an independent chapter. However, as shown that it is often called the most centralized country in the world, the degree of local autonomy in terms of law is very restricted by the Constitution itself. The local government may enact provisions relating to local autonomy within the scope of Acts and subordinate statutes. This means that local autonomy is allowed only when and where the National Assembly and the Central Government allow it. In this specific sense, the grass-root democracy in Korea is still in the making inside the green house of overcentralized political and legal system. Within this conditions, municipal ordinances are laid down after going through deliberation by local councils and municipal rules are promulgated by the heads of local governments.

The Constitution expressly stipulates the observance of international laws and international peace. The treaties duly concluded and promulgated under the Constitution and the generally recognized norms of international law shall have the same effect as the domestic laws of the Republic of Korea. The power to conclude and ratify treaties is vested upon the President, but the National Assembly shall have the right to consent to the conclusion and ratification of some treaties. Those are the treaties pertaining to mutual assistance or mutual security, the treaties concerning important international organizations, the treaties of friendship, trade and navigation, the treaties to any restriction in sovereignty, peace treaties, treaties which will burden the State or the people with a significant financial obligation, or treaties related to legislative matters. So, there could be a room for foreign law-givers in Korean legal system via the constitutional roles of the President and the National Assembly.

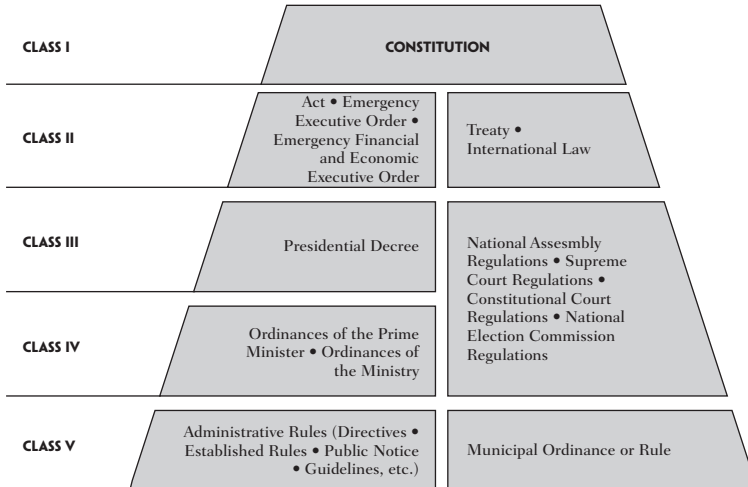
As commented above, the Constitutional Court as well as the Supreme Court are the law-givers in indirect way. Through the power to finalize the

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interpretation of the Constitution, the Acts, and the subordinated statutes, those two highest judicial authorities may establish the judicial precedents which function as the so-called judge-made law or judicial law. Let us talk about this in the section of judicial review later.

The hierarchy of law in Korean legal system is as shown in the table below.

TABLE 1. The Hierarchy of Law in Korean Legal System



V. THE EXISTENCE OF LAW: WRITTEN OR UNWRITTEN?

Now, let us move on to the existence of law in Korean legal system. For this purpose, we have to mention that the basic laws exist in the form of statutes and legal code in Korean society. Certainly there are some rooms for unwritten customary law which are even legally guaranteed in the fields of civil law, commercial law, and international law, customary law is basically regarded as the secondary sources of law as a matter of principle. In every sphere of basic laws, written laws and regulations are the primary sources. In addition, as a country in the Civil law tradition, there is no principle of *stare decisis* in the Korean legal system. It is true that the lower courts tend to follow the legal interpretations ascertained by the Supreme Court in actual practice and the importance of the Supreme Court’s precedents is always emphasized in every stage of legal education. But, the Supreme Court decisions are at best *de facto* judicial law and also regarded as the secondary source of law.

Regarding this understanding on the existence of law in Korean society, a scandal provoked by the Korean Constitutional Court in 2004 is worth to be thought a little bit further. In the case on the Relocation of the Capital(2004Hun-Ma554), the Korean Constitutional Court decided that the

New Administrative Capital Act violated the Constitution with its own theory of customary constitution. Let us listen to the main reasoning of the majority, which were eight Justices out of nine.

“Korea is governed under a written constitution, and therefore the text of the Constitution is the primary source of constitutional law. Yet, as the basic law of the state, a written constitution, by its very nature, uses language that is succinct as well as symbolic. Matters not explicitly stated in the text of the Constitution may therefore be recognized as part of an unwritten or customary Constitution. In particular, matters that are self-evident or presupposed at the time the Constitution is drafted may be left out of the text. Similarly, certain constitutional principles that are understood to have universal applicability may not be expressly stated. Provided, certain strict standards must be satisfied for these to become constitutional rules with legal force, and only those that have met such standards will then have the same normative authority as the written text of the Constitution.

In order for a customary Constitution to be established, there must first exist a certain custom or practice; second, the custom must be repeated or continued for a sufficient amount of time (repetition and continuity); third, the custom must be constant and consistent so that there are no intervening countervailing practices (constancy); fourth, the custom must consist of clear content and not be vague (clarity); and fifth, there must a recognition or conviction on the part of the people that the practice, as customary Constitution, has normative authority (popular consensus).

The decision to establish or move the capital involves the spatial positioning of the backbone of state organization, involving the relocation of the state’s highest constitutional agencies such as the National Assembly and the President, and is a crucial matter of constitutional significance. That the capital of Korea is Seoul is a normative fact that has never been questioned for over six hundred years since the Joseon Dynasty, so it is a continuous practice formed through tradition (continuity); it has endured effectively over a long time without ever having been breached (constancy); the fact that Seoul is the capital is clear in the sense that it is not something over which individuals can have different interpretations (clarity); and as a practice that has solidified over the years, it has gained the recognition and approval of the people such that there is wide consensus over its normative power and effectiveness (popular consensus). In sum, Seoul as the capital of Korea is a norm which is evident to everybody and which was presupposed by the written Constitution, although it is not expressly provided for in text. As a customary constitutional norm, it has gained the status of an unwritten Constitution.”

Against the majority, the Justice Jeon Hyo-Sook alone filed a dissenting opinion.

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“Under a system of law governed by a written Constitution, we cannot regard a customary constitutional norm as having the same force as the text of the Constitution, or as having a normative force that can disable provisions of the written text. The written constitution is the highest law of the land established by the sovereign people, and its normative power binds and overrides all powers of the state. The august power and authority of the written Constitution derives from the fact that the sovereign will of the people was given expression and embodiment through the unique process of constitution-making. Such power and authority cannot be said to inhere in a mere custom. A customary constitutional norm holds “supplementary force” only when it is harmonious with the various principles of the written text. This is true even when the subject matter regulated by the customary constitution is a “significant constitutional matter.” Therefore, the revision of a constitutional custom such as the relocation of the capital can be undertaken through legislation by the National Assembly, as long as there is no explicit constitutional provision that restricts this.”

This decision provoked a scandalous debate upon the nature of constitution, law, and the power of Constitutional Court in Korean society, and vast majority of constitutional scholars criticized it. Yet, the Constitutional Court confirmed its theory of customary constitution having the same normative power to the written constitution in other case in 2005(2005Hun-Ma579 et al.). In this following case, three Justices stated that they were not able to affirm the existence of a customary constitutional norm that specified Seoul as the nation’s capital, and even if such a customary constitution existed, that a revision of the written Constitution is not required in order to change the customary norm. Only because that there has been no other case for this matter, these two decisions still remain as the constitutional precedents in Korean legal system. But it does not mean that the theory of customary constitution becomes more persuasive in Korean society.

VI. BASIC LAWS

Despite this exceptional situation happened by the Constitutional Court, it is clear that Korea is a typical written law country. According to the statistics of the Ministry of Government Legislation of Korea, about 1,528 Acts, 1,723 Presidential Decrees, 1,329 Ordinances of Prime Minister and Ministries, and more than 114 thousands Municipal Ordinances and Rules are in effect as of April 1, 2020. The number of Acts and subordinate statutes has never decreased. The more power the state gets, the more laws the society faces, and *vice versa*.

Like many other countries in Civil Law tradition, the Republic of Korea has the six grand legal codes of Constitution, Civil law, Criminal law, Commercial

law, Civil Procedure, and Criminal Procedure. Also, a legislative process of the Basic Administrative Law is going on in 2020. Let us just glance these seven basic laws in order to have a simple overview on the contents of Korean law.

The Constitution is the paramount law of Korea. It stipulates fundamental matters concerning the rights and obligations of the people, fundamental structures of the Government, economic order, management of elections and local autonomy. The Constitution prescribes its fundamental principles, stipulates a guide to the legislative system and procedure and ensures that the sovereignty of Korea resides in the people and all authority comes out from the people. The Constitution also declares that Korea tries to maintain international peace, renounces all aggressive wars and observes international law. Moreover, the Constitution stipulates fundamental rights and duties of the people, declares that all the people are assured of human dignity and have the right to pursue happiness as human beings. It also stipulates fundamental structures of the Government, economic order, management of elections and local autonomy. The Constitution is the standard for legislation and amendment of Acts and subordinate statutes of Korea. The First Constitution of Korea was enacted on July 17, 1948. There were nine amendments of Constitution so far. The latest amendment was made on October 29, 1987. The 1987 Constitution is presently in force. The Constitution, starting with the preamble, consists of 130 articles categorized into 10 chapters and addenda of 6 articles.

Civil matters are primarily governed by the Civil Act. The Civil Act is a comprehensive and fundamental body of norms covering the entire area of private law. It bears much resemblance to the overall structure of the *Bürgerliches Gesetzbuch* (BGB), the Civil Code of Germany, in that it follows a *Pandekten* system. The hallmark of this system is to place the general principles at the fore front, then to subsequently provide concrete doctrines concerning particular areas of the subject matter. After this manner, the Civil Act is divided into five Parts: General provisions (Part 1); the law of rights in *rem* (Part 2); the law of obligations (Part 3); the law of family (Part 4); the law of inheritance (Part 5). The law of contracts, torts, and unjust enrichment are governed by the law of obligations (Part 3) along with some part of general provisions (Part 1), whereas the law of property and the law of security rights are governed by the law of rights in *rem* (Part 2) along with some other part of general provisions (Part 1). The First Civil Act of Korea was enacted on February 22, 1958. There were twenty-eight amendments of the Civil Act so far. The latest amendment was made on February 3, 2015.

The laws for criminal matter are largely codified in the Criminal Act, which was originally enacted on September 18, 1953, and has undergone sixteen revisions so far. In addition to the Criminal Act, several ‘special acts’

have been enacted which create criminal offenses not found in the Criminal Act or else modify the penalties of crimes found in the Criminal Act. In cases where provisions in a special act create an apparent conflict with the Criminal Act, the special act is usually given preference. The Korean Criminal Act is organized into 372 articles, further organized into 4 chapters of general provisions and 42 chapters of specific provisions.

Commercial law is primarily governed by the Commercial Act. The nature of the Commercial Act is that of fundamental laws that focus on profitable business activities unlike the common law code. The Commercial Act comprises five parts in total, namely- General parts (Part 1), the commercial activities (Part 2), the corporate parts (Part 3), the insurance (Part 4), and maritime parts (Part 5). In addition to the Commercial Act, the Bills of Exchange and Promissory Notes Act and the Check Act deal with promissory notes and checks. The First Commercial Act of Korea was enacted on January 20, 1962. There were twenty-four amendments of the Commercial Act so far. The Korean Commercial Act has undergone a number of changes since the 1997 Financial Crisis, and there were some reforms in the corporate governance part and amendments in the merger and acquisition part to encourage corporate transparency.

Civil procedure in Korea is governed by the Civil Procedure Act. In addition to this Act, the Rules of Civil Procedure was promulgated by the Supreme Court of Korea, and is serving as a supplemental norm to the Civil Procedure Act. Besides these two main bodies of norms, there are adjacent statutory laws, such as the Civil Execution Act, the Family Litigation Act, and the Debtor Rehabilitation and Bankruptcy Act. The First Civil Procedure Act of Korea was enacted on April 4, 1960. There were twenty-six amendments of the Civil Procedure Act so far. The Civil Procedure Act is comprised of 7 chapters and 502 provisions. The first four chapters account for the most part of the Civil Procedure Act. The first chapter sets forth general provisions on courts, parties, litigation costs, and litigation procedure in general. The second chapter provides various provisions concerning litigation procedure of the court of first instance. The third chapter is on appeals, while the fourth chapter deals with re-trials. Case law in the area of civil procedure also plays an important role.

Criminal procedure law is governed by the Criminal Procedure Act. The First Criminal Procedure Act of Korea was enacted on September 23, 1954. There were thirty-two amendments of the Criminal Procedure Act so far. The 1988, 1995 and 2007 revisions to the Criminal Procedure Act have strengthened the procedural rights of criminal suspects and defendants and have reconstructed the entirety of criminal procedure. The Criminal Procedure Act is comprised of 5 chapters and 493 provisions.

Administrative law in Korea covers all domestic public laws that define the administrative organization, action and relief, which is not existent in the form of unified legal code. The major administrative laws, however, are the following: the Administrative Procedures Act, the Administrative Litigation Act, the Administrative Appeals Act, the Framework Act on Administrative Regulations and the State Compensation Act. The Administrative Procedures Act primarily deals with dispositions (Chapter 2), reports (Chapter 3), administrative pre-announcement of legislation (Chapter 4), pre-announcement of administration (Chapter 5), administrative guidance (Chapter 6) and strengthening citizen participation (Chapter 7). In addition, the Administrative Litigation Act mainly stipulates revocation litigation (Chapter 2), appeal litigation other than revocation litigation (Chapter 3), party litigation (Chapter 4) and public and agency litigations (Chapter 5). As mentioned above, a legislative process of the Basic Administrative Law is going on in 2020.

VII. LEGISLATIVE PROCEDURE OF THE ACT

Now, let us have a more dynamic understanding of Korean legal system by surveying the parliamentary legislative procedure. The Act, legislated by the National Assembly, is the normal and basic type of law in Korea. The Korean Constitution empowers the National Assembly to enact Acts exclusively. The lawmaking power held by the Executive, etc. for subordinate statutes is confined to matters delegated by Acts and other matters necessary to enforce Acts. Since such subordinate statutes are required to be in conformity with Acts, the National Assembly is the supreme lawmaking organ.

In many other modern welfare-states, however, the Executive branch is playing a leading role in performing state functions and the Executive is increasingly involved in legislation designed to provide the legal basis for administration. In the case of Acts, although the National Assembly has the lawmaking power, the Executive has the power to propose bills directly to the National Assembly as legislators do. Most of the bills are introduced by the Executive to the National Assembly because information on legislative needs is concentrated in the Executive. Under the presidential system of government, it is rare that the Executive is empowered to introduce bills directly to the Legislature. In the United States and other nations that have adopted the presidential system of government, the Executive exerts an influence in an indirect manner upon the Legislature's power to introduce bills.

Also, the Executive can check the National Assembly's legislative power through the exercise of the power to veto bills, which is universally accepted in presidential systems. In Korea, however, the ruling party has long retained a majority in the National Assembly and the ruling party and the Executive has regularly held policy consultations prior to intro-

ducing bills to the National Assembly, leaving little room for the Executive to veto bills.

Thus, the Executive is empowered to propose and veto bills in addition to its delegated power to enact subordinate statutes. For this reason, the Executive's legislative activities are perceived to be more active than the National Assembly's. In Korea, it is quite natural that the greater attention is being paid to the Executive's internal self-control of its legislative activities.

Since establishment of its government, Korea has established and operated an independent and specialized self-legislative control agency called the Ministry of Legislation within the government in order to exercise overall control of and coordinate the government's legislative activities and to review whether individual bills contravene higher laws or conflict with relevant laws. The Ministry also reviews juridical questions and the effectiveness, appropriateness and equity of policies.

Many legislative bills used to flood the Regular Session of the National Assembly convened for the purpose of deliberation on the budget. In an effort to solve the problem, the Ministry of Legislation has established and implemented the legislation planning system. This system would allow the Government to process the legislation more systematically and efficiently by estimating the demand for the legislation in advance, and by securing adequate time for the deliberation on legislative bills. Korea has also paid attention to the democratization of procedures for legislation and put the advance legislation notice system into operation as a means to secure participation by the people in the legislation process. In addition, Korea has made efforts to publicize and disseminate enacted Acts and subordinate statutes.

So far, most of the enacted or amended Acts have been proposed by the Executive in Korea. Hence it is better for us to describe below the legislative procedures for bills introduced by the Executive to the National Assembly first.

Each ministry which is in charge of relevant Acts is called the competent ministry and the competent ministry is determined according to the division of administrative affairs prescribed by the Government Organization Act. Looking at motives for enacting Acts, the competent ministry's judgment about legislation needs is the most important motive and the President's directions with respect to legislation, proposals for legislation from interested individuals and organizations and the revamp of Acts and subordinate statutes following a ruling by the Constitutional Court regarding unconstitutionality may become such motives. The competent ministry is in charge of drafting a bill. The ministry has to decide on policies to be reflected in the bill after consultations with other relevant ministries involved prior to drafting the bill.

With respect to a drafted bill, the competent ministry puts the public on notice about the legislation beforehand for a period of at least 20 days in

principle. Of the opinions received from the public, the ministry will accept reasonable ones.

128 The bill which has been put to advance notice for legislation is submitted to the Ministry of Legislation for review. The legislative officials with professional competence at the Ministry of Legislation review the constitutionality and the appropriateness of the bill as described above, confirm whether the policy has been agreed upon between relevant ministries, and, in case of any discrepancy between such relevant ministries, present their views from the legal standpoint for the coordination of such disagreement.

The bill that has passed the review by the Ministry of Legislation is put on the agenda of the vice-ministerial meeting and the State Council attended by ministers for deliberations that focus on whether views of relevant ministries with respect to the legislative policy have been properly reflected.

The bill, after going through the deliberation of the State Council, is signed by the President and then introduced to the National Assembly in the name of the Executive.

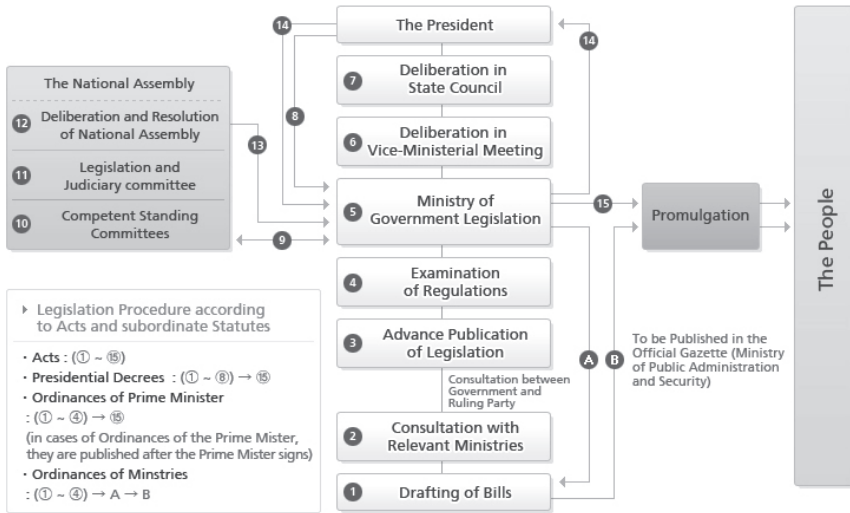
In the National Assembly, the standing committee in charge takes up the introduced bill for deliberation with the presence of the minister of the competent ministry and then forwards the bill to the Legislation and Judiciary Committee for deliberation. After such deliberation process, the National Assembly finally votes on the bill at a plenary session upon deliberating on the form and other matters of the bill.

The bill that is adopted at the National Assembly is transferred to the Executive. The Ministry of Legislation and the competent ministry, upon receiving the bill approved by the National Assembly, examine the bill and then forward it to the State Council for a decision on whether to exercise the power to veto the parliament-approved bill. Any bill against which the Executive exercises the veto power is made final and conclusive only when the National Assembly votes again for the bill (overriding veto). As to a bill against which the veto power is not exercised, the President promulgates the bill in the Official Gazette.

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The legislative process is as shown in the table below.

TABLE 2. Legislative Process of the Act



Any bill introduced by legislators to the National Assembly requires signatures of not less than 10 legislators. If a bill requires allocation of a budget, details of the budget should also be attached to the bill. In introducing a bill, legislators try to reflect the voices of their constituents and also their own specialized background, etc. However, legislators are more concerned with legislating their political parties' fundamental policy goals. The ruling party, in particular, makes efforts to harmonize its legislative policy with that of the Executive. Procedures for legislation from putting the bill on the agenda of the standing committee to promulgating it are the same as those for bills introduced by the Executive to the National Assembly.

VIII. JUDICIAL REVIEW IN KOREA

As mentioned above, one of the characteristics of 1987 constitution in Korea is that judicial review became very popular. In its history, Korean Constitution has had various types of judicial review system: The Constitutional Committee 1948-60, 1972-87; The Supreme Court 1963-72; Constitutional Court 1960-1. But, it is after the democratic transition in 1987 that judicial review became frequently used by people and got political importance year by year. The Constitutional Court shall have jurisdiction over the cases on the constitutionality of a law upon the request of the courts, impeachment, dissolution of a political party, competence disputes between State

agencies, between State agencies and local governments, and between local governments, and constitutional complaint as prescribed by Act. For the past 3 decades, the Korean Constitutional Court has been the most important institution in making final decisions within Korean politics. The statistics below shows how much work the Constitutional Court has done since 1988 in making judicial law by using the power of constitutional interpretation.

TABLE 3. The Statistics of the Cases at Korean Constitutional Court

TYPE		TOTAL	CONSTITUTIONALITY OF STATUTES	IMPEACHMENT	DISSOLUTION OF A POLITICAL PARTY	COMPETENCE DISPUTE	CONSTITUTIONAL COMPLAINT
Filed		39,350	994	2	2	111	38,241
Settled		38,154	942	2	2	99	37,109
Dismissed by Panel		22,736					22,736
Decided by Full Bench	Unconstitutional	645	287				358
	Nonconformity	255	78				177
	Conditionally Unconstitutional	70	18				52
	Conditionally Constitutional	28	7				21
	Constitutional	2,744	356				2,388
	Upheld	764		1	1	19	743
	Rejected	7,804		1		22	7,781
	Dismissed	2,074	73		1	39	1,961
	Other	10					10
Withdrawn	1,024	123			19	882	
Pending		1,196	52			12	1,132

As of Mar 31, 2020

Although it has the name of court and most of the power is exercised in judicial way, the Korean Constitutional Court is a quite of political institution in terms of composition. It shall be composed of 9 Justices, qualified to be a court judge, and they shall be appointed by the President. Among those 9 Justices, three shall be appointed from persons elected by the National Assembly, and surprisingly enough, three appointed from persons nominated by the Chief Justice of the Supreme Court, who has no democratic legitimacy. The President of the Constitutional Court shall be appointed by the President from among the Justices with the consent of the National Assembly.

This composition implies that the Korean Constitutional Court has been functioning at a deeper level than so-called the normal politics driven by the National Assembly and the President. Following the constitutional theory suggested by Bruce Ackerman once, this deeper level would be called the

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politics of constitutional interpretation in Korean politics, where a type of lawyer's politics has been functioning in the way of lawyer's guardianship.¹² Korean Constitution seems to demand the members of the Constitutional Court to behave as judges rather than politicians or jurors. The term of office of the Justices shall be six years and they may be reappointed as prescribed by Act. Like any of the court judges, the Justices shall not join any political party, nor shall they participate in political activities and shall not be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

The lawyer's guardianship seems to be emphasized in the mechanism of final decision-making. The concurrence of six Justices or more shall be required when the Constitutional Court makes a decision of the constitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint. This means the three Justices who were nominated by the Chief Justice of the Supreme Court could be the real decision-makers as swing voters between the three Justices elected by the National Assembly and the other three Justices appointed by the President. This form of swing voter-ship could be exercised between the ruling party and the opposition party too. In this specific sense, the Constitutional Court can be regarded as a hidden political instrument of lawyer's guardianship in Korean constitutional politics.

But, there is one more point we have to concern about the lawyer's politics in Korean society. It is that the mechanism of lawyer's guardianship has not been functioning very well because of some internal reason within judicial institutions especially between the Constitutional Court and the Supreme Court. As commented earlier, the Acts and subordinate statutes form a certain hierarchy in terms of effect in Korean legal system. Subordinate statutes enacted under powers delegated by Acts or enacted for the purpose of enforcing Acts are not permitted to contain provisions in conflict with the Acts. Lower subordinate statutes that are enacted by the delegation of higher subordinate statutes or are enacted for the purpose of enforcing higher subordinate statutes are not permitted to contain provisions in conflict with the higher subordinate statutes. Judicial review is usually regarded as a final resort to guarantee this normative hierarchy in legal system. Albeit, it is not the case in Korean legal system now.

In the current constitutional power structure, the question of whether any Act is in violation of the Constitution is decided by the adjudication of the Constitutional Court. However, the Constitution also declares that in cases where the question of whether any order, any rule or any disposition is

¹² Bruce Ackerman, *We the People*, volume 1: Foundations, Belknap Press of Harvard University Press, 1993, Ch.1 'Dualist Democracy'

in violation of the Constitution or Acts is brought to court, the Supreme Court has the authority to make a final review of the question. These seemingly contradicting articles in the same constitutional document have made a lot of problems and conflicts between these two highest and final judicial decision makers, but never resolved yet. Even if the judicialization of politics has proceeded so drastically for the past 30 years, the final authority in judicial process is still split into two cameras, which have a serious jurisdictional disputes against each other. This is the reason why this contradicting jurisdiction is often pointed as one of the urgent matters demanding constitutional revision.

IX. THE FUTURE OF KOREAN LAW

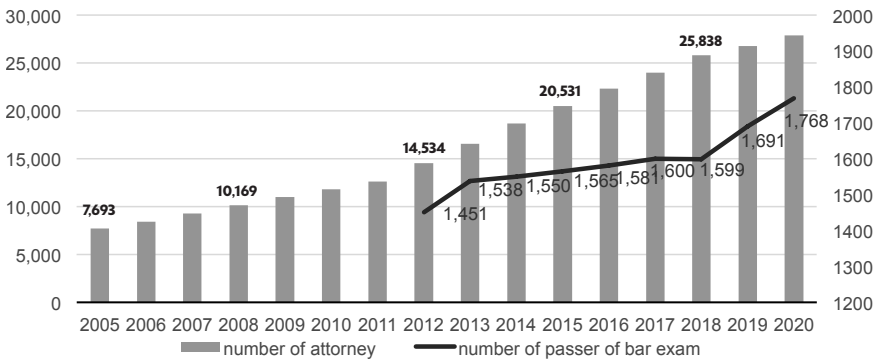
In closing this short introduction to Korean law and legal system, it is worth to mention about the possible direction to which Korean law and legal system will be changing in near future. As already described above, Korean law and legal system remains many distinctive features of Civil Law tradition like the existence of legal codes and the bureaucratic apparatus that enforces those written laws. But in the past 20 years, the influence of Common Law tradition has been dramatically increasing in Korean society. This could be a historical result of long standing American influence since 1945 in the field of law and legal system.

The most remarkable evidence of this change is that the National Assembly, the President and the Executive, the Judiciary, and most importantly the law society as a whole made a final decision to introduce an American style law school system in order to reform the Korean legal education in 2007. It was an irrevocable decision after a long debate in Korean society at least from the mid of 1990s when the slogan of Globalization was proclaimed for proactive adjustment in the age of Neo-Liberalism. The old judicial examination system to recruit judges and prosecutors was suddenly abandoned and scheduled to be replaced by the new bar examination system to license attorneys. The must be a starting point of long and fundamental change of law and legal system.

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The initial impact of the new law school system was the quite rapid increase of the numbers of attorneys in Korean society as shown the table below.

TABLE 4. The Increase of Korean Attorneys after Law School System



But it is quite predictable that this trend will change the structure of legal profession and the judicial apparatus of the Republic of Korea in near future. After a dozen of years from now, it is very much likely that Korean law and legal system will still maintain many of the characteristics of Civil Law country such as the existence of strong judicial bureaucracy described above. Yet, nobody can deny right now that a fundamental change in the direction toward a more professionalism in law has already begun in the dimensions of legal education and legal practice.

Although there are many critiques upon current states of Korean law school system insisting that it is never qualified to be a truly professional platform of legal education¹³, it is already scheduled to change the way to select and appoint the judges in Korean society. From 2026, the all of the judges will be selected from the attorneys having more than 10 years' experience. This means that Korean legal profession will be divided along with the distinction of the Bench and the Bar rather than the internal division of judicial bureaucracy such as courts, prosecutors' offices, and other governmental institutes. Given that now is too early to bet on whether this change will finally transform the nature of Korean law and legal system from Civil Law to Common Law, it is evident that Korean law and legal system is in the first stage of a long and fundamental change.

¹³ For the recent review, see Jootaek Lee, *The Crisis and Future of Korean Legal Education: Compared with the American Legal Education System*, *Korean University Law Review* 41, 2017

X. POSTSCRIPT: HOW TO FIND KOREAN LAW

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The purpose of this paper is to introduce an outline and main aspects of the legal system of the Republic of Korea and to provide readers with general information on Korean law. Foreigners may find the Korean legal system difficult to understand because it has its own unique and traditional legal history and system different from those of Western and other countries. It is more difficult for them to understand the overall concepts of the legal system and legislative process of Korea without knowing Korean language and history. This paper is designed to help readers, especially for foreign readers who are interested in Korean law, understand and become familiar with the Korean legal system, and present the legislative process of Korean by giving an overall picture on essential aspects of Korean legal system in plain English.

Numerous internet websites operated by government organizations provide full text of the Korean Constitution. The English version of the Constitution is available on the official website of the Constitutional Court of Korea as well as the Supreme Court of Korea. Both provide major cases which are counted as judicial precedents in English too. The address are <http://www.court.go.kr/> and <http://www.scourt.go.kr/>. A click on the word “English” at the top activates the English website. By clicking on the resources icon, you will be able to view and download the Korean Constitution, acts and regulations in their full text. Korea Legislation Research Institution’s website <http://elaw.klri.re.kr> also contains English translations of domestic statutes. A single click of the English icon on the upper right hand corner starts the English website. A free membership is required to view all contents. It should be noted that the translation found on this website cannot be construed as having an official authority. Other governmental websites such as the one run by the Ministry of Legislation are in the process of uploading all the statutes in English. However, most of these websites do not offer English websites yet.

MINISTRY OF GOVERNMENT LEGISLATION KOREA LAW SERVICE CENTER ([HTTP://WWW.MOLEG.GO.KR/ENGLISH/ABOUTMGL](http://www.moleg.go.kr/english/aboutmgl))

Korea Law Service Center is a national search tool for a variety of useful legal information. It contains current laws of the Korea and historical materials, administrative rules, local laws and regulations, court decisions, case-interpreting statutes. It is designed to be representative of the Korea’s legal information portal. Korea Law Service Center provides (1) a three-column chart through which you can systemically compare by connecting the upper-level law and lower-level law by provision and (2) old law and new law comparative service in which the provisions of new law and old law can be compared to easily grasp the revisions to provisions.

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KOREA LEGISLATION RESEARCH INSTITUTE ENGLISH VERSION OF KOREAN LAW ([HTTP://ELAW.KLRI.RE.KR/KOR_SERVICE/MAIN.DO](http://elaw.klri.re.kr/kor_service/main.do))

Korea Legislation Research Institute provides English version of laws just for the reference purpose such that in case of a discrepancy in meaning between the Korean version of law and the English version of law, the Korean version of laws takes priority effect. If you click “English” icon on the upper right corner, you can use in English.

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THE COURT OF KOREA COMPREHENSIVE LAW INFORMATION ([HTTP://GLAW.SCOURT.GO.KR/WSJO/INTESRCH/SJO022.DO](http://glaw.scourt.go.kr/wsjo/intesrch/sjo022.do))

Comprehensive Law Information is a law information search system through which you can quickly and accurately search/check court decisions, Acts and subordinate statutes, law references, Supreme Court rules/established rules/precedents, etc.

THE CONSTITUTIONAL COURT OF KOREA ENGLISH HOMEPAGE ([HTTP://ENGLISH.CCOURT.GO.KR/CCKHOME/ENGNEW/INDEX.DO](http://english.ccourt.go.kr/cckhome/engnew/index.do))

For the constitutional adjudications and major cases, the main resource center is the Korean Constitutional Court itself. This websites provides basic materials for a comparative approach to judicial review including the Venice Commission. For more academic research, the constitutional research institute, an annexed research organization of Korean Constitutional Court is more helpful.

LAWNB ([WWW.LAWNB.COM/](http://www.lawnb.com/))

Amongst many private data bases like West Law or LexisNexis, LAWnB is broadly used by Korean legal professionals. This domestic comprehensive law database providing court decision, law, administrative data, documents, forms, lawyer information, etc., basically in Korean language.