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## ARTICLES



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**ARTICLES**

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## ARTICLES

# CHANGES IN MODERN SOCIETY AND ADAPTATIONS IN KOREA'S CIVIL CODE

*Byoung Cheol OH* [*]

### ABSTRACT

*This year marks the sixtieth anniversary of the Korean Civil Code. While society has dramatically changed and progressed, the improvement in the Korean Civil Code has been limited. The evolution in IT and BT has raised many questions and challenges regarding the entire field of the Korean Civil Code. There was a suggestion to apply legal personhood to artificially intelligent robots, but it is neither necessary nor appropriate in today's world. However, the Korean Civil Code should handle the attribution of the electronic expression of will (die eletronische Willenserklärung) and expression of will followed by errors or hacking from a computer. Digital properties with new formats and substances must be granted an independent state as a distinct value on their own. Thus, 'electronic labor,' in the form of the 'electronic formation of human labor,' must be differentiated from an object. The right regarding the digital, referred to as the right of the digital, should be structured in parallel with a real right, the right of objects. In the field of contract law, the formation of contracts through online platforms and the policy regarding the return of the digital should be allowed. For torts, so-called benefit liability, separate policies to manage damages caused by AI-controlled devices are necessary. Additionally, a policy to decide the parents of a child born through artificial insemination should be put in place and supported by a policy to determine the father through paternity tests. In the realm of succession law, a measure assigning an inheritor the right to manage the digital legacy of the deceased must be considered.*

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# I. INTRODUCTION

## *A. Legal Reality Amid Dramatic Social Changes*

Although the Republic of Korea's government was established in 1948, it was impossible to immediately enact and operate a new legal system. Hence, it was inevitable to apply Japanese laws to the extent that they would not conflict with the First Constitution. However, the fact that most of the laws were Japanese or otherwise foreign brought the newly independent nation to shame. Moreover, it was urgent to establish a new legal system because those foreign laws had not been enacted with public support.[1] The work to draft a Civil Code[2] started with the establishment of the Legislative Compilation Committee, according to Presidential Decree No. 4 on September 15, 1948, and ended with Law No. 471 of the Civil Code' promulgated as Law 471, on February 22, 1958.[3] Furthermore, according to its Supplementary Provision No. 28, the Civil Code began to be implemented from January 1, 1960 (Dangun Era 4293), and, thus, the year 2020 marked the sixtieth anniversary of the Civil Code.

The Civil Code is the most fundamental legal norm that should be applied universally and fairly to everyone. Hence, we can hardly expect the Civil Code to reflect social phenomena neither existing nor realized. Namely, the Civil Code that began to be implemented in 1960 must have been the normative mirror reflecting the society of the Republic of Korea over time. However, the last six decades since the implementation of the Civil Code have witnessed revolutionary changes in society. In particular, Korea has developed most remarkably. The legal reality that has changed may be most outstanding in the following three areas.

First, digital information processing devices and their software have become necessities. Almost all people possess mobile communication devices that can process information as

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[1] Changsu Yang, Min-Beob-An-ui Seong-Lib-Gwa-Jeong-e gwan-han So-Go [Review of the Process Wherethrough the Civil Code was Established], 30(3·4) SEO-UL-DAE-HAG-GYO BEOB-HAG [SEOUL LAW JOURNAL] 186, 188-189 (1989).

[2] For the details about the process whereby the Civil Code was promulgated, refer to Jonghyu Jeong, *Han-Gug-Min-Beob-Jeon-ui Je-Jeong-Gwa-Jeong* [*Process of the Korean Civil Code being Enacted*], *in* MIN-BEOB-HAG-NON-CHONG [COLLECTION OF THE CIVIL CODE TREATISES (Professor Huam Yun-Jik Kwak's Collection of Treaties in Commemoration of his 61th Birthday)]: 1-6 (1985).

[3] Soon-koo Myoung, Sil-Log Dae-Han-Min-Gug Min-Beob 1 [Annal of the Republic of Korea Civil Code 1] 1 (2008).

efficiently as a computer. They have numerous software installed. People use information processing devices and their software with diversified digital contents. Currently, digital information devices and their software are developing into the area of robot engineering and artificial intelligence (AI). Thus, it is expected that the era of AI robots will soon begin.[4]

Second, online networks have been established as means of forming new relations, including legal ones. The internet, which began to be popular in the 1990s, is now positioned beyond virtual space to be mingled with the real world. The online execution of agreements has been routine. Since the 2000s, online platforms have been more and more influential while becoming more popular. Diversified transactions take place routinely, centering around online platforms. Furthermore, online platforms are used not only in the areas of commercial transactions but also in such private transactions as real estate rentals.

Third, bio-engineering and medical technology have developed remarkably. On July 25, 1978, a 'test-tube baby' was first born in the UK, and, in 1985, Korea would witness its first test-tube baby. Such artificial insemination technology would cause various problems not conceivable under the Civil Code enacted in 1960; the code operated on the assumption of natural pregnancy and childbirth. Genetic tests allow for the scientific judgment of blood relationships. If there were no normative restrictions, it would be possible to reproduce human beings. Such scientific developments transcend the perception of those who lived in the 1950s. They pose a great challenge for the entire Civil Code ranging from property law through family law.

### *B. Stagnation of the Civil Code*

Since the enactment of the Civil Code in 1960, the development of related theories and the accumulation of relevant Supreme Court precedents have been encouraging. Moreover, as society has changed, the Civil Code has been amended accordingly. However, the amendments have been limited mostly to those regarding family law, while the motives for such amendments addressing gender equality or the welfare of minor children. In short, several amendments to the Civil Code were

[4] The autonomous car that may well be considered an AI robot is now being commercialized, which means that it is driven on the road. Hence, it may cause specific legal problems such as traffic accidents.

only motivated by the eradication of the last vestige of the feudal system. The property law section has been amended nine times, of which only three amendments were significant.[5] Such extremely limited amendments hardly reflect the social changes, and the current Civil Code almost remains the same as the original version.[6] While the Civil Code has little reflected social changes, the special civil laws have responded to them. Examples are the Basic Act on Electronic Documents and Electronic Transactions (Electronic Document Acts), Electronic Signature Act, and Act on Protection of Consumers in E-Commerce (E-Commerce Act), and Product Liability Act.

In contrast, the continental civil codes that provided a basis for the Korean Civil Code have progressed remarkably. Since 2000, property law has been amended drastically, centering around the law of obligations in Germany, France, and Japan. In particular, the provisions regarding the electronic expression of one's intention or online agreement have been introduced. Lately, efforts for the enactment of laws related to AI have been actively pursued by the EU. In 2017, the European Parliament published the Civil Law Rules in Robotics, which was thereafter adopted by a European Parliament resolution on February 16, 2017, with a recommendation to the Commission on Civil Law Rules on Robotics. In addition, in "A White Paper on Artificial Intelligence – A European Approach to Excellence and Trust," which was published in February 2020, the European Parliament made it clear to impose a duty on the actors regarding the potential obligation of high-risk AI,[7] which will significantly influence the civil codes of EU members.

### *C. The Aim of the Twenty-First Century Civil Code*

Since 2000, the discussions about amendments to continental

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[5] Tuck-Soo Song, Sa-Hoe-Byeon-Hwa-wa Min-Beob Gae-Jeong - geu Bang-Beob-gwa Bang-Hyang, Gye-Yag-Beob(Chae-Gwon-Chong-Chig Po-Ham) [Method and Direction of Amendment of the Civil Code, Contract Law], 85 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 177, 181 (2018).

[6] Dongsup Eom, Min-Beob-Gae-Jeong, Mu-Eos-eul Eo-Tteoh-Ge Hal Geos-In-Ga? - Choe-Geun-ui Oe-Gug-ui Sa-Lye-leul Cham-Go-Ha-Yeo [How to Revise the Korean Civil Code: A Comparative Study], 85 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 223, 223 (2018).

[7] Han-Gug-Ji-Neung-Jeong-Bo-Sa-Hoe-Jin-Heung-Won[National Information Society Agency of Korea], EU In-Gong-Ji-Neung-Baeg-Seo-Wa Data-Jeon-Lyag 3 [E U Digital Special Report 3] 18 (2020), https://www.nia.or.kr/common/board/Download.do?bcIdx=22131&cbIdx=39485&fileNo=1.

civil law or Korea's Civil Code have focused on the development of the existing legal system. As discussed above, legislative efforts to reflect in the Civil Code the social changes caused by the development of IT technology and bio-science have yet to be fully exerted. It is essential to accommodate in the Civil Code the development and routinization of scientific technology—Internet, digital contents, online platforms, artificial insemination, genetic tests, etc. Nineteenth-century theory of analysis, full of abstract rhetoric, may not well resolve the problems arising in the twenty-first century. We have to surmount such perceptions.

Six decades ago, when the Civil Code was enacted, the civil law academic circle was barren, being significantly influenced by Japanese, German, and French civil law and their underlying theories.[8] However, Korea now has sufficient capability to establish its own original Civil Code. The efforts of the academy to accommodate social development in the twenty-first century have been published in numerous academic publications.[9] The purpose is to suggest what changes should be reflected in the Civil Code by reviewing the remarkable achievements of the academic circle and, thereby, facilitate active discussions on amendments to the Civil Code.

On the other hand, it is also inevitable that judicial precedents have developed so that specific civil cases should be judged at court. Although it is essential to discuss the judicial cases being developed, this study does not cover them due to the limited space. The scope of this study is whether and how the new social phenomena should be accommodated in the Civil Code. A specific suggestion for phrasing an amendment may only be made after a sufficient discussion.

## Ⅱ. GENERAL PROVISIONS OF THE CIVIL CODE

### *A. The Juristic Personhood of AI*

#### 1. Background of the Discussion

We have already experienced, through the shocking 'Alpha

[8] Yang, *supra* note 1, at 205.
[9] By considering the approximately one hundred publications quoted by this article, we can start discussing the amendments to the Civil Code.

Go,' that the algorithm of AI has been advanced highly enough to be the same as or smarter than the human mental operation. AI exists not only as the conventional computer program but also as a controller of such physical devices as robots. After all, it has emerged in our real world as an autonomous car. Thus, the EU has proposed a draft recommendation for the electronic personhood of AI like human beings, and, thereupon, legal professionals have discussed the ways to give legal personhood like human beings to AI robots so that they can be a subject of rights and obligations. Such discussions are active in Korea, too, while diverse prospects and arguments are suggested.

## 2. Discussions about Introduction of Electronic Personhood

Under the Civil Code, there is no provision admitting the legal personhood of AI. Moreover, there is no opinion that the current weak AI robot should have rights. However, opinions are split among scholars about the legal personhood of a strong AI robot. Some scholars opine that a strong AI robot should be given juristic personhood.[10] They argue that, in order to have an AI robot's expression of opinions or its illegal acts attributable to a legal responsibility, it is necessary to admit its legal status as an electronic personhood within a certain scope.[11] Furthermore, just

[10] Choong-Kee Lee, In-Gong-Ji-Neung-eul Ga-Jin Lo-Bos-ui Beob-Jeog Chwi-Geub: Ja-Yul-Ju-Haeng-Ja-Dong-Cha Sa-Go-ui Beob-Jeog In-Sig-gwa Chaeg-Im-eul Jung-Sim-eu-lo [How to Treat A Robot with Artificial Intelligence], 17(3) HONG-IK-BEOB-HAG [JOURNAL OF HONGIK LAW REVIEW] 1, 9 (2016); Jong-Bo Park & Hwihong Kim, In-Gong-Ji-Neung-Gi-Sul-ui Bal-Jeon-gwa Beob-Jeog Dae-Eung-Bang-Hyang [Advancement of Artificial Intelligence Technology and its Legal Countermeasure], 34(2) BEOB-HAG-NON-CHONG [HANYANG LAW REVIEW] 37, 53 (2017); Do-Kook Lee, In-Gong-Ji-Neung(AI)ui Min-Sa-Beob-Jeog Ji-Wi-wa Chaeg-Im-e gwan-han So-Go [Eine Studie über den zivilrechtlichen Status und die Haftung der künstlichen Intelligenz(KI) [The Status and Responsibility of AI under the Civil Law], 34(2) BEOB-HAG-NON-CHONG [HANYANG LAW REVIEW] 317, 332 (2017); Hyeon Tak Shin, In-Gong-Ji-Neung(AI)ui Beob-In-Gyeog—Jeon-Ja-In-Gyeog Gae-Nyeom-e gwan-han So-Go [Research on the Legal Status of AI and the Concept of Electronic Person], 478 IN-GWON-GWA JEONG-UI [HUMAN RIGHT AND JUSTICE] 45, 50 (2018); Gunoo Kim, Beob-Jeog Ju-Che-lo-seo Ja-Yul-jeog In-Gong-Ji-Neung: Ui-Ui-wa Gwan-Jeom [Autonomous AI Robots as Legal Subjects I: The Significance and Perspectives], 30(2) SEONG-GYUN-GWAN BEOB-HAG [SUNGKYUNKWAN LAW REVIEW] 215, 234 (2018); Chinwoo Kim, In-Gong-Ji-Neung-e dae-han Jeon-Ja-In Je-Do Do-Ib-ui Pil-Yo-Seong-gwa Sil-Hyeon-Bang-An-e gwan-han Go-Chal [A Study on the Necessity and Implementation of Electronic Person for Autonomous System], 171 THE JUSTICE 5, 17 (2019).

[11] Chinwoo Kim, Ji-Neung-Hyeong Robot-e dae-han Sa-Beob-jeog Gyu-Yul - Europe-Yeon-Hab-ui Ib-Beob Gwon-Go-leul Gye-Gi-lo ha-yeo [Privatrechtliche

as the rights of the corporation are admitted due to some policy consideration, so AI may well have rights such as property rights according to some policy considerations. It is argued, too, that the subject of rights would expand 'from corporations to electronic devices' as it has expanded 'from human beings to corporations.'[12] It is even argued that as self-reproduction has been feasible, departing from the carbon-centered concept of life, the concept of human life would evolve into a mechanical one.[13]

In contrast, there are some negative positions that even a strong AI or robot need not be admitted to for rights.[14] They criticize the personhood of AI as a waste of thinking like demonology during the Medieval Age. They add that most of the relations of rights and obligations may well be discussed within the individual norms of the civil and commercial codes.[15] In particular, the idea that the devices invented by human beings may well live as independent egos from their inventors may incur an irrevocable danger.[16]

However, many scholars reserve their opinions without suggesting any clear view about the future, strong AI, although they judge that introduction of electronic personhood is premature for weak AI.[17] Some scholars argue that a clearly differentiated

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Regelungen im Bereich Robotik, Juristic Control of the Intelligent Robot], 723 BEOB-JO [KOREAN LAWYERS ASSOCIATION JOURNAL] 5, 43 (2017).

[12] Choong-Kee Lee, *supra* note 10, at20.

[13] Chun-Soo Yang, Tal-In-Gan-Jung-Sim-jeog Beob-Hag-ui Ga-Neung-Seong - Gwa-Hag-Gi-Sul-ui Do-Jeon-e dae-han Haeng-Jeong-Beob-Hag-ui Dae-Eung [The Possibility of Post-Anthropocentric Law - A Response of the Administrative Law to the Challenge by Scientific Technology], 46 HAENG-JEONG-BEOB-YEON-GU [ADMINISTRATIVE LAW JOURNAL] 1, 15 (2016).

[14] Byoung Cheol Oh, In-Gong-Ji-Neung Robot-e ui-han Son-Hae-ui Bul-Beob-Haeng-Wi-Chaeg-Im (Torts by AI Robot), 27(4) BEOB-HAG-YEON-GU [YONSEI LAW REVIEW] 157, 169 (2017); Kyung Gyu Lee, In I-Oe-ui Jon-Jae-e dae-han Beob-In-Gyeog In-Jeong-gwa In-Gong-Ji-Neung-ui Beob-jeog Ji-Wi-e gwan-han So-Go (A Study on the Legal Personhood of Non-Person Beings and the Legal Status of Artificial Intelligences) 21 BEOB-HAG-YEON-GU [INHA LAW REVIEW] 323, 350-351 (2018); Dongyiel Syn & Doo Hwan Kim, In-Gong-Ji-Neung-gwa Beob-Che-Gye - Jeon-Ja-In-Gyeog-Lon-ui Mo-Sun-gwa Jeong-Bo-Gwon-Han-gwa-ui Gal-Deung-eul Jung-Sim-eu-lo [Artificial Intelligence and Autonomous Legal System—The Weakness of E-Personality and Conflicts on the Right to Disappear], 57 GANG-WON-BEOB-HAG [KANGWON LAW REVIEW] 463, 466 (2019) (assesses that "such argument for admittance of the personhood is as much unrealistic as those for legalization of defense training to defend Mars against aliens invading the planet").

[15] Syn & Kim, *supra* note 14, at 489.

[16] Lee, *supra* note 14, at 351.

[17] Ja-Hoi Kim et al., Ji-Neung-Hyeong Ja-Yul-Robot-e dae-han Jeon-Ja-jeog In-Gyeog Bu-Yeo—EU Gyeol-Ui-An-eul Jung-Sim-eu-lo [A Study about Creating Electronic Person Status for Smart Autonomous Robots—Focusing on European

system should be established for AI,[18] and other scholars insist that the exclusion of AI would result in the regression of legal theories.[19]

### 3. Sub-Conclusion

It is perceived that the introduction of electronic personhood may cause confusion rather than bring about benefits even if a strong AI robot is invented. First, problems may arise from the relation between its owner and the AI. Even if an AI robot should be given juristic personhood, its ownership cannot but be attributed to a natural person or cooperation. In short, the AI robot can hardly equal a natural person in the legal context. Because it has been manufactured for the benefit of human beings, its status as an object of ownership cannot be denied. Namely, it would be a difficult challenge to solve the systematic confusion that a substance would be an object of ownership and, at the same time, a subject of ownership.

Second, even if electronic personhood should be admitted to be a subject of rights, the problem would be how it could secure properties for itself. It is also doubtful that the AI robot could earn money independently without its owner's agreement. Even if electronic personhood can be engaged in money-making activities only according to its owners, the results would not be meaningful. This case does not much differ from the case where its owner would lend the AI robot to a third party to receive the rental cost and then grant it to the AI robot. Here, the only difference is a direct attribution of the income to the AI robot or an indirect one through its owner.[20]

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Parliament Resolution with Recommendations to the Commission on Civil Law Rules on Robotics] 724 BEOB-JO [KOREAN LAWYERS ASSOCIATION JOURNAL] 122, 151 (2017); Soogon Park, Ja-Yul-jeog Ji-Neung Robot-ui Beob-jeog Ji-Wi-e dae-han So-Go [The Legal Status of Autonomous Intelligent Robots], 31(2) BEOB-HAG-NON-CHONG [KOOKMIN LAW REVIEW] 46, 79 (2017); Seung-Kyoon Kye, Beob-Gyu-Beom-e-seo In-Gong-Ji-Neung-ui Ju-Che-Seong Yeo-Bu [The Corpus of Artificial Intelligence in Law], 724 BEOB-JO [KOREAN LAWYERS ASSOCIATION JOURNAL] 158, 190 (2017); Sung Jin Lee, In-Gong-Ji-Neung-gwa Beob-In-Gyeog In-Jeong [Artificial Intelligence and Legal Personality], 23(3) MIN-SA-BEOB-UI I-LON-GWA SIL-MU [Theory and Practice of the Civil Law] 63, 86 (2020).

[18] Park, *supra* note 17, at 79.

[19] Kye, *supra* note 17, at 190.

[20] Furthermore, if the AI robot has not been given a legal personhood but been regarded as an asset, and, thus, has been rented to a third party, then, the owner would receive the rental, while being responsible for the loss caused by the AI

Third, the actual benefit from ascribing electronic personhood to the AI robot is the possibility of attributing to it the damage it causes. However, the problem remains if the properties of AI fall short for compensation of the claimed damages. If we should adopt a limited responsibility for the AI robot,[21] the victim would bear the damages not attributed to the AI robot. If the owner of the AI robot were responsible for the damage, the actual benefits of accepting electronic personhood would be meaningless.

Lastly, there would be disharmony between the attribution of the effects of the juristic acts and the obligation of the illegal act. Specifically, the owner of the AI robot wants the effects of the contract made by the AI robot attributed to him or her, while he or she wants no responsibility for damages caused by the AI robot, which is quite unfair.

There is a noteworthy argument that while we have yet to see a completely autonomous AI robot, the Civil Code would be behind the times when a completely autonomous AI robot is invented.[22] Whether we should give electronic personhood to the AI robot would depend on the autonomy of the AI robot and social needs.[23] Namely, in consideration of the current science and technology, it would be deemed neither necessary nor valid to grant juristic personhood to the AI robot. Rather, it would be deemed proper to amend the Civil Code, partially, focusing on parts regarding juristic acts and torts and, then, complement it gradually. If a strong AI robot should appear, it would be better then to examine this issue from a new perspective.

## 4. Electronic Declaration of Intentions (Die eletronische Willenserklärung)

### (a) Concept

A legal act is "the legal condition approved by the legal order to the effect that it should have the declaration of an intention and have a legal effect."[24] Since a legal act should consist of the

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robot within the scope of owner's benefits from the AI robot.

[21] Chin-Woo Kim, *supra* note 10, at 8.

[22] Park, *supra* note 17, at 79.

[23] Rovert van den Hoven van Genderen, *Do We Need New Legal Personhood in the Age of Robots and AI?*, *in* ROBOTICS, AI AND THE FUTURE OF LAW 50 (Corrales Compagnucci et al. eds., 2018).

[24] Tuck-Soo Song, *Chap.5 Preface, in* Min-Beob-Ju-Hae II [INTERPRETATION OF

declaration of an intention, it should include one or more declarations of intentions.[25] The declaration of an intention as the core of the legal act is based on private autonomy. Hence, only the natural person who has free will can declare an intention. Recently, however, such information processing devices as computers began to produce a result having a legal value, delivering it to the other party's information processing device, which replaces the classical declaration of intention by a natural person. Such a phenomenon has been popular since the 1990s; it now has become a part of our ordinary life; and, further, it is more sophisticated and specific because of AI.

When a certain program is installed in the computer, and the user puts a command into the computer, it would operate according to the pre-determined algorithm and might well declare a legally valid intention. Here, the effects of the declaration of the intention should be attributed to the user. So, we need to focus on some aspects of this issue: the process is different from mechanical automation such as a vending machine, specification of intention in detail, incomplete behavioral control, networked declaration of an intention, the possibility of a more developed automotive device, etc. Thus, a researcher once defined 'electronic declaration of intentions (Die eletronische Willenserklärung)' as "a declaration of the intention by means of an electronic automation device that converts the human being's comprehensive intention into some electronic codes and stereotypes it with some unique signs to specify the contents of a declaration according to a certain program."[26]

In comparison with the declaration of the twentieth-century computer falling far behind AI, that of AI may well be accepted as an electronic declaration of the intention. The AI activates the robot according to the pre-input comprehensive decision-making algorithm to declare a specific and firm individual intention. Such electronic processing is a core characteristic of the electronic declaration of an intention. At the time when an AI algorithm is installed, nobody can predict what specific decision-making would

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THE CIVIL CODE II] 85 (Yun-Jik Gwak ed., 1992).

[25] In the past, some scholars who argued for the de facto contract tried to establish a concept of the legal act without the declaration of an intention, but "today, the universal theory is that any legal act should have one or more declarations of intentions unexceptionally." Song, *supra* note 24, at 88.

[26] Byoung Cheol Oh, Jeon-Ja-jeog Ui-Sa-Pyo-Si-e gwan-han Yeon-Gu [A Study on Electronic Expression] 44 (1997) (unpublished Ph.D. dissertation, Yonsei University) (on file with author).

be made by the AI. Merely, some comprehensive contents or the criteria for the AI to make decisions are inputted. Then, the AI will make specific decisions befitting some specific environment, being subject to the comprehensive criteria.

Thus, it is impossible for the AI manufacturer or owner to predict all the results of an AI's specific operations in advance. The possibility that AI would evolve for itself through machine running or self-coding cannot be excluded. Nevertheless, the dependency of the AI operation on the algorithm does not change. Namely, every normal work of an AI is dependent on its algorithm. Even the machine's running is merely a result of its algorithm installed after external information is inputted. Even self-coding is a result of the coding program installed. In short, the autonomy of the AI is nothing other than a built-in autonomy.[27] Because of unpredictable results, the dependency of AI on the algorithm can hardly be denied. If any declaration of intention by the AI is a result of the normal algorithm operation, its effects may well be attributed to the installation and start-up of the AI algorithm. Hence, the decision made by the AI under some specific situation and its declaration must be the typical electronic declaration of an intention.

### (b) Civil Code Loophole and Special Law Regulation

The German and French civil codes were amended to add provisions about the electronic contract and declaration of intention via electronic means, but Korea's Civil Code does not cover such contract or declaration of intention. In the past, the perception prevailed that it would be sufficient to expand the concepts of the conventional declaration of intention or use an analogical interpretation. In the early 2000s, the inclusion of the electronic contract in the Civil Code was discussed, but it would end up only in the dimension of academic discussion.[28]

The electronic declaration of intention or conclusion of a contract is regulated by the Electronic Document Law and Electronic Signature Law. However, they are special laws about the IT area rather than a special civil code, and, therefore, in the aspect of the law, they are not systematic but fragmental. For

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[27] Oh, *supra* note 14, at 162.

[28] Jin-Myung Chung, Jeon-Ja-Geo-Lae Gyu-Jeong-ui Min-Beob Pyeon-Ib Je-An [Incorporation into Civil Law of Electronic Transaction Regulations], 48 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 59, 59 (2010).

example, "the electronic transaction is defined as that where the whole or parts of which are processed by an electronic document" (Art. 2, Para. 5, of the Electronic Document Law), and, thus, the electronic declaration of intention is equated with the electronic document. However, every conventional declaration of intention is not made by means of a document, and, therefore, it is not deemed appropriate to define the electronic declaration of intention with the terminology 'electronic document.' In addition, the concept of electronic documents is defined as "the information made, transmitted, received or stored in electric forms by an information processing system" (Art. 2, Para. 1, of the Electronic Document Law) and, thus, encompasses photos, animations, music, and other digital contents, which are far from the conventional concepts of paper documents. The attribution of the effects of electronic documents processed by the computer is also regulated by Sub-paragraph 2 of Paragraph 1 of Article 7 of the Electronic Document Law. The intention contained in "the electronic document automatically transmitted by the computer programs or other electronic means" shall be attributed to its writer, which attributes the effects of the declaration of intention made by the computer to its writer.[29] Besides, Article 6 of Electronic Document Law regulates the time and place of the electronically declared intention transmitted and received.

On the other hand, Paragraph 1 of Article 3 of the Electronic Signature Law specifies that "the effects of the electronic signature are not denied as a signature, signature and stamping, or registering and stamping." Paragraph 2 of the same article stipulates that if an electronic signature has been elected as a signature, signature and stamping, or registering and stamping according to the agreement between the relevant parties, the electronic signature shall be effective the same as a signature, signature and stamping, or registering and stamping.

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[29] Some scholars opine in a strict sense of the word that "the relevant paragraph of the law stipulates that the declaration of an intention included in the electronic document shall be regarded as having been transmitted by the writer." Hence, they argue that this clause is not relevant to the attribution of the effects of a declared intention but only assumes who the transmitter is. HyoungSuk Ko, *In-Gong-Ji-Neung-eul I-Yong-han Jeon-Ja-jeog Ui-Sa-Pyo-Si-ui Hyo-Lyeog-e dae-han Go-Chal* [*A Study on the Effect of the Electronic Declaration of Intention by means of Artificial Intelligence*], 38(4) BEOB-HAG-NON-CHONG [CHONNAM LAW REVIEW] 129, 134 (2018). Even in such expressions of the law, a legal dogmatic limit is revealed.

### (c) Progression of Debates in the Korean Academic Circle

(1) Attribution of the Effects of the Electronic Declaration of Intention

It is almost agreed among scholars as well as specified in Electronic Document Law that the effects of an electronically declared intention should be attributed to the person behind it.[30] It may well be debatable through what legal theories the effects of the electronically declared intention would be attributed to the person behind it[31] and according to what criteria the effects would be attributed to the person. In particular, in an electronically declared intention involving many persons (programmer, operator, hardware owner, software owner, etc.), it would be very difficult to designate the person to whom the effects of the electronically declared intention would be attributed.[32] In the Electronic Document Law, it is simply indicated as the writer who prepares an electronic document and transmits it to others. Here, the concept of the writer is very ambiguous. After all, it depends on the interpretation of the law.

There are diverse opinions about the subject to whom the effects of the electronically declared intention would be attributed: "the person who used the computer for the benefits of himself or herself,"[33] "the person who wanted the computer to declare for his or her own good ,"[34] "the person who operates the AI program,"[35]

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[30] Chinwoo Kim opines that, in consideration of the autonomy of an intelligent agent, it would be necessary to review the introduction of the legal personhood for it. *Ja-Yul-System-e ui-han Ui-Sa-Pyo-Si-ui Gwi-Sog* [*Zurechnung der intelligenten Agentenerklärung*] [*Attribution of the Declared Intention by means of an Autonomous System*], 38(4) BEOB-HAG-NON-CHONG [CHONNAM LAW REVIEW] 97, 120 (2018).

[31] With regard to this problem, diverse legal theories are suggested—simple tool, herald, agent, etc. See Sang Yong Lee, In-Gong-Ji-Neung-gwa Gye-Yag-Beob: In-Gong Agent-e ui-han Gye-Yag-Gwa Sa-Jeog-Ja-Chi-ui Won-Chig [Artificial Intelligence and Contract Law: Conclusion of Contract by Artificial Agent and Principle of Private Autonomy], 23(4) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 1639, 1639-1700 (2016); Kim, supra note 30; Jin-Myung Chung, In-Gong-Ji-Neung-ui Pyo-Si-e dae-han Go-Chal [A Study on Artificial Intelligence Expression], 26(1) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 1, 1-40 (2019).

[32] Byoung Cheol Oh, Jeon-Ja-Geo-Lae-Gyu-Jeong-ui Min-Beob-e-ui Pyeon-Ib [Reception of provisions for E-Commerce in Civil Code], 46 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 117, 139 (2009).

[33] Oh, *supra* note 32, at 148.

[34] Chung, *supra* note 28, at 84.

[35] Ko, supra note 29, at 143; Choong Hoon Lee, In-Gong-Ji-Neung-eul I-Yong-Han Ui-Sa-Pyo-Si-ui Ju-Che [The Subject of Representation of Intention by

or "the person who uses or manages the technological system, being responsible finally for others."[36]

(2) Time and Place of Transmission and Arrival of the Electronic Document

Before its amendment in 2020, Paragraph 1 of Article 6 of the Electronic Document Law specified that "the document would be regarded as having been transmitted to the receiver or his/her agent when it has been inputted into the information processing system." Nevertheless, the majority of opinions stated that the time of the transmission was "when the electronic document has departed from the information processing system managed by the sender."[37] On June 9, 2020, the relevant article of the law would be amended: "The electronically declared intention is regarded as having been transmitted when it has been transmitted to the information processing system that can receive the intention." So, it is deemed proper to quote Paragraph 2 of Article 6 of the Electronic Document Law with regard to the time and place of receiving the electronic document.

(3) Discrepancy between Intention and Its Declaration

In case the result of the operations of the information processing device cannot be accepted by the user due to the errors of its program, the opinions are divided among scholars. Some scholars attempt to solve the problem by applying the theories of mistake,[38] while others try to apply legal theories about apparent agency[39] or those regarding carte blanche.[40] Even if the

Using Artificial Intelligence], 30(1) BEOB-HAG-YEON-GU [YONSEI LAW REVIEW] 285, 299 (2020).

[36] Kim, *supra* note 30, at 98.

[37] Jae Hyung Kim, Jeon-Ja-Geo-Lae-Gi-Bon-Beob-e gwan-han Gae-Jeong-Non-Ui [Discussion about the Revision of Basic Electronic Transaction Law], 42(4) SEOUL-DAE-HAG-GYO BEOB-HAG [SEOUL LAW JOURNAL] 145, 157 (2001); HyoungSuk Ko, Jeon-Ja-Sang-Geo-Lae-ui Seong-Lib-Si-Gi-e gwan-han Yeon-Gu - Jeon-Ja-So-Bi-Ja-Gye-Yag-eul Jung-Sim-eu-lo [A Study on the Time of Formation of Electronic Commerce], 13(3) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 17, 31 (2006); Oh, supra note 32, at 148; Chung, supra note 28, at 91.

[38] Kyoungjin Choi, Ji-Neung-Hyeong Sin-Gi-Sul-e gwan-han Min-Sa-Beob-jeog Geom-To [A Study of New Innovative Intelligent Technology in Civil Law], 19(3) JEONG-BO-BEOB-HAG [JOURNAL OF KOREA INFORMATION LAW] 203, 216 (2015); Ko, supra note 29, at 145.

[39] Lee, *supra* note 31, at 1682. Nevertheless, they keep the position that "the

conventional theory about mistake were applied, the right to cancel the declared intention would be limited, and, thus, the discussions tend to converge onto the user's responsibility.[41] Since such problems can seldom be solved with conventional theories about the declaration of intention, it seems reasonable to include the other party's situations or admit the apparent responsibility in the Civil Code.[42]

If an intention should be declared electronically by a third-party's hacking, the effects of such declaration of intention should not be attributed to the user because he or she has not used or set the computer, and he or she did not declare an intention comprehensively.[43] Some scholars opine that such a hacked declaration is equal to a declaration by fraud and, therefore, it can well be canceled,[44] or the hacker should be responsible as an unauthorized agent.[45] However, such a situation is quite different from the declaration of intention due to fraud or duress, and, moreover, the methods of solving the situation are not discovered in the Civil Code. Hence, it is deemed necessary to develop a new reasonable legal theory.[46]

Besides, it is deemed necessary to examine the relevant articles of the Civil Code—authorized representation (Art.'s 114-117, 127), unauthorized representation (Art. 130), and apparent representations (Art.'s 125, 126, and 129). Some scholars suggest, in terms of the differences of intention between AI and the person, that other relevant articles of the Civil Code should also be examined—the contract for a third party (Art. 539-542), conflicts of interest (Art. 64 [appointment of a special agent]),

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estimated intention is superior" with regard to the grounds of the effects of the electronically declared intention.

[40] Won Jae Hwang, In-Gong-Ji-Neung Si-Dae-ui Gye-Yag-Ja-Yu Won-Chig-gwa Beob-Jeog-Yong-Sang-ui Mun-Je-Jeom [Freedom of Contract and Legal Issues in the Age of Artificial Intelligence], 27(1) BEOB-HAG-NON-CHONG [THE LEGAL STUDIES INSTITUTE OF CHOSUN UNIVERSITY] 163, 184 (2020).

[41] Sejun Kim, In-Gong-Ji-Neung-e i-han Gye-Yag-ui Hyo-Lyeog [Wirksamkeit des Vertrages durch künstliche Intelligenz; Effects of the Contract Made by AI], 43(4) OE-BEOB-NON-JIB [HUFS LAW REVIEW] 23, 38 (2019).

[42] Lee, *supra* note 31, at 1682.

[43] Lee, *supra* note 31, at 1667.

[44] Sam-In Han & Chang-Bo Jung, Jeon-Ja-jeog Ui-Sa-Pyo-Si-e dae-han Min-Beob-Sang Jeog-Yong-Mun-Je-e gwan-han Yeon-Gu [A Study on How to Construct Electronic Expression of Intent in the Civil Law Context], 45 BEOB-HAG-YEON-GU [LAW REVIEW (KORLAW)] 201, 217 (2012).

[45] Ko, *supra* note 29, at 149.

[46] Jewan Kim, Blockchain Gi-Sul-ui Gye-Yag-Beob Jeog-Yong-Sang-ui Jaeng-Jeom - Smart Contract-eul Jung-Sim-eu-lo [Legal Issues of the 'Smart Contract'], 727 BEOB-JO [KOREAN LAWYERS ASSOCIATION JOURNAL] 150, 178 (2018).

conflict of interests between a person with parental rights and his or her child (Art. 921), the obligation of the guardian (Art. 940-6), conflict of interests (Art. 949-3),[47]etc.

(4) The So-Called 'Smart Contract'

The 'smart contract' is automatically executed and implemented by the computer program without human intervention.[48] In legal terms, it is a type of electronic contract.[49] The smart contract uses blockchain technology. The codes are registered on the blockchain, being implemented automatically.[50] The most peculiar characteristic of the smart contract is the autonomous implementation of the contract at the same time of its execution,[51] and, thus, it is free from the risk of delay of the performance. However, it is not free from an imperfect performance or the problem of warranty liability.[52] Hence, the advantage of autonomous performance alone can hardly rationalize a new legal regulation.

**(d) Sub-Conclusion**

In the German Civil Code[53] or the French one,[54] the

[47] Seil Ko, Chaeg-Im-Ju-Che-lo-seo Ji-Neung-Hyeong In-Gong-Ji-Neung Robot-e dae-han Go-Chal [A Study of Artificial Intelligence Robots as Legal Subjects], 37(2) JAE-SAN-BEOB-YEON-GU [THE JOURNAL OF PROPERTY LAW] 1, 12-13 (2020).

[48] Jin-Myung Chung, Blockchain Gi-Ban Smart-Gye-Yag-ui Beob-Lyul-Mun-Je [Legal Issues on the Smart Contracts based on Blockchain], 25(3) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 925, 926 (2018).

[49] Kim, *supra* note 46, at 163.

[50] Taeyoung Yoon, Block-Chain-Gi-Sul-eul I-Yong-Han Smart-Gye-Yag (Smart Contract) [Smart Contract Using Block Chain Technology], 36(2) JAE-SAN-BEOB-YEON-GU [THE JOURNAL OF PROPERTY LAW] 69, 74 (2019).

[51] Seongho Kim, Blockchain-Gi-Sul Gi-Ban-ui Smart Gye-Yag-e dae-han Min-Sa-Beob-Jeog Geom-To [Civil Law Issues of Smart Contract Based on Blockchain Technology], 30(3) HAN-YANG-BEOB-HAG [HAN YANG LAW REVIEW] 235, 243 (2019).

[52] Kim, *supra* note 46, at 181; Chung, *supra* note 48, at 960.

[53] Regarding the electronic declaration of an intention specified in the German Civil Code, see Byeong-Ju Jang, Jeon-Ja-jeog Beob-Lyul-Haeng-Wi Bang-Sig-ui Min-Beob-Jeon Pyeon-Ib Geom-To - Dog-Il-ui Beob-Lyul-Haeng-Wi Bang-Sig-gwa-ui Bi-Gyo-leul Jung-Sim-eu-lo [Untersuchung zur Einführung der elektronichen Rechtsgeschäftsform ins Koreanischen Bürgerlichen Gesetzbuch; Review of the Introduction of the Electronic Legal Acts to the Civil Code—Focusing on the Comparison with the German Legal Act], 31(3) JAE-SAN-BEOB-YEON-GU [THE JOURNAL OF PROPERTY LAW] 75, 75-104 (2014).

[54] Regarding the electronic contract specified in the French Civil Code, see Koong-Sool Nam, France Gae-Jeong Min-Beob-e-seo-ui Jeon-Ja-Gye-Yag-e

regulations of the electronic declaration of intention were newly introduced more than ten years ago. In our legal reality, the electronic declaration of intentions or the electronic contract has become routinized, but we cannot see any relevant articles in our Civil Code. It is very late to polish the provisions of the Electronic Document Law to accommodate them in the Civil Code. Furthermore, the provisions about the electronic signature in Electronic Signature Law should also be accommodated into the Civil Code, for they are essential normative elements of the routinized electronic declaration of intention or electronic contracting.

As discussed above, any actual profit for giving juristic personhood to AI can hardly be identified, and, therefore, it is deemed necessary to attribute the effects of AI's electronic declaration of intention to its user. In this regard, it is essential to define such attribution and its criteria in the Civil Code. Also, it is necessary to regulate the errors of the program and a third party's hacking according to the amended Civil Code.

## Ⅲ. REAL RIGHTS LAW

### *A. The Digital as a Third Value*

#### 1. Differentiation between Real and Digital Assets

Since our legislators who were working on the Civil Code in the 1950s did not know about the digital, it may be quite natural that the relevant articles do not exist in the Civil Code. Today, when some sixty years have passed since the implementation of the Civil Code, the digital has been established as a living necessity in our ordinary life. Nevertheless, we cannot find any legal regulation of the digital in our Civil Code. The first attempt to regulate it through legal hermeneutics was the discussion of whether the digital is the thing in reference to Article 98 of the Civil Code or not.

Some scholars deny the tangible materiality of the digital while defining it as being quite different from conventional

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gwan-han Go-Chal [Etude sur le contrat électronique dans le Code civil français réformé; A Review of the Electronic Contract in the French Civil Code], 34(2) BEOB-HAG-NON-CHONG [HANYANG LAW REVIEW] 229, 229-263(2017).

tangible things.[55] There are, of course, those scholars not admitting its materiality.[56] The differences between digital and things can be itemized as follows. First, since the digital has neither physical nor tangible form, it cannot be a manageable natural power.[57] Second, the digital can be reproduced infinitely without its quality being damaged, which means that unique materiality could not be found in the digital.[58] Hence, the concept of the delivery based on the uniqueness and specificity of a thing does not fit. Third, it can be electronically transmitted in its intangible state. It can ride the electric wave, not through a tangible storage medium, to be transmitted and completely reproduced at the other side. Hence, the conventional legal system can no longer be effective as far as the restoration by return is concerned. Fourth, the digital is not a natural being but an artificial being only produced by human labor. Namely, the digital as the electronic form of human labor has an impersonal substance, and, therefore, it is separated from human behaviors. In short, the digital is a third value differentiated from human labor or the thing as a materialized labor.

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[55] The representative literature are DAE HEON BAE, DIGITAL SI-DAE-UI JEONG-BO-WA JAE-SAN [INFORMATION AND ASSETS IN THE DIGITAL AGE] 90 (2009); Byoung Cheol Oh, *Computer Program-ui Mul-Seong-e gwan-han Jae-Geom-To* [*Whether a Computer Program is a Thing in a Legal Sense?*], 26(3) JAE-SAN-BEOB-YEON-GU [THE JOURNAL OF PROPERTY LAW] 1, 24 (2010); Kyoung Jin Choi, *Data-wa Sa-Beob-Sang-ui Gwon-Li, geu-li-go Data So-Yu-Gwon (Data Ownership)* [*Private Rights in Data and Data Ownership*], 23(1) JEONG-BO-BEOB-HAG [JOURNAL OF KOREA INFORMATION LAW] 217, 227 (2019).

[56] Literature covering the opposite positions on digital property rights include Chan-hyun Hwang, "Internet Law," No. 3 at 6 (2000); Seung Woo Lee, *Computer-Software Saeng-San-Ja-ui Min-Sa-Chaeg-Im* [*Computer Software Producers' Civil Responsibility*], 10(2) Min-Sa-Beob-Yeon-Gu [PRIVATE LAW REVIEW] 77, 88 (2002); Bong-Geun Shin, *Computer-Software-wa Je-Jo-Mul-Chaeg-Im* [*The Product Liability of Computer Software*], 27 SEON-JIN-SANG-SA-BEOB-LYUL-YEON-GU [ADVANCED COMMERCIAL LAW REVIEW] 103, 126 (2005); Myeong Guk Heo, *Pyo-Jun Computer Program Geo-Lae-ui Beob-jeog Seong-Jil - License-Seol mich Hon-Hab-Gye-Yag-Seol-e dae-han Bi-Pan-jeog Ib-Jang-e-seo* [*Die Rechtsnatur des Überlassungsvertrags von Standardsoftware - Aus der kritischen Sicht über die Lizenztheorie und die Theorie des gemicshten Vertrags*; *The Legal Nature of the Standard Computer Program Transactions—From a Critical Perspective about the Theory of License and that of Mixed Contract*], 16(3) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 21, 44-45 (2009).

[57] Byoung Cheol Oh, Digital-Jeong-Bo-Gye-Yag-Beob [Digital Information Contract Law] 25 (2005).

[58] Byoung Cheol Oh, Jeong-Bo-Hwa-Sa-Hoe-e-seo-ui Min-Beob-ui Ju-Yo-Mun-Je-wa Gwa-Je [*A Problem Awaiting a Solution of Civil law in the Information Society* ], 4 INTERNET-BEOB-YEON-GU [RESEARCH INTO INTERNET LAW] 97, 113 (2007).

## 2. Distinction between Digital and Storage Media

In order to store the intangible digital, a tangible medium is required. Moreover, in order to run the digital file, a tangible information processor is required. In this sense, some scholars do not differentiate the digital from its storage medium or the information processing device. The fact that the digital can be supplied via information communication network describes a method of digital transaction only, and, therefore, it cannot be an objective argument for the materiality of the digital. This opinion requires that the digital should be physicalized in order to perform its function and, therefore, argues that a computer program itself or an object of transaction not physicalized cannot exist.[59]

However, in the past, the digital was traded, being stored in media, and, therefore, the digital should necessarily be physicalized. Today, however, the applications are sold in the 'app store' of the smartphone, and, in such a case, it cannot well be explained that something physicalized is traded. Hence, in discussing the materiality of the digital, those of the digital itself should be differentiated from those of the object containing the data.[60] When the digital is stored in a USB or CD or other information storage device to be traded, the tangible USB or CD may well contain the digital to be treated as a single commodity. However, a USB or CD is a simple storage medium, and the major target for trading is the digital stored therein.[61] Namely, the price of the digital would be determined depending not on the value of its storage but on that of its contents.[62] Moreover, it is fundamentally free to separate the digital from its tangible storage media. If the digital stored in the smartphone were transmitted using wireless transmission technology such as Bluetooth, there would be neither a storage medium nor tangible transmission medium in the interval space through which the digital passes. In short, the fundamentally intangible digital exists without being

[59] Heo, *supra* note 56, at 44-45.
[60] Choi, *supra* note 55, at 233.
[61] Such a logic may well be supported by the fact that the price of CD storage of a computer program or digital contents is different from that of the CD itself. It is quite natural that the prices of CDs are different depending on the digital information contained therein.
[62] Dae Heon Bae, Geo-Lae-Dae-Sang-eu-lo-seo Digital Jeong-Bo-wa "Mul-Geon" Gae-Nyeom Hwag-Dae-e gwan-han Geom-To [A Study on the Legal Concept of In Rem and Digital Information as a Business Object], 14 SANG-SA-PAN-RYE-YEON-GU [COMMERCIAL CASES REVIEW] 301, 338 (2003).

contained in the tangible media.

### 3. The Digital as 'Digitalized Labor'

In the Civil Code, the value of an asset may exist as human action, inaction, or a thing. Namely, the value of the properties is the human labor itself, its results, or a product of nature. Human labor loses its value as soon as its product has been made, being converted into quite a different thing. Namely, since the human labor is physicalized as soon as it has been converted into a product, the product is 'a materialized labor.' However, the digital is a product of intellectual labor or is an electronic product. In the pre-digital age, human labor cannot be separated from its subject or human beings, but, in the digital age, 'the labor not materialized' would be separable from its subject or human beings. Then, the new object of transaction or the digital may exist in a form between labor and product. Namely, although it has been separated from the subject of labor, it exists as digitalized labor.[63] After all, the digital is neither 'the materialized labor' nor human labor. It may be a third intermediate value.[64]

### 4. Sub-Conclusion

In terms of legal hermeneutics, it is difficult to regard the digital as the thing defined in Article 98.[65] It is neither a physical thing nor an energy existing in nature. Even if we deem the digital as a thing, we still face complex problems. Since the digital can hardly be admitted as a unique thing or specified one, its value as an asset cannot be transferred to a third party through 'delivery.' The 'delivery' of the pure digital not using tangible storage is a reproduction via transmission, which means sharing of its asset value or its spread. Moreover, the digital cannot well be returned intact to its original owner. Since the unique materiality of things is not in the digital, it is never effective to apply the relevant Civil Code provisions to the digital.

Chapters II and III of the General Provisions of the current Civil Code specify the subjects of rights of the natural person and

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[63] OH, *supra* note 57, at 19.
[64] Oh, *supra* note 58, at 116.
[65] Kyoungjin Choi, *Min-Beob-sang Jeong-Bo-ui Ji-Wi* [*The Statutes of Information in Civil Law*], 15 SAN-EOB-JAE-SAN-GWON [JOURNAL OF INDUSTRIAL PROPERTY] 1, 19 (2004).

juristic one, and Chapter IV specifies the things as objects of rights. It is deemed desirable to add a separate chapter to define the digital and enact provisions that reflect characteristics of the digital such as its arbitrary reproduction.

## *B. Digital Rights*

### 1. Digital Right as a Third Property Right

The Pandekten system, dividing property rights into real rights and obligations, affected our Civil Code that incorporates the system by specifying real rights in its second chapter and the obligation rights in its third chapter. However, as some rights that could not well be accommodated by such a dichotomic system have appeared, it is deemed necessary to establish a new system to accommodate them.[66] As discussed above, the third value, the digital belonging to neither things nor human acts, has appeared, and, thus, it may well be necessary to introduce a third kind of property rights. It is deemed a social request for the scholars to develop a third form of value in addition to real rights and obligations for the twentieth-first century Civil Code; this third form of value must be a digital one that is separated from human labor and different from conventional things.[67]

So far, the digital has tended to be regulated by obligation law rather than exclusive ownership. However, from the perspective of denying the materiality of the digital, the discussion is centered around the exclusive allotment of data and a series of powers therefrom. Data ownership or an absolute right for excluding third parties' engagement is discussed.[68] In

[66] Bong-Seock Seo, Chae-Gwon & Mul-Gwon, Sae-Lo-Un Yu-Hyeong Gwon-Li-ui Beob-Jeog Bon-Jil-e dae-han Che-Gye-jeog Go-Chal [Rechtsnatur der Schildrechte, dinglichen Rechte und neuen Art von subjektiven Rechte; A Systematic Review of the Legal Essence of Liability Rights, Property Rights, and New Types of Rights], 30(1) BEOB-HAG-NON-CHONG [KOOKMIN LAW REVIEW] 117, 119 (2017). This article argues for a new type of rights not for the digital but for conceptual rights (intellectual property rights, marketable securities, portrait rights, etc.,), but its context may well be same in that the current dichotomic division of the rights is limited.

[67] Oh, *supra* note 55, at 24.

[68] Dong-Jin Lee, Data-So-Yu-Gwon (Data Ownership), Gae-Nyeom-Gwa geu Sil-Ig [The Concept of Data Ownership—A Critical Observation], 22(3) JEONG-BO-BEOB-HAG [JOURNAL OF KOREA INFORMATION LAW] 219, 224 (2018); Sang Yong Lee, Data Geo-Lae-ui Beob-jeog Gi-Cho [Legal Foundation for Data Transaction], 728 BEOB-JO [KOREAN LAWYERS ASSOCIATION JOURNAL] 5, 10 (2018); Da-Young Jeong, Digital-Gae-In-Jeong-Bo-wa Digital-Contents -ui

contemporary society, the data should be digitalized in principle,[69] and, so, it would be necessary to establish a third property right for the digital in addition to real rights and obligations.[70] Namely, the direct right for the intangible substance or the digital is the right of the digital. Like the real right, the ownership of the digital may well be called 'the digital right.' For example, those who purchased a computer program or digital contents through downloading may well have the digital right for it. If a third party deletes the digital data intentionally from their owners' computer, he or she would be responsible for the infringement on others' property rights.

However, digital rights should be distinguished from intellectual property rights for digital creation or conversion. Intellectual property rights for the digital should be handled in the area of conventional copyrights, while the digital right needs to be dealt with as a third right in the Civil Code. Namely, the digital right needs to be handled as an object. Hence, if you have the digital right as a third property right, you may not have the intellectual property right for the digital creation or conversion thereof. The digital right is a kind of right that should be limited internally by the intellectual property right. If you have a digital right, you are not allowed to reproduce the digital at will or infringe upon the intellectual property right. In this regard, the digital right is fundamentally different from the ownership of a thing, which is a sole and exclusive dominance over the thing. Moreover, in case the term of an intellectual property right has expired or the digital shows a lack of creativity, any intellectual property right does not exist, while the substance of the digital still exists, being the object of a right. In this regard, the intellectual property right is quite distinguishable from the digital right.

### 2. Digital Retention Right

The representative sub-right of the digital right may be the

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Gye-Yag-jeog Gyo-Hwan – So-Bi-Ja-Bo-Ho-ui Gwan-Jeom-e-seo [Contractual Exchange of Personal Digital Data and Digital Contents—Focused on Consumer Protection], 26(3) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 245, 250 (2019).

[69] Lee, *supra* note 68, at 222.

[70] Bae, *supra* note 62, at 344. Similarly, Bae suggests an expansion of the concept of real right or a separate legislative solution. Choi (*supra* note 55, at 239) argues that the ownership of data should be accommodated in the Civil Code through a drastic legislative change.

digital retention right. If a person who has the right to reproduce the digital has copied and distributed the digital, he/she may well have a digital retention right. Namely, a digital retention right may well be defined as the right to possess digital copies and use them.[71] Since a digital retention right encompasses the exclusive use of the digital, the holder should be allowed to dispose of the digital. Accordingly, the digital owners should be allowed to assign his/her digital to a third party. Merely, as the delivery of the digital means a new duplication of it, its holder should delete the digital from its storage media that would be delivered to the third party. In addition, a digital retention right is a right to possess the digital permanently, and, therefore, it is not subject to any limitation, like standard title or conventional ownership. Furthermore, some scholars argue that the digital can be owned through good faith acquisition in reference to Article 249 through its continued uses such as downloading and copying.[72] But such an argument can hardly be reasonable because the digital is not unique or specific, unlike the tangible.

For a contract purchasing the digital, various theories have been suggested about its nature—sales contract, copyright license contract, end-user license contract, mixed contract, etc.[73] The common point of these views is the contract of obligation. Namely, these scholars understand that the contract is not about the digital right but the right to the thing storing the digital. However, the substance or the digital exists separately from the tangible storing medium or the intellectual property right holder's act. Moreover, those who purchase the digital dominate the intangible substance or the digital. In this regard, it would not be desirable to regard the contract as a contract of obligation. Those who have purchased the digital may well possess the digital directly. In this regard, it would be realistic to construct a legal theory to the effect that they have the right to dominate the digital directly. Hence, the contract for buying the digital and retaining it may well be called the

[71] It may be the synonym of the so-called data ownership. Because it sounds a little unnatural, digital right is used instead of digital ownership.

[72] Hae-Sang Jung, Online-Contents-ui Seon-Ui-Chwi-Deug-e gwan-han Beob-Li [Theory of Bona Fide Acquisition on Online Content], 17(3) HONG-IK-BEOB-HAG [JOURNAL OF HONGIK LAW REVIEW] 195, 209 (2016).

[73] For a discussion about the nature of purchasing the digital, see OH, supra note 57, at 289-298; Jong-Kwun Park, Digital-Contents I-Yong-Gye-Yag-ui Beob-jeog Seong-Jil-gwa Gwon-Li · Ui-Mu-e gwan-han Go-Chal [A Study on the Legal Nature of Mass-Market Digital Contents License and the Right and Obligation in a Digital Contents License], 14(1) BEOB-HAG-NON-JIB [EWHA LAW JOURNAL] 189, 204-213 (2009).

'digital retention contract.' All in all, such a contract may well be defined as a digital rights contract, which is other than a contract of property or obligation.[74]

### 3. Digital Access Rights

Not only the right to install the digital in its storage medium or the information processing device but also the right to access the digital and use it should be treated as a digital right. Such a right may well be called a digital access right. For example, you may well acquire digital contents through streaming digital contents or accessing an online game. In such cases, you would not retain the digital directly, which means you have no right to dispose of the digital. It is not deemed unreasonable to apply the statute of limitations to the digital access right. Namely, if you do not access the digital for a certain period of time, you may lose your digital access right.

The contract of acquiring the digital access right may well be called the digital access contract. This contract is basically a continuous contract.[75] The details of the digital access contract may include the right to access the digital for a certain period of time and the right to renew or change the digital. Besides, the digital access contract may include the assignment or rental of the access right.

### 4. Sub-Conclusion

As discussed above, if we categorize the digital as an independent substance of proprietary value, it would be desirable to establish the digital right as a new property right in a separate chapter of the Civil Code. Since the current Civil Code specifies property rights in Chapter II and the right of obligation in Chapter III, it is deemed natural and logical to establish 'the digital right' between them. Then, the digital heritage that has been regarded only as a personality value would be treated as an asset, and, thus, the succession of the digital can be solved naturally.

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[74] Park, *supra* note 73, at 213. Park suggests the need to review the ways to give an exclusive right of the digital to its user.

[75] OH, *supra* note 57, at 475.

# IV. CONTRACT LAW AND TORTS

## *A. Intermediate Contract Including that of Platform Use*

### 1. Structure of the Platform

Recently, a technological basis began to be popular among many users who link and exchange communications with other users online for diverse purposes. It is called a 'platform.'[76] The transaction platform intermediates the offer and acceptance among users to make contracts about goods and services. This is called a 'transaction platform.' It functions like an online marketplace. Namely, the platform provides a transaction place for sellers and buyers. It does not become a party to the contracts.[77] Since transaction platforms began to be operated in the e-commerce area, the discussion has been focused almost entirely on the protection of consumers. Currently, such transaction platforms are expanding gradually into the areas of civil businesses like the transactions of used items.

There exist three subjects for using the platform. Above all, the platform services are provided by the platform operator. Then, there exist many platform users, which may well be divided into offerers and acceptors.[78] Although the platform operator is not a subject of the transactions within the platform, he or she is involved in the transactions within the platform by providing such services as settlement, delivery, discount coupons, and point of operation.

### 2. Definition of the Platform-Use Contract

There exist two contract relations with regard to the transaction platform. One of them is the platform-use contract

[76] Byoung Cheol Oh, Jeon-Ja-Sang-Geo-Lae-Beob-Sang-ui Geo-Lae Platform Gyu-Je-wa Gae-Seon-Bang-An [Regulation on Transactions Platform in the Korean Electronic Commerce Consumer Protection Act and Its Improvement Measure], 41(4) OE-BEOB-NON-JIB [HUFS LAW REVIEW] 145, 148 (2017).

[77] Jin-Myung Chung, Platform-eul I-Yong-han Jeon-Ja-Geo-Lae-ui Beob-Lyul-Mun-Je - Platform-Sa-Eob-Ja-Ui Chaeg-Im-eul Jung-Sim-eu-lo [Legal Issues of Electronic Transaction Using Platform—Focused on the Responsibility of Platform Providers], 24(4) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 1559, 1563 (2017).

[78] In the e-commerce area, the contracting parties within the transaction platform may clearly be divided into seller and buyer. In the private platform transactions, however, it is more appropriate to divide users into offerers and acceptors.

between platform operators and platform users. Another is the contract about goods or services, executed between the insider users. This contract through the platform is the conventional contract under the Civil Code. Examples are sales contracts for goods or rights, rental contracts, contracts for attorneys, sub-contracts, etc. Such contracts are ordinary contracts, except for the fact that they are made online. Hence, it is not deemed difficult to handle them according to the Civil Code and its hermeneutics.

Here, the problem may arise from the platform-use contract made between platform operators and users. According to such platform-use contracts, the platform operator provides a platform service to the users or intermediates the contract between the users. Usually, in the e-commerce platform, the contract between the platform operator and seller is quite different from that between the platform operator and user.[79] However, in the platform for individual transactions, such a difference can seldom be found. All in all, the platform-use contract may well be defined as "a contract whereby the platform operator will mediate the transactions or involve himself or herself in them."

### 3. The Legal Character of the Platform-Use Contract

The conventional discussions about the legal character of the platform-use contract have been centered on the contract between the platform operator and its users or sellers in e-commerce. Since the platform operator allows its users or consumers to use the platform without any clear contract, the operator's service has been regarded as management of affairs in reference to Article 734.[80] Depending upon the types of platform operation, however, the contract between the platform operator and sellers may be a

[79] For example, in the case of the platform using the smart phone application for order and delivery of foods, a platform-use contract is made between the platform operator and the food seller, which is quite different from the platform-use contract between platform operator and users.

[80] Chung, supra note 77, at 1564; Bong-Geun Shin, Platform Un-Yeong-Ja-ui Gye-Yag-Sang-ui Chaeg-Im - Dog-Il-ui Non-Ui-leul Jung-Sim-eu-lo [Platform Operator's Contractual Liability—Focusing on the Discussion in Germany] 18(3) BEOB-HAG-YEON-GU [LAW REVIEW (KORLAW)] 419, 424 (2018); Ji Hyun Choi, Online Platform Sa-Eob-Ja-ui Min-Sa-Chaeg-Im-e gwan-han Yeon-Gu – Open-Market-eul Jung-Sim-eu-lo [Online Platform Operator's Civil Liability—Focusing on 'Open Market'(Online Marketplace)], 12(4) AJOU-BEOB-HAG [AJOU LAW REVIEW] 152, 158 (2019).

delegation contract,[81] a contract for a working, or a mixed contract of delegation and for a working.[82]

It is deemed proper to view the uses of the platform as an intermediation.[83] However, the current Civil Code does not specify the intermediate contract in its list of the typified contracts. In this sense, our Civil Code has a loophole. In the Commercial Code, a brokerage business is specified. However, the person who intermediates a civil transaction cannot be a broker as defined in the Commercial Code, which means that the relevant article of the Commercial Code cannot be applied directly to the platform-use contract. Even if a platform can be defined as a commercial brokerage, there are requirements for the commercial platform as an obligation of sample storage (Art. 95 of the Commercial Code), obligation of executing a contract (Art. 96, Para. 2, of the Commercial Code), obligation of confidentiality for the name or trade name (Art. 95 of the Commercial Code), obligation of the broker's performance (Art. 99 of the Commercial Code), etc. Because such requirements cannot well be applied to the online platform or are unrealistic,[84] it is deemed necessary to introduce a separate typical contract in the Civil Code and, thereby, regulate the platform-use contract.

## 4. Need for Special Regulation of Platform-Use Contracts

### (a) Platform Operators' Responsibility for Contracts through a Platform

The key issue is whether the platform operator should be responsible for the contract made by its users. In the e-commerce using the platform, its operator would not be responsible for the contract if he/she should make clear that he/she is a mail-order broker. In 2016, the e-Commerce Transaction Law was amended to establish the platform operator's secondary responsibility for the settlement or payment.[85] Such an amendment seems to have reflected the argument for a heavy responsibility on the part of

[81] Shin, *supra* note 80, at 425.
[82] Chung, *supra* note 77, at 1564.
[83] Shin, *supra* note 80, at 431; Choi, *supra* note 80, at 162.
[84] Chung, supra note 77, at 1573; Boeun Chang, Eum-Sig-Ju-Mun Platform-eul I-Yong-Han Geo-Lae-e gwan-han Gye-Yag-Beob-jeog Geom-To [Private Law Perspectives on Platform Services—Based Upon Regulations on Food Industry], 42(3) OE-BEOB-NON-JIB [HUFS LAW REVIEW] 39, 54 (2018).
[85] For details, see Oh, *supra* note 76, at 158.

platform operators in case he/she gets involved in the online transaction just beyond providing information services.[86] In a recent discussion in Europe, it was argued that the platform operator should be responsible for the online contract jointly with the seller if the consumer trusts the operator.[87] A recent Supreme Court precedent included the platform operator among the distributors,[88] and, therefore, there is a view that the platform operators' responsibility should be expanded.[89]

In case the online platform should be regulated by the Civil Code, such special considerations as protection of the commercial transactions and consumers may not be taken into account. It is deemed necessary to exempt the platform operator from responsibility for performing his/her obligation in Commercial Code or e-Commerce law.[90] Merely, if the consumers use the settlement system provided by the platform, it is deemed necessary to impose as much responsibility on the platform operators as the commercial brokers.[91] Another scholar argues that the confidence liability specified in Paragraph 3 of Article 311 of the German Civil Code should be imposed on the platform operator.[92]

Another issue is the possibility that a joint tort responsibility for the users' acts should be imposed on the platform operator. For example, should the platform operator be responsible for users'

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[86] Byoung Cheol Oh, Tong-Sin-Pan-Mae-Eob-Ja-ui Bul-Beob-Haeng-Wi-e dae-han Tong-Sin-Pan-Mae-Jung-Gae-Ja (Open market)ui Chaeg-Im [Responsibility of Open Market for the Torts of a Dealer in the Internet Market Place], 26(1) JAE-SAN-BEOB-YEON-GU [THE JOURNAL OF PROPERTY LAW] 1, 8-9 (2009); Hyong-suk Ko, Tong-Sin-Pan-Mae-Jung-Gae-wa So-Bi-Ja-Bo-Ho [Mail Order Brokerage and Consumer Protection], 2(2) YU-TONG-BEOB YEON-GU [DISTRIBUTION LAW REVIEW] 107, 117 (2015).

[87] Byung-Jun Lee, Jeon-Ja-Sang-Geo-Lae Platform-gwa Geo-Lae-Gwan-Gye-e dae-han Chaeg-Im [E-Commerce Platform and the Responsibility for Contractual Relations], 5(1) SO-BI-JA-BEOB-YEON-GU [JOURNAL OF CONSUMER LAW] 11, 25 (2019).

[88] Daebeobwon [S. Ct.], Sept. 10, 2019, 2019Ma5464 (S. Kor.).

[89] Byung-Jun Lee et al., Platform Gyeong-Je-Si-Dae-e iss-eo Je-Jo-Mul-Chaeg-Im-Beob-ui Hwag-Jang [Improvement Direction of Product Liability Law in the Platform Economy Era], 6(1) SO-BI-JA-BEOB-YEON-GU [JOURNAL OF CONSUMER LAW] 141, 150 (2020).

[90] Gwang Un Ji opines that any legislation imposing a collective responsibility on the platform operator should be very cautious. *Europe-Yeon-Hab Platform-Sa-Eob-Ja Gyu-Je-Dong-Hyang-gwa Si-Sa-Jeom* [*Regulatory Trends and Implications of Online Intermediary Platforms in the EU*], 20(2) BEOB-GWA-JEONG-CHAEG-YEON-GU [JOURNAL OF LAW AND POLITICS RESEARCH] 153, 179 (2020).

[91] Shin, *supra* note 80, at 432.

[92] Shin, *supra* note 80, at 423.

acts such as infringement on others' trademark rights, transactions of drugs, and distributions of illegal or immoral information? The Supreme Court judged that the open market should help prevent infringement on trademarks[93] and further imposed a joint tort responsibility on the online market operator for inaction, facilitating the infringement of the user's trademark.[94] All in all, it is not deemed proper to impose an online monitoring obligation on the platform operator under the Civil Code. It is opined that it would be proper to impose tort responsibility on the platform operator only in the case of intentional or gross negligence on the operator's part.

**(b) Dualistic Contract Contents**

Generally, the contents of the platform-use contract differ depending upon users' roles. The reality is that the fee is imposed only on sellers in the transactions of goods or services, or, in the real property lease contracts or the sales of the used items, only the seller or the lessor should pay the fee for using the platform. The buyers or lessees pay less or are exempted from any payment. The platform-use contracts should be regulated on the assumption of such differential or dualistic contracts. In particular, the cases need to be divided into paid uses and free ones. In the former case, the platform operators should be more responsible for the users.

**(c) Regulation of Information Obtained on Transactions**

The biggest income by operating a platform may consist of the transaction fees or the advertisement rates, but, in addition to them, the platform operator could earn income by collecting and using the diverse information provided by the numerous users or obtained from them. Since such trade-related information has been obtained from the users, it should not be monopolized by the platform operator. This should be reflected in the regulation of online platforms.

In the online platform, some users may well upload their assessments on the bulletin board, and other users may well refer to them for their decision on the transaction. Such reputation must

[93] Daebeobwon [S. Ct.], Apr. 16, 2009, 2008Da53812 (S. Kor.).
[94] Daebeobwon [S. Ct.], Mar.11, 2010, 2009Da4343 (S. Kor.); Chung, *supra* note 77, at 1590-1591.

be an essential element for on-platform trust.[95] Of course, such a system of assessment should be operated in a fair and transparent way.[96] Hence, some reasonable obligations need to be imposed on the platform operator.[97] Specifically, the platform operator's arbitrary manipulation of the assessment should be prohibited, while he/she should be obligated to prevent a third party's manipulation of the assessment.

### 5. Sub-Conclusion

Regarding e-Commerce through the platform, e-Commerce law regulates the transactions, focusing on the responsibilities of the platform operator. E-Commerce law aims to protect consumers' rights and interests, which means the law was enacted to protect consumers. In other words, e-Commerce law may well be compared with the Civil Code that suggests 'fair legal principles' from a neutral perspective. Hence, it is deemed a historical challenge to establish the regulations for platform uses in the Civil Code. Merely, since the functions of the platform may well be equated with the brokerage, it is deemed desirable to establish 'an intermediate contract' in the Civil Code rather than use the unfamiliar terminology 'platform.'

Regarding the establishment of a brokerage contract in the Civil Code, discussions were active on amending the Civil Code.[98] Online platforms are quite different from conventional brokerages such as matchmaking or real property brokerage. Hence, some separate specifications about the online platform need to be introduced in the Civil Code. Of course, the unique conditions of the platform-use contract discussed above should be reflected in the amendment of the Civil Code.

## *B. Electronic Fulfillment*

### 1. Characteristics of Electronic Fulfillment

The most peculiar characteristic of the digital is the

[95] Choi, *supra* note 80, at page 156.
[96] Byung-Jun Lee et al., Europe-Yeon-Hab Jeon-Ja-Sang-Geo-Lae Platform Gyu-Je-Dong-Hyang-gwa Si-Sa-Jeom [Regulatory Trends and Implication of the Model Rules on Online Intermediary Platforms in the EU], 42(3) OE-BEOB-NON-JIB [HUFS LAW REVIEW] 1, 22 (2018).
[97] Shin, *supra* note 80, at 434.
[98] Song, *supra* note 5, at 206.

possibility that the data could well be transmitted via a wired or wireless network by using no storing medium. Particularly in the case of wireless transmission, the data would ride on the intangible radio waves. The electronic fulfillment using the wireless wave is well evident in applications of the smartphone and the personal broadcasting platform. Electronic fulfillment is more significant in accessing the digital via a network rather than by downloading the digital. Furthermore, in the case of the smart contract, where execution of an agreement and its fulfillment are simultaneous,[99] the electronic fulfillment would be more popular in the future.

Regarding the classification of the delivery, conventional civil law theories divide the delivery into the delivery of things and the service, and, thereby, admit the difference between the two categories of delivery in terms of method of compulsory fulfillment, limited transfer and receipt of the obligations, application of the principle of good faith, and change of situation.[100] Then, what is electronic fulfillment? The current Civil Code does not specify. Although the digital is not a tangible thing, it has an intangible substance. So, the electronic fulfillment or the reproduction of the digital by downloading it may well be a 'delivery.' However, electronic fulfillment when accessing the digital via a network may not well be handled as 'delivery.' So, a new regulation seems to be required for the middle concept between 'delivery' and 'service.'

## 2. Time and Place for Electronic Fulfillment

Since electronic fulfillment is made via a network, the conventional judgment according to physical space is not effective. In particular, if the principle that the obligation should be fulfilled at the creditor's place should be applied to the digital transaction, it would be difficult to judge where the digital should be stored.[101] Since our current Civil Code does not cover electronic fulfillment, there is a legal loophole as far as the time and place for the electronic fulfillment are concerned. On the other hand, Article 6 of the Electronic Document Act stipulates the time and place for transmission and receipt of electronic documents. Although the

[99] HyoungSuk Ko, Smart-Gye-Yag-e Gwan-Han Yeon-Gu [A Study on the Smart Contract], 22(1) MIN-SA-BEOB-UI I-LON-GWA SIL-MU [Theory and Practice of the Civil Law] 173, 179 (2018).
[100] Joonho Kim, Gye-Yag-Beob [Contract Law] 346-347 (2011).
[101] OH, *supra* note 57, at 342.

article is about the time and place for the transmission and receipt of the electronic declaration of intention, it may well provide an implication for the electronic fulfillment as the electronic documents encompass computer programs, digital contents, and other digital information.

Article 6 of the Electronic Document Act that was amended on June 9, 2020 specifies that "the electronic document is regarded as transmitted when it has been transmitted to the information processing system that can receive it" and that it is regarded as received when "it has been input into the information processing system designated by the receiver." Regarding the time of receipt, the article specifies that "if the receiver has designated the information processing system for reception, the digital document is regarded as received when it has been inputted into the designated information processing system." And if the document has been inputted into other information processing systems than designated by the receiver, it is estimated that the receiver has retrieved it when he or she has searched for or retrieved it from the information system. If the receiver has not designated the information processing system, the article specifies that "when the electronic document has been inputted into the information processing system managed by the receiver, it is estimated that the document has arrived at the receiver." Since such regulations are deemed reasonable, they may well be borrowed for electronic fulfillment.

Paragraph 3 of Article 6 of the Electronic Document Act was established for e-commerce, and, therefore, the electronic document is regarded as transmitted or received at the sender's or receiver's business place. Since the business place is not deemed proper as the place for electronic fulfillment, it may well be proper to replace the business place with the sender's or receiver's address.[102]

### 3. Servant for Electronic Fulfillment

Electronic fulfillment is characterized by the digital and the network. The object is not a thing but digital, while the fulfillment is made not off-line but via a network. Since electronic fulfillment is made via the network, a smooth operation of a network should

[102] In case of the smart phone, the notebook, or any other mobile information processing device, the judgment about time and place of the electronic transmission may not well be significant from the normative perspective.

be assumed. Here, the problem is that the network is operated by a third party (ex, telecommunications company etc.) rather than the debtor. Even if the debtor is prepared to fulfill his/her obligation, the fulfillment would be impossible if the network should not function. After all, in electronic fulfillment, the network operator would be involved in the fulfillment as a servant in most cases. However, it is not deemed proper to impose the responsibility of a servant on the network operator according to the *Einstandsprinzip*. Hence, a new legal regulation is required to impose an obligation on the third party or the network operator or exempt him or her from any responsibility.

### 4. The Right to Request for Re-Transmission as a Remedy

Since electronic fulfillment can be reproduced without limit, the unlimited duplications are all free from charge. Namely, even if the debtor should transmit the same digital item twice, he or she would be almost absolutely free from any financial burden. Unlike tangible things, the creditor would not benefit from the debtor's second transmission of the digital item. Hence, in the case of the digital item, the right to request a second transmission needs to be admitted. In conventional default liability theory, the claim for replenishment is feasible. If the complete payment should be made as the claim for replenishment, the creditor is allowed to request a subsequent accomplishment.[103] All in all, the right for subsequent accomplishment may well be equal to the right for re-transmission in the electronic fulfillment.[104]

### 5. Sub-Conclusion

As the digital is being established as a necessity with the routinization of the electronic fulfillment of the digital, it is deemed essential to establish some provisions in the Civil Code. When the digital is stored in a tangible medium, the legal theories of the conventional fulfillment may be applied.[105] However, when the Civil Code was enacted, electronic transmission via the network could not be anticipated, so it would not be sufficient to

[103] Changsu Yang, MIN-BEOB-JU-HAE IX [INTERPRETATION OF CIVIL CODE IX] Article 750, 310 (Yunjik Gwak ed., 1995).
[104] OH, *supra* note 57, at 350.
[105] Of course, such incomplete fulfillment of the digital from erroneous programs still remains.

handle this issue with the hermeneutics of the Civil Code. Hence, the regulations of the Electronic Document Law regarding the time and place of electronic fulfillment needs to be accommodated in the Civil Code, and, in this context, it would be deemed necessary to introduce the right to request a re-transmission as a remedy for the non-performance of the obligation or the network operator's responsibility.

### *C. Return of the Digital as the Effect of Unfair Profit*

#### 1. Restoration through Return of the Original

Article 741 of the Civil Code stipulates restoration through the return of the profit to remedy unfair profit. In this regard, Article 747 of the Civil Code specifies that the return of the original thing is the principal recovery. Such a restoration through the return of the original thing has the effect of canceling the contract or confirming its invalidity. If the thing is tangible, the unfair profit gainer's benefit would be eliminated.[106] The party who suffered a loss could have his/her thing returned.

#### 2. Difficulties Due to the Characteristics of the Digital

The tangible thing can be used exclusively through its possession. Namely, as soon as the possessor has lost his/her thing, he or she could no longer use it. However, in the case of the digital, the delivery of possession is only a reproduction of the digital, and, so, the return of the digital is insignificant.[107] If the party who should return the digital has transmitted it to the other party, it is only a copy of the digital. Namely, the digital stored in the transmitter's computer would not be erased. Hence, the restoration through the return of the original thing cannot be an effective legal remedy. On the other hand, in case the digital end-user contract has been canceled, the original thing cannot be returned. Therefore, if the payment should be refunded, there could be no solution. Nevertheless, it would not be proper to give up the remedy or the return of the original thing. Namely, it is deemed necessary to establish another remedy or restoration in the Civil Code.

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[106] The bona fide gain of the unfair profit is accepted as the right to collect the fruits according to Paragraph 1 of Article 201, and, therefore, his/her gains would not be denied.

[107] OH, *supra* note 57, at page 116.

### 3. Restoration of the Digital through Deletion

If the digital were stored intact in a tangible medium, the restoration would be possible with the tangible-storing medium returned. However, if the digital has been separated from its storing medium to be installed in an information processing device or copied into it, the return of the original storage medium would not be sufficient for restoration. Therefore, Paragraph 2 of Article 17 of the e-Commerce law does not admit a right to withdraw the offer if the package containing the reproducible data has been damaged. Nevertheless, the balance of the profits between mail carriers and consumers should not be collapsed. Paragraph 6 of Article 17 of e-Commerce law specifies that "the mail carrier should indicate the fact of impossible withdrawal from the offer and that the mail carrier should not obstruct consumers' rights of withdrawal from their offer according to the specifications in the Presidential Decree." Further, the e-Commerce law stipulates that, if the mail carrier violates such obligations, the consumers should be given the right to withdraw their offers.

If the digital has been delivered electronically via the network, we need to refer to Paragraph 2 of Article 47-3 of the Japanese copyright act, which suggests that "if an owner of the reproduced digital has lost it without it having been destroyed, he/she should not preserve its copy without the copyrighter holder's extra declaration of intention." Specifically, the person who should return the digital to its original owner should uninstall and delete the digital completely.[108] In case the consumer has already transmitted the digital to the seller and the seller already owned it, the return of the digital would not be significant. In such a case, the transmission should not be included in the methods of restoration without the seller's separate request. Such restoration through the deletion would well be applied to the restoration of the digital together with its storing media.

### 4. Sub-Conclusion

If the contract regarding the digital right should be included in the Civil Code, the problem must lie in its restoration. Even if the contracts regarding the digital right have not been specified in the Civil Code, the restoration of the digital would still be

[108] *See* OH, *supra* note 57, at 117; Park, *supra* note 73, at 222.

problematic because the contracts regarding the digital have already been routinized. The denial of the right to withdraw from the offer, as specified in the e-Commerce law, may well be one of the solutions. But the restoration of the original conditions as an effect of the cancellation of the contract is not possible. Moreover, the return of the payment, calculated not as 'paid' unfair profit but as 'infringed' unfair profit, would not be satisfactory. Hence, it is deemed essential to suggest some specific method of restoring the digital in order to solve the abnormal contract relationships and the problem of unfair profits. As Paragraph 2 of Article 47-3 of the Japanese copyright act suggests, the restoration of the digital should well be equal to the complete deletion of the digital.

### *D. Liability for damages caused by AI*

#### 1. Actual Risk

The question of who should be responsible for injury or damage caused by mechanical systems controlled by AI has become a real problem due to the emergence of autonomous cars. Because the conventional mechanical system was manipulated by human beings, any injury or damage could be attributed to human behaviors. However, in the case of the mechanical system technically controlled by AI without any human intervention, such a normal attribution is deemed impossible.[109] So far, many articles have been published centering on the accidents caused by autonomous vehicles.

#### 2. Limit of the Principle of Liability with Fault

According to the common view based on the objective fault theory, fault may well be defined as "a psychological state causing the unlawful result that may be predicted or prevented."[110] The most important point of the duty of care is a reasonable prediction of a result and obligation to avoid the result. Namely, the possibility of prediction and that of avoidance should exist. More specifically, the criteria for fault are the obligation to predict the result and avoid it. The violation of such criteria would lead to the

[109] Oh, *supra* note 14, at 163.
[110] Gwang Min Seo, MIN-BEOB-JU-HAE IX [ANALYSIS OF THE CIVIL CODE XVIII] 129 (Yunjik Gwak ed., 1992).

attribution of fault.[111] The Supreme Court holds[112] that, if a person could well expect a result, but he or she did not actually expect it due to a fault and, further, that he or she could well avoid the result but did not avoid it, the person should be responsible for such a result.

The mechanical device controlled by AI is not directly manipulated by anybody, a direct human operator of the mechanical device causing damage to a person does not exist. The judgment of intention or fault should be made for a human being who does not exist in the case of a mechanical device controlled by AI. So, the judgment of the possibilities of prediction and avoidance cannot be made clear.[113] The person who has programmed the AI algorithm may not anticipate a danger specifically. He or she may have felt a vague anxiety for the loss caused by the AI. The programmer may well have tested and verified the safety of the mechanical device controlled by the AI, which means he or she did not neglect an obligation to avoid the damage caused by the AI. Here, the user or the owner of the mechanical device does not manipulate it directly, which means that he or she cannot control the mechanical device. Hence, it would be difficult to identify the normative factors clearly; those responsible for the faulty operation of the mechanical device could not well be identified.[114] Then, according to the principle of law, *casum sentit dominus*, (the profit holder should be responsible for the loss), the victim should be responsible for his/her damage, which is quite far from legal justice.

### 3. Problems of Product Liability Law

The mechanical device controlled by AI must be a product regulated by the Product Liability Law.[115] Accordingly, it is being reviewed whether the manufacturer of the mechanical device controlled by AI should be responsible for the damages caused by

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[111] Dongjin Park, *Bul-Beob-Haeng-Wi-Beob-e-seo-ui Ju-Ui-Ui-Mu* [*Duty of care in torts*], 9(2) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 157, 161 (2002).

[112] Daebeobwon [S. Ct.], June 12, 1984, 82Do3199 (S. Kor.).

[113] Oh, *supra* note 14, at 185.

[114] *Id.* at 188.

[115] Choong Hoon Lee, Ja-Yul-Ju-Haeng-Ja-Dong-Cha-ui Gyo-Tong-Sa-Go-e dae-han Min-Sa-Beob-jeog Chaeg-Im [Study Concerning Civil Liability fort Car Accidents Involving Self-Driving Cars], 19(4) BEOB-HAG-YEON-GU [INHA LAW REVIEW] 137,158 (2016).

the mechanical device. In order to put the responsibility on the manufacturer, however, it is not sufficient for the victim to prove that the product is not perfect. Namely, the victim should prove that the machine device lacks the safety expected ordinarily. However, it is very difficult for the victim to prove that the product lacks the safety expected ordinarily from the AI algorithm.[116] In particular, it is more difficult for the victim to prove that he or she has suffered a loss, while the mechanical device controlled by AI operates normally.[117]

Another problem of the Product Liability Law is the diverse waiver clauses. Subparagraph 3 of Paragraph 1 of Article 4 of the Product Liability Law specifies that, "if the manufacturer should prove that he or she has followed the criteria required by the law at the time of the delivery of the product," he or she would be exempt from product liability. In the case of autonomous vehicles, a higher level of safety is required than conventionally for users' safety. Article 26-2 of the Automobile Management Law specifies the conditions for the safe operation of autonomous vehicles and their test operation. If the manufacturer's product liability were waived with such passive observation of the law, every manufacturer would be exempt from the product liability.[118] All in all, it is not easy to put responsibility for the damages on the manufacturer of the mechanical device controlled by AI.

### 4. The Limits of the So-Called Electronic Personality

It is discussed that the concept 'electronic personality' puts liability on the mechanical device controlled by an AI for the damage caused by it. However, the practical problem is how the electronic personality could be chargeable properties. If the electronic personality should be granted an asset by someone and thereby should be responsible, it would well be sufficient to put the liability on the person who has granted his/her asset to the electronic personality. So, it must be difficult to understand such unnatural logic or interpretation.[119] Furthermore, if the liability asset owned by the electronic personality could not be sufficient to pay for the damage, how could the victim be protected? There is an opinion that the loss beyond the liability asset should be borne

[116] Oh, *supra* note 14, at 194.
[117] Kim, *supra* note 11, at 35.
[118] Oh, *supra* note 14, at 196.
[119] *Id.* at 173.

by the victim,[120] which may be unfair for the victim.

### 5. Sub-Conclusion

If a behavioral element does not exist for the damage caused by the mechanical device controlled by AI and, thus, the condition of behavior for the damage is absent, and, additionally, if its possibility of causing the damage is lower than that of the conventional mechanical device,[121] we cannot but find a ground for liability in certain normative relations between the mechanical device and its users. In other words, we need to identify the grounds for liability in the normative relations such as ownership or lease between the AI-controlled mechanical device replacing the human labor and the users. Then, it would be possible to clearly and objectively identify those who are responsible for the damage. If we can identify the subject of liability in the normative relationship, where the AI-controlled mechanical device was installed and used for the sake of safety, convenience, and efficiency, such an approach is completely distinguishable from conventional risk accountability.[122] We may well establish a new theory called 'benefit liability' in this area.[123]

## V. FAMILY LAW

### *A. Birth by Artificial Insemination and Relation between Parents and Child*

[120] *See* Chinwoo Kim, *supra* note 10, at 38. Such arguments cannot well be admitted for tort liability.

[121] There is the view that the potential risk of AI may be accepted but that it would be unclear whether the risk is high. Jonghee Seo, *4Cha San-Eob-Hyeog-Myeong Si-Dae-ui Wi-Heom-Chaeg-Im-ui Yeog-Hal-gwa Han-Gye - In-Gong-Ji-Neung Robot-e ui-hae Bal-Saeng-han Son-Hae-ui Chaeg-Im-Gwi-Sog-eul Go-Lyeo-ha-yeo* [*Role and Limitations of Risk Liability in the Era of the Fourth Industrial Revolution*], 43 SA-BEOB [JURIS] 69, 92, n. 96 (2018).

[122] There are the arguments that the liability of animal owners may well be applied analogically to this case. Donghwan Shin, In-Gong-Ji-Neung-Robot-gwa Bae-Sang-Chaeg-Im-e gwan-han So-Go [A Study on Artificial Intelligence Robots and Liability for Compensation], 55 ANAM-BEOB-HAG [ANAM LAW REVIEW] 35, 62 (2018). But the Civil Code specifies that the owner of an animal would be exempt if he or she should not be negligent for its management. Such arguments are based on negligence liability theory. Hence, they may be rather contradictory because they deny negligence liability.

[123] Oh, *supra* note 14, at page 211.

### 1. A Third Party's Sperm Donation and Decision of Paternity

In the case of artificial insemination between spouses, where the insemination and implantation are enabled not through sex but by medical technology, it would not be difficult to acknowledge the spouse of the mother as the father in terms of legal hermeneutics.[124] According to theory and judicial precedent,[125] if a third party donates his sperm with the agreement on the part of the father, the child is regarded as the child of the couple.[126] Here, the spouse's agreement to the donation of sperm is the legal ground for deciding the real child of the couple,[127] but another theory criticizes this as overlooking the characteristics of the Family Law.[128]

Another problem is whether the child born with the sperm donation agreed to by the parents could recognize the sperm donor as the father. The majority of theories and the judicial precedent argue that the child could not request the filiation of the biological father because the sperm is donated anonymously.[129] Moreover, according to judicial precedent, [130] the father who agreed to artificial insemination should not be allowed to file a suit for denial of legal fatherhood because it betrays the principle of good faith.

### 2. Surrogate and Decision on Motherhood

The surrogate contract for sexual affairs rather than artificial

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[124] Byoung-chang Woo, Min-Beob-Sang Chin-Ja-Gwan-Gye-ui Gyeol-Jeong [The Determination of a Paternity Relationship in the Korean Civil Act], 42(1) BEOB-HAG-NON-CHONG [DANKOOK LAW REVIEW] 195, 204 (2018).

[125] Daebeobwon [S. Ct.], Oct. 23, 2019, 2016Meu2510 (S. Kor.).

[126] Woo, *supra* note 124, at 206.

[127] Dong Su Lee, Bo-Jo-Saeng-Sig Ui-Lyo-Bang-Beob-eu-lo Chul-Saeng-han Ja-ui Chin-Ja-Beob-Sang-ui Mun-Je-e dae-han Go-Chal [Eine Untersuchung über die Grundprobleme des Abstammungsrechts für das durch heterologe Insemination gezeugte Kind im Rahmen des Samenspenderegistergesetzes; A Review on the Child Born through Assisted Reproductive Technology], 31(3) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 219, 223 (2017).

[128] Younsoon Jang, Je-3-Ja Jeong-Ja-Je-Gong-Hyeong In-Gong-Su-Jeong-Ja-Nyeo mich Hyeol-Yeon-Gwan-Gye Eobs-Eum-i Myeong-Baeg-han Ja-Nyeo-e dae-han Gag Chin-Saeng-Chu-Jeong Jeog-Yong-Yeo-Bu [A Study on Judgment of Supreme Court Justice in terms of whether the Application of Each Presumption as Husband's Child about obvious children without Artificial Insemination by Donor and Blood Relationship], 61(1) BEOB-HAG-YEON-GU [PUSAN NATIONAL UNIVERSITY LAW REVIEW] 1, 14 (2020).

[129] Woo, *supra* note 124, at 206.

[130] Daebeobwon [S. Ct.], Oct. 23, 2019, 2016Meu2510 (S. Kor.).

insemination violates the good custom declared in Article 103 of the Civil Code, and, therefore, it is invalid. Although the surrogate contract is invalid, the surrogate must be the mother of the child. Of course, there is a view supporting negating the surrogate contract,[131] but, in consideration of an infertile couple's right to pursue happiness, the surrogate contract cannot be decisively considered invalid.[132] But the paid surrogate contract must be absolutely invalid because it violates Paragraph 3 of Article 13 of the Life Ethics and Safety Law,[133] while there is a realistic view that it should be permitted under some regulations.[134] In case a surrogate mother's ovum is implanted through artificial insemination into herself, the surrogate mother would be the biological and legal mother.[135] However, the problem arises when a third party's ovum is artificially inseminated and implanted into the surrogate mother. Here, who should be the legal mother is the problem. There is a view that it would be simple to prohibit unpaid artificial insemination,[136] but it is necessary to arrange some criteria for deciding the legal mother.

The Civil Code does not cover any case regarding the legal mother of the child born from the surrogate. Theoretically, some scholars argue that the woman who has given birth to a child must be the legal mother regardless of the donation of genes,[137] while other scholars argue for the maternity of the woman who donated her ovum.[138] The scholars argue that the woman who asked for

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[131] Yeon Chang Gu, *Dae-Li-Mo-Gye-Yag-ui Gae-Nyeom-gwa geu Yu-Hyo-Seong* [*Concept of Surrogate Contract and Its Validity*], 333 SA-BEOB-HAENG-JEONG [Judicial Administration] 45, 59 (1988); DONG SEOB PARK, CHIN-JOG-SANG-SOG-BEOB [RELATIVES AND SUCCESSION LAW] 297 (4th ed. 2013).

[132] Seok Chan Yoon, In-Gong-Im-Sin-eul Tong-Han Dae-Li-Mo-Gye-Yag-ui Yu-Hyo-Lon-gwa Je-Ban-Jaeng-Jeom [Effectiveness of Surrogate Mother Contract through Artificial Pregnancy and All Issues], 44 YEUNG-NAM-BEOB-HAG [YEUNGAM UNIV. LAW JOURNAL] 101, 103 (2017).

[133] *Id.* at 106.

[134] So Hye Hyun, Dae-Li-Mo-leul Dul-Leo-Ssan Jaeng-Jeom-gwa Hae-Gyeol-Bang-An [Some Legal Issues and Solutions around Surrogate Motherhood], 32(1) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 107, 131 (2018).

[135] Dongjin Park, Dae-Li-Mo-Gye-Yag-e ui-han Chul-San-gwa geu Beob-Jeog Mun-Je [Child-birth by Surrogate Contract and Its Legal Problems], 3(1) UI-LYO-BEOB-HAG [THE KOREAN SOCIETY OF LAW AND MEDICINE] 55, 83 (2002); Min Joong Kim, Saeng-Myeong-Yun-Li-wa Min-Beob [Bioethic and Civil Law] 65 THE JUSTICE 111, 137 (2002); Yoon, supra note 132, at 104.

[136] Hyun, *supra* note 134, at 130.

[137] Dongsup Eom, *Dae-Li-Mo-Gye-Yag* [*Surrogacy Agreement*], 34(6) THE JUSTICE 88, 109 (2001); Hyun, *supra* note 134, at 134.

[138] Jeong Myeong Go & Gwan Cheol Shin, Dae-Li-Mo-Gye-Yag-ui Mo-Seong-Chu-Jeong-e gwan-han Go-Chal [A Review of the Estimation of the Motherhood in the Surrogate Contract], 10 BEOB-HAG-NON-CHONG [KOOKMIN LAW REVIEW]

childbirth with the intention of rearing the child should be the legal mother.[139] Hence, it is deemed necessary to specify some clear legal criteria in the Civil Code for determining the mother of the child born of the surrogate mother.

### 3. Sub-Conclusion

Despite the several amendments to the Civil Code, the criteria for deciding the real mother of the child born through assisted bio-technology, either artificial insemination or surrogacy, are still unclear.[140] In the case a child is born by assisted bio-technology, the Civil Code should be amended to cover the loopholes for the protection of the child.[141] The German Civil Code specifies the disclosure of the sperm donator's personal information if a child is born with sperm donated by a third party, but Germany amended its Article 1600d to not permit the forced bastardization of the sperm donors,[142] which should provide some suggestions for Korea's legislation.

In the past, a draft amendment of the Civil Code regarding motherhood through surrogacy was submitted in vain. It is proper to specify this motherhood in the Civil Code. The unpaid surrogate contract allowed by law may well be made under special human relationships. From a strict perspective, the unpaid surrogate contract is a relationship of goodwill rather than a legal one, and, therefore, the Civil Code can only specify the decision of legal motherhood. Such issues have already been discussed in an article suggesting an amendment of the Civil Code.[143]

## *B. Gene Test and the Decision on Paternity*

### 1. Scientific Judgment of Biological Paternity

Owing to the development of science and technology, it is

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7, 36 (1998).

[139] Yoon, *supra* note 132, at 106.

[140] Woo, *supra* note 124, at 124, 215.

[141] Cheol Ung Je, Saeng-Mul-Hag-jeog Bu-Mo, Beob-jeog Bu-Mo, geu-li-go Sa-Hoe-jeog Bu-Mo- A-Dong Bog-Li U-Seon-ui Gwan-Jeom-e-seo Bon Chin-Ja-Gwan-Gye Hwag-Jeong-eul Jung-Sim-eu-lo [Biological, Legal, and Social Parents—Confirmation of Relation between Parents and a Child from the Perspective of Child Welfare], 26(2) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 1, 37 (2019).

[142] Lee, *supra* note 127, at 260.

[143] Hyun, *supra* note 134, at 142.

possible to simply and rapidly decide on the biological paternity through precise gene analysis without much financial burden. Nevertheless, the relations between father and child cannot be confirmed 100% through the biological test. "The mother is always clear, while the father is the person indicated by marriage" (*mater semper certa est, pater est, quem nuptias demonstrant*).[144] Korea's Civil Code trusts the normative estimation of fatherhood. The Civil Code reflects the advancement of science and technology indirectly.

According to the Civil Code amended in 2017, the mother or her former husband could file a suit with the family court to deny the parenthood of the child who was born within three hundred days after the termination of their parents' marital relations. In this case, the family court could decide parenthood through a blood type test, gene test, and other scientific methods while considering such conditions as the long separation of the couple. Paragraph 2 of Article 854-2 specifies exceptional scientific proof of paternity. Paragraph 2 of Article 855-2 specifies the same proof. However, the result of scientific tests, such as a gene test, may only be indirect proof for the denial of paternity or its acknowledgment. Hence, the court uses such indirect proof only as one of the criteria for the judgment.[145] As such, the Civil Code estimates paternity normatively only through the mother's marital relations. Thus, the pre-modern discrimination between legitimate and illegitimate children remains, which could not be overlooked. Hence, if the scientific proof of paternity through a gene test or others should be introduced, the long-existing discrimination would well be surmounted.

## 2. Complimentary Scientific Proof of Paternity

Even if paternity should be acknowledged through scientific proof, the acknowledgment should be equal to the normative estimation of paternity or should not override the normative estimation. The normative estimation of paternity reflects the value of fundamental rights: "Marriage and family life should be established and maintained based upon the human dignity and

[144] Jinsu Yune, Chin-Jog-Sang-Sog-Beob-Gang-Ui [Lectures on Family and Succession Law] 146 (2016).

[145] Byoung Cheol Oh, Gwa-Hag-jeog Bu-Seong(paternity) Do-Ib-eul tong-han Chin-Ja-Beob-ui Gae-Hyeog [Reform of Parentage Law through Paternity Scientifically Proven], 166 THE JUSTICE 166, 182 (2018).

gender equality, which the nation should guarantee" (Art. 36, Para. 1, of the Constitution). Since the scientific confirmation of paternity is designed to biologically confirm the relations between child and father, it cannot be given legal effect such as the normative estimation of paternity.[146] Namely, even if the scientific proof of paternity should be introduced, complete nepotism cannot be accepted.

Hence, it is deemed fair to normatively estimate the paternity for the child who was born within a certain period of time after the marriage[147] or within three hundred days after the termination of the marriage. Namely, the scientific proof of paternity for such a child should not be accepted. The scientific proof of paternity should only be permitted for the child who was born within a certain period after marriage[148] or from a mother who was not married.[149] All in all, the normative estimation of paternity overrides other estimations. A recent Supreme Court precedent[150] put priority on the normative estimation of paternity and, thus, the child who is permitted to file a suit with the court for confirmation of paternity can request a gene test. Then, the result of the gene test cannot be negated in any case.

### 3. Abolishment of Discrimination against the Illegitimate Child

Article 855 of the Civil Code distinguishes the legitimate child during marriage from the illegitimate child born out of wedlock. However, the Civil Code just regulates the illegitimate child as the target of acknowledgment and imposes no legal restriction on him or her. Namely, the illegitimate child cannot be otherwise legally distinguished from the legitimate child beyond the acknowledgment. Generally, the illegitimate child means a child whose father cannot be estimated. All in all, there is no

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[146] *Id.* at 188.

[147] The current Civil Code specifies two hundred days. But the immature fetus younger than twenty-four weeks could survive sufficiently. Hence, the days should be shortened to one hundred and fifty days. *Id.* at 179.

[148] There is a view that the child born during this period is not subject to the legitimacy estimation, and, therefore, he or she should well be regarded as an illegitimate child. Jin Sub Yang, *Chin-Ja-Gwan-Gye-ui Gyeol-Jeong-e gwan-han Beob-jeog Jaeng-Jeom Bun-Seog* [*Reform of Parentage Law through Paternity Scientifically Proven*], 33(3) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 33, 62 (2019)). If such a view should be upheld, the child should be subject to scientific confirmation of his/her legitimacy.

[149] Oh, *supra* note 145, at 184-186.

[150] Daebeobwon [S. Ct.], Oct. 23, 2019, 2016Meu2510 (S. Kor.).

difference in legal terms between legitimate and illegitimate children. Nevertheless, in the feudal Confucian society, illegitimacy was an important social stigma, affecting children greatly in their social life. However, the social status system would begin to collapse with the 1894 Reform. It is urgent to abolish this anachronistic discrimination.[151] If the illegitimate child should be able to confirm his biological father through a scientific test, it would no longer be significant to discern the legitimate or illegitimate child and, then, the current childbirth report system would be abolished.[152]

### 4. Sub-Conclusion

Although the relations between father and child can be easily proven by scientific methods, it would not be good for solving the legal problems of father-child relations. In consideration of the child's rights and scientific development, it is necessary to establish more diverse criteria and methods to decide the relations between father and child. Here, the argument that the utmost criteria should be the child's welfare should be noteworthy.[153] Hence, the scientific proof of paternity needs to be introduced only as a complementary means for the normative estimation of paternity through marital relations. In this regard, for the child who was born within a certain period after marriage, the negation of paternity through the scientific test should not be permitted except for the suit for denial of paternity.[154] Then, the most important value—the child's welfare—should be maintained. In this regard, for the man whose fatherhood could not be admitted normatively, the scientific confirmation of paternity should be permitted widely to ensure the illegitimate child's welfare.

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[151] Oh, *supra* note 145, at 191.
[152] *Id.* at 204.
[153] Woo, supra note 124, at 216. Cheol Ung Je has the same view. Saeng-Mul-Hag-jeog Bu-Mo, Beob-jeog Bu-Mo, geu-li-go Sa-Hoe-jeog Bu-mo-A-Dong Bog-Li U-Seon-ui Gwan-Jeom-e-seo Bon Chin-Ja-Gwan-Gye Hwag-Jeong-eul Jung-Sim-eu-lo [Biological, Legal, and Social Parents—Confirmation of Relation between Parents and a Child from the Perspective of Child Welfare], 26(2) BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 1, 36-37 (2019).
[154] See Oh, *supra* note 145, at 200-202 for the specific draft of amendment of the Civil Code regarding the scientific proof of the fatherhood.

## *C. Inheritance of the Digital*

### 1. Inheritance of the Digital Having Proprietary Value

Article 1005 of the Civil Code specifies that the "Inheritor shall inherit the comprehensive rights and obligations from the inheritee as soon as inheritance begins." Here, the objects of the inheritance are the inheritee's rights and obligations regarding the assets. If the digital is one of the assets, it could well be inherited by the inheritor. Within such scope, the legal theories regarding conventional inheritance would be applied. Hence, it is not deemed necessary to discuss legislation regarding it.[155] Here, the problem is how to handle digital that could not be regarded as assets in relation to Article 1005 of the Civil Code.

There is also a different view. All the digital left by the inheritee should be objects of inheritance because they are a type of asset.[156] Even if a thing is not valuable, it 'could well be' an asset. While the personal right is not separable from the person, the digital can be clearly separated from the person. So, the digital left by the inheritee must be an asset, separable from the person.[157] This view separates the intangible digital from its storing media and, thereby, perceives it as an independent object or inheritable asset.

We need to be cautious in such discussions. If the inheritee's digital is stored in a medium or an information processing device, the tangible thing should be the object of the inheritance. In such a case, the digital is doomed to be included in the comprehensive inheritance. However, in the case the inheritee's digital is stored in the media or information processing devices owned by others, a problem would arise.[158] For example, the messages left by the

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[155] Byoung Cheol Oh, In-Gyeog-jeog Ga-Chi iss-neun Online-Digital-Jeong-Bo-ui Sang-Sog-Seong [Succession of Online Digital Information as a Personal Right] 27(1) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 147, 155 (2013).

[156] Hyun Jin Kim, Digital Ja-San-ui Sa-Hu Cheo-Li-e gwan-han So-Go [How to Treat the Digital Assets after Death?], 147 THE JUSTICE 270, 289 (2015).

[157] Chae Ung Im, *Digital Yu-San-ui Sang-Sog-Seong-e gwan-han Yeon-Gu* [*A Study on the Inheritance of Digital Heritage*], 28(2) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 340, 345-346 (2014).

[158] Hyun Tae Choi, Digital-Yu-San Sang-Sog Bo-Ho-e gwan-han Ib-Beob-Lon-jeog Go-Chal-Online-Sang-ui Digital Jeo-Jag-Mul/Yu-San-eul Jung-Sim-eu-lo [A Legislative Consideration Study on the Succession of Digital Inheritance—Focused on Digital Works Online], 17(3) BEOB-GWA-JEONG-CHAEG-YEON-GU [JOURNAL OF LAW AND POLITICS RESEARCH] 209, 214 (2017).

inheritee on the portal site or SNS must belong to an inheritee. In this case, only the digital belongs to the inheritee, not the server, and, therefore, its inheritability needs to be determined. In this regard, the expression of 'online inheritance'[159] can be convincing.

### 2. Disposal of the Digital Having the Value of Personality

If any information among the closed online information left by the inheritee should be for the inheritee's personal benefit, it cannot be inherited according to a view.[160] Moreover, there is a view that the claim and liability, having a personal relationship, should be excluded from the inheritance.[161] However, such views do not cover the problem involving the disposal of the inheritee's digital excluded from inheritance.

Another problem is that the control of the digital with personal value cannot well be mandated through the will to the inheritor. According to the principle of legalism of wills, the contents of a will should be strictly specified in the Civil Code. The disposal of the digital, having a value of personality, is not specified as the contents of a will in the Civil Code, while it cannot be encompassed by the bequest.[162]

### 3. Introduction of the Digital Right

Another solution to the problems regarding the inheritance of the digital is recognition of digital rights as a third right of property controlling the digital directly. Then, the digital controlled by the inheritee can well be inherited comprehensively, regardless of whether it can be protected as an intellectual property right or can be acknowledged as an asset value. The debate surrounding the inheritance of the digital and using the terminology 'digital heritage' may well provide a clue to handle

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[159] Kyoung Jin Choi, Digital-Yu-San-ui Beob-jeog Go-Chal-Online Yu-San-ui Sang-Sog-eul Jung-Sim-eu-lo [A Legal Study of Digital Inheritance—Focusing on Succession of Online Inheritance] 46(3) KYUNG-HEE-BEOB-HAG [KYUNG HEE LAW JOURNAL] 253, 258 (2011).

[160] *Id*. at 270.

[161] Sejun Kim, Digital-Yu-San-e dae-han Sang-Sog-In-ui Jeong-Bo-Cheong-Gu-Gwon [Auskunftsanspruch des Erben für Digitalen Nachlass; Heir's Right to Request Information about the Digital Inheritance.] 31(3) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 319, 340 (2017).

[162] Oh, *supra* note 155, at 177.

the digital right as a third property right separated from the information processing device.

### 4. Sub-Conclusion

There is also a view that the digital can be the object of inheritance and, therefore, that no legislation is required.[163] However, there is another view that legislation is desirable to help the inheritor use his or her right of inheritance regarding the digital.[164] From a pragmatic perspective, most of the digital left by the inheritee can well be inherited via a storing media. Moreover, due to the proprietary nature of the digital, it can be the object of inheritance. The major problems involving such a view are the inheritee's digital stored in other's IT systems such as a portal or SNS. Then, the inheritor's right to the digital can be exercised for the reproduction of the digital or access to it. Therefore, it may be a good alternative to handle this problem according to the Act on Uses of the IT Network and Protection of the Information rather than the Civil Code.[165] In particular, even if the digital right can be inherited, Article 48 or 49 of the IT Network Act may well be an obstacle for the inheritor to gain access to the inheritee's information.[166] If the digital should be admitted as a third property right, as suggested above, the problem of inheriting the digital would well be solved according to Article 1005 of the current Civil Code.

## VI. CONCLUSION

The year 2020 marked the sixtieth anniversary of the Civil Code. It is not any less than marvelous that Korea as a nation enacted the Civil Code within a decade after undergoing national crises like Japanese military occupation and the Korean War. Thereafter, the nation successfully maintained its Civil Code intact and almost in its original form for six decades. However, while human society has witnessed a revolutionary development of science and technology for the last sixty years, its achievements are not hinted from the Civil Code. It is untrue that no efforts have

[163] Im, *supra* note 157, at 347.
[164] Choi, *supra* note 159, at 279.
[165] An example of such a view may well be Choi, *supra* note 158, at 223-230.
[166] Kim, *supra* note 156, at 290.

been exerted to amend the Civil Code, and even now, discussions are underway to amend the Civil Code. However, it is deemed limited to materialize the developed hermeneutics into the Civil Code.

Even when a new phenomenon that was previously unnoticed by the Civil Code emerges, it may not avoid legal regulation. When the legal community responds to the limitation of the analogic hermeneutics with an enactment of new special civil law, the current Civil Code is doomed to be antiquity. Many continental law countries have long accepted and reflected the development of science and technology in their civil law. Now, Korea can no longer put off the amendment of the Civil Code and breathing life into it, considering the upcoming changes of the next sixty years that will bring more innovation and speed.

**Keywords**
Artificial Intelligence, Digital, Electronic Declaration of Intention, Platform Contract, Electronic Performance, Benefit Liability, Artificial Insemination, Digital Inheritance

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# FIT AND PROPER REGULATION FOR CONTROLLING SHAREHOLDERS OF FINANCIAL COMPANIES

*Young Shim*[*]

## ABSTRACT

*In the past ten years, there have been a number of financial accidents related to illegal acts and immoral management by controlling shareholders. Examples include the mutual savings bank crisis, the Dongyang group crisis, and the private equity fund crises of Lime Asset Management and Optimus Asset Management. These financial accidents not only caused the financial companies to become insolvent but also caused great damage to the financial consumers. This article aims to analyze whether the current regulations for controlling shareholders are appropriate to prevent fraudulent behavior and prevent ineligible controlling shareholders from managing financial companies, and then to present reform measures. Section II analyzes the financial company ownership regulations. Section III analyzes the controlling shareholders' fit and proper test when establishing a financial company, the approval system for controlling shareholders' changes, and the periodic controlling shareholders' eligibility screening system. Based on these analyses, Section IV proposes reform measures for fit and proper regulation for controlling shareholders of financial companies. In order to improve the current fit and proper regulations, it is necessary to ensure consistency in the eligibility of controlling shareholders. There is a need to expand the scope of shareholders who are subject to the fit and proper test as controlling shareholders. In addition, the stock disposal order system needs to be supplemented to secure the effectiveness of the controlling shareholders' fit and proper regulation. It is necessary to strengthen regulations on controlling shareholders for asset management companies, which are specialized private equity funds. Since the regulations of controlling shareholders restrict shareholder rights and infringe on the property rights of shareholders, it is necessary to establish clear legal standards. Through these measures, it is necessary to establish an appropriate controlling shareholder regulatory system to prevent damage to financial*

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*consumers by securing sound financial order and management.*

## I. INTRODUCTION

Since the mutual savings bank crisis in 2011, the insolvent mutual savings banks have been restructured, posing various problems—non-performing project financing loans due to the global financial crisis, recession in the real estate market, unexpected malfunctioning of government policies, etc. But the main causes were large shareholders' illegal acts and moral hazards; they used their mutual savings banks as if they were their private safes.[1] In the 2011 mutual savings bank crisis, the major victims were subordinated security holders. Their total losses amounted to 714.3 billion won, and the number of victims was twenty-two thousand.[2] Particularly in the Pusan Savings Bank scandal, the large shareholder received from his bank an illegal loan amounting to 6.0315 trillion won while committing accounting fraud amounting to 3.0353 trillion won. He would be arrested and prosecuted for his violation of the Act on the Aggravated Punishment of Certain Economic Crimes. He would be sentenced to a twelve-year imprisonment for the crimes of embezzlement, breach of trust, and violation of the Mutual Savings Banks Act.[3]

In 2013, the chairman of Dongyang Group sold the corporate bonds issued by his almost insolvent affiliates and the Commercial papers (CPs) to ordinary investors and used the money to support

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[1] Financial Services Commission of Korea et al., Jeo-Chug-Eun-Haeng-ui Geon-Jeon-han Bal-Jeon-eul wi-han Jeong-Chaeg Bang-Hyang [A Policy Direction for the Sound Development of Savings Banks] (Sept. 17, 2013), https://www.korea.kr/archive/expDocView.do?docId=34419.

[2] Financial Services Commission of Korea & Financial Supervisory Service of Korea, Dong-Yang-Group Mun-Je Yu-Sa-Sa-Lye Jae-Bal-Bang-Ji-leul wi-han Jong-Hab-Dae-Chaeg [A Comprehensive Measure for Prevention of the Recurrence of the Dongyang Group Incident] (Nov. 21, 2013), https://www.korea.kr/archive/ expDocView.do?docId=34662.

[3] Online News Team, Daebeobwon 2013Do6394: Park-Yeon-Ho Bu-San-Jeo-Chug-Eun-Haeng Hoe-Jang Jing-Yeog 12yeon Hwag-Jeong, Kim-Yang Bu-Hoe-Jang Jing-Yeog 10nyeon-do Hwag-Jeong [Supreme Court 2013Do6394: Park Yeon-ho, the Chairman of Busan Savings Bank and the Vice-Chairman, and Kim Yang, the Vice-Chairman of the Same Bank Were Sentenced to Twelve-Year-Imprisonment and Ten-Year Imprisonment, Respectively], BEOB-LYUL-SIN-MUN [LAW TIMES], Sept. 26, 2013), https://www.lawtimes.co.kr/Case-Curation/view?serial=78666.

his poor affiliates by means of transferring it into a trust cash fund until they applied for court receivership. As of the end of September 2013, the CPs and the corporate bonds sold to individual investors amounted to approximately 1.6 trillion won, while the number of the victims amounted to forty-one thousand persons.[4]

The Dongyang Group scandal exposed various problems. The main problems were incomplete sales to the ordinary individual investors or the poor protection of them and large shareholders' illegal acts or instructions. The chairman of Dongyang Group was indicted for the fraud according to the Act on the Aggravated Punishment of Certain Economic Crimes, and his seven-year imprisonment would be upheld at the Supreme Court in 2015. Then, the Supreme Court decided that even after mid-August 2013, when the chairman of Dongyang Group could predict insolvency (or since the second restructuring of his group), he issued CPs and corporate bonds in the name of his non-performing affiliates only to cause losses to the individual investors. (The amount of CPs and corporate bonds issued illegally was 170.8 billion won.)[5]

Recently, investors suffered great damage due to hedge funds. The examples are Lime Asset Management and Optimus Asset Management. In the Lime Asset Management scandal, doubts were raised that the company had traded illegally while using new revenue to manipulate the fund performance repeatedly.[6] Lime Asset Management declared that it should massively put off its fund redemption since October 1, 2019. As of the end of 2019, the insolvent funds were five parent funds and their 173 subsidiary funds. The total amount operated by these funds was 1.667.9 trillion won.[7] In May 2020, the key figure responsible for the suspension of redemption, its former vice-chairman, was arrested

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[4] Financial Services Commission of Korea and Financial Supervisory Service of Korea, *supra* note 2.

[5] Shin Young Lee, 'Dong-Yang-Sa-Tae' Hyeon-Jae-Hyeon Jeon-Hoe-Jang Jing-Yeog 7nyeon Hwag-Jeong ['Dongyang Incident' Chairman Hyun Jae Hyun Was Sentenced Finally to Seven-Year Imprisonment], YONHAP NEWS, Oct. 15, 2015, https://www.yna.co.kr/view/AKR20151015168451004.

[6] Jin Hyeong Jo, 6Jo-Won Gul-Li-neun Hedge Fund Lime...Fund Su-Ig-Lyul 'Dol-Lyeo-Mag-Gi' Ui-Hog [The Hedge Fund Lime, Operating the Six trillion Won, Is Suspected to Have Used New Revenues to Manipulate the Fund Performance] HAN-GUG-GYEONG-JE [THE KOREA ECONOMIC DAILY], July 23, 2019, https://www.hankyung.com/finance /article/ 2019072219771.

[7] Financial Supervisory Service of Korea, Lime-Ja-San-Un-Yong-e dae-han Jung-Gan Geom-Sa-Gyeol-Gwa mich Hyang-Hu Dae-Eung-Bang-An [A Result of Lime Asset Management's Operations and Future Reform Measures] 3 (Feb. 14, 2020), https://eiec.kdi.re.kr/policy/materialView.do?num=197630&topic=.

and indicted for his violation of the Act on the Aggravated Punishment of Certain Economic Crimes (acceptance of property, etc.). In July 2020, the CEO of Lime Asset Management was arrested and indicted for violations of the same law (fraud) and the Financial Investment Services and Capital Markets Act (Capital Markets Act). The CEO and vice-chairman were responsible for the incident as directors of the company, but it should be noted that they were the de jure or de facto large shareholders.

The scandal of Optimus Asset Management erupted while the Financial Supervisory Service (FSS) was inspecting the operations of major asset management. The FSS discovered illegal transactions (assignment of the assets in ways different from those suggested in their investment proposal) and CEO embezzlement of the funds' assets. As of July 21, 2020, forty-six funds were being operated by Optimus Asset Management, which amounted to 515.1 billion won, and, among them, twenty-four funds, amounting to 240.1 billion won, were not redeemed.[8] Almost all of the staff and employees left the company while the prosecutors were investigating. On June 30, 2020, its operations were suspended by administrative order.[9] The CEO, a director of the board, and the top two major shareholders were arrested and indicted for their violations of the Act on the Aggravated Punishment of Certain Economic Crimes (fraud) and the Capital Markets Act (unfair trading), while another director of the board was indicted without detention.[10] It should be noted that the CEO was also a de facto large shareholder.

After the Lime and Optimus scandals, the Financial Services Commission (FSC) and FSS suggested some reform measures for

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[8] Financial Supervisory Service of Korea, Optimus-Ja-San-Un-yong-e dae-han Jung-Gan Geom-Sa-Gyeol-Gwa mich Hyang-Hu Dae-Eung [The Results of an Intermediate Inspection of Optimus Asset Management and Future Countermeasures] (July 23, 2020), https://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=23266&no=15508&s_title=&s_kind=title&page=2.

[9] Financial Services Commission of Korea & Financial Supervisory Service of Korea, Optimus-Ja-San-Un-yong-e dae-han Yeong-Eob Jeon-Bu-Jeong-Ji Deung Jo-Chi-Myeong-Lyeong [Administrative Order to Suspend the Operation of Optimus Asset Management Inc.] (June 30, 2020), https://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=23220&no=15470&s_title=&s_kind=&page=32.

[10] Gug Sang Hwang et al., Optimus Ju-Beom Cheos Jae-Pan, Sa-Tae-ui Jae-Jo-Myeong (sang) [Review of the First Trial for the Main Culprit of the Optimus Scandal (Vol. I)], Money Today, Aug. 31, 2020, https://news.mt.co.kr/mtview.php?no=2020083016020468743.

hedge funds.[11] The reform measures assumed that the problems were the poor operational structure in terms of risk management and investor protection. In particular, the risk management measures suggested were reinforcement of internal controls and decision-making procedures, fair assessment of the funds' assets, and expansion of the ability to compensate for investors' losses. Particularly, in order to reinforce the protection of the investors, the funds for ordinary investors should be protected more than those for the professional investors (including the institutional investors). However, such reform measures did not solve the problems due to the major shareholders' arbitrary operation of the funds, and, accordingly, some measures in relation to the large shareholders would be included in the reform measures.

If the large shareholders are not be checked for their possible illegal acts, the financial consumers, including the investors, are exposed to a great risk of losing their money. The examples are the Busan Savings Bank incident, Dongyang Group scandal, and Lime Asset Management and Optimus Asset Management scandals. Hence, it is necessary to review the regulations covering large shareholders to address their illegal acts.

The financial companies are banks, non-bank depository institutions, financial investment services entities, insurance companies, etc. The regulations of such financial companies are not integrated and the regulators are different. Hence, this article aims to discuss ways to oversee the financial companies regulated by the Act on Corporate Governance of Financial Companies (Financial Company Corporate Governance Act), except for the special banks.[12]

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[11] Financial Services Commission of Korea & Financial Supervisory Service of Korea, "Sa-Mo-Fund Hyeon-Hwang Pyeong-Ga mich Je-Do-Gae-Seon Bang-An (Choe-Jong-An) [Assessment of the Hedge Funds and Their Institutional Reform Measures (Final Draft)], (April 27, 2020), https://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=23079.

[12] Geumyunghoesaui jibaegujoe gwanhan beoblyul [Geumyungsajibaegujobeob] [Act on Corporate Governance of Financial Companies], art. 2, para. 1. The subjects of this act are commercial banks, financial investment services entities, merchant banks, insurance companies, mutual savings banks, credit finance companies, financial holding companies, and special banks.

## II. REGULATING OWNERSHIP (HOLDING) OF FINANCIAL COMPANIES

The regulations of ownership (holding) of financial companies target commercial banks. The regulations of ownership of banks were introduced in the 1982 Amendment of the Banking Act when the commercial banks owned by the government began to be privatized to prevent them from becoming 'private safes.'[13] Until then, according to the Temporary Act on the Financial Institutions, the ownership of voting stock per person had been limited to 10% of the outstanding stock, but the regulations of ownership were introduced to prevent the privatization of banks.[14] Later in 1997, the system of the financial holding company was introduced to facilitate the restructuring of financial institutions.[15] There was the opinion that, unlike the banks, the regulation of financial holding companies should be eased, but the companies would continue to be regulated to prevent bank capital from being privatized as well as the concentration of economic power.[16] Next, regulations limiting the stock owned by the 'same person' are discussed.

### *A. Principles*

#### 1. Contents of the Principles

The 'same person' cannot hold more than 10% of the voting stocks issued by a bank. Here, the 'same person' includes the person himself/herself/itself (principal) and a person having a special relationship with the principal (specially-related persons).[17] There is a dispute regarding whether the principal should be a

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[13] About the changes for regulating the ownership of the banks in Korea, see SANGCHE LEE, EUN-HAENG SO-YU-GYU-JE HAB-LI-HWA BANG-AN [MEASURES OF RATIONALIZING THE REGULATION OF THE OWNERSHIP OF THE BANKS] 3-10 (Korea Institute of Finance, 2008).

[14] Finance Committee of the National Assembly, Eun-Haeng-Beob Jung Gae-Jeong-Beob-Lyul-An Sim-Sa-Bo-Go-Seo [Report about the Results of Examining the Draft Amendment of Banking Act] 12, 13-14 (1982).

[15] Mun Hui Kim, Geum-Yung-Ji-Ju-Hoe-Sa-Beob-An Geom-To-Bo-Go [A Report about the Financial Holding Company Act] 5 (Finance and Economy Committee of the National Assembly, July, 2000).

[16] *Id.* at 18-19.

[17] According to Eunhaengbeob sihaengnyung [Enforcement Decree of the Banking Act], art. 4-2, para. 3 (S.Kor), the person himself or herself may not own the largest number of shares.

shareholder.[18]

If the company mainly operating a bank business in a foreign country or its holding company (the foreign bank, etc.) holds directly or indirectly the stocks or stakes of any foreign corporation established according to the foreign law, the foreign bank, etc. may request that the foreign corporation be excluded from the scope of the 'same person.' However, if the foreign corporation directly or indirectly holds stocks of the bank, the foreign corporation shall be included (Art. 16-5 of the Banking Act). The consortium members who made a shareholder contract for the change of the stock ownership ratios do not constitute the 'same person' if the contract is not relevant to the exercise of voting rights.[19]

## 2. Voting Stocks

The regulation of the 'same person's' stock ownership targets the voting stock of the bank. Here, the voting stock means the stock granted voting rights. The stock with temporarily restricted voting rights should also be included in the total number of voting stock.[20] 'Same person' ownership of stock exceeding the limit of ownership (limit-exceed-holding shareholder ownership) would differ whenever the amount of stock with temporarily restricted voting rights changes. In addition, if the limit-exceed-holding

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[18] Dong Won Ko, Eun-Haeng So-Yu Gyu-Je-ui Hyeon-Hwang-gwa Gae-Seon-Gwa-Je [Legal Review on a Bank Ownership Regulation under the Banking Act and Its Future Prospects and Tasks in Korea], 22(2) SEONG-GYUN-GWAN BEOB-HAG [SUNGKYUNKWAN LAW REVIEW] 245, 257 (2010); Mun Sig Seo, Eun-Haeng-So-Yu Gyu-Je-wa Gwan-Lyeon-han Ib-Beob Gi-Sul-Sang-ui Mun-Je-Jeom mich Gae-Seon-Bang-An [The Problems and Remedies of Korean Regulation on Acquisition of a Bank in Perspective of Legislation Techniques], 9(2) GEUM-YUNG-BEOB-YEON-GU [KOREA FINANCIAL LAW ASSOCIATION] 355, 364 (2012); SOON SEOB JUNG, EUN-HAENG-BEOB [BANKING ACT] 74 (2017).

[19] Financial Supervisory Service of Korea Consumer Service Center, Geum-Yung-Hoe-Sa In-Heo-Ga Manual [Manual for Authorizing and Permitting Financial Companies] 139 (May 2020), https://m.fss.or.kr:4434/fss/board/boardDetail.do?idx=1580184817350&page=1&bbsId=1207388946537&mId=M01040601000000&searchType=titleContent.

[20] The shares restricted for temporarily voting are treasury shares, cross-ownership shares, holding company shares owned by the subsidiary company, etc. Those who do not operate the financial business may well be permitted by the FSC to own shares exceeding their limits on the condition that they will not exercise their voting rights beyond the limit (Eunhaengbeob [Banking Act], art. 16-2, para. 2 (S.Kor)). There is a dispute whether such non-voting shares should be excluded from the total number of voting shares. The current Banking Act excludes such shares from the voting shares when deciding large shareholder. (Eunhaengbeob [Banking Act], art. 2, para. 1, subpara. 10 item (b) (S.Kor)).

shareholder has obtained the FSC's permission with the specific voting stock ratio, the limit of holding would be exceeded when some voting stock has been temporary restricted in terms of its voting rights.

The stock with voting rights excluded or limited (Art. 344-3, Para. 1 of the Commercial Code) needs to be discussed more. When the regulations of bank ownership were introduced for the first time, there was only non-voting stock stipulated in the Commercial Code but not specified limited-voting stock in the by-laws. Since the stock excluded from voting should be regarded as non-voting stock specified in the former Commercial Code, it should be excluded in the voting stock issued.[21] However, if the bank issues the stock with its voting rights limited, the stock may well have voting rights on some agendas but may not have voting rights on other agendas. The problem is whether they should be included in voting stock.[22] Since limited voting rights means partial voting rights, the stock may well be included in the stock with the voting rights, but, since the regulations limiting the 'same person's' ownership of stock target persons who may actually control the banks, they need to be judged considering the possibility that they may exert an influence over major business administration of the bank.[23] Some legislative supplementation is required based on such interpretations.[24]

### 3. 'Holding'

'Holding' means that "the same person owns stock in his/her

[21] Dong Won Ko, Geum-Yung-Gyu-Je-Beob-Gae-Lon [An Introduction to the Financial Regulation Act] 64 (2019).

[22] In case a financial institution or another financial institution belonging to the same enterprise group intends to own other companies' shares and, therefore, apply for to FSC, the scope of the shares issued shall be determined and published by the commission (Geumyungsaneobui gujogaeseone gwanhan beoblyul [Restructuring of the Financial Industry Act], art. 24, para. 9 (S.Kor)). Accordingly, Eunhaengeob gamdoggyujeong [Banking Supervision Regulations], art. 54-2, para. 1 (S.Kor), Geumyungtujaeobgyujeong [Financial Investment Services and Capital Markets Regulations], art. 2-14, para. 2 (S.Kor), and Boheomeobgamdoggyujeong [Insurance Business Supervision Regulations], art. 5-13(3), para. 1 (S.Kor) specify that "the voting shares issued means the shares issued excluding the non-voting shares according to Paragraph 1 of Article 344-3 of the Commercial Code." Such regulations seem to include limited-voting shares in the category of voting shares issued.

[23] See Eunhaengbeob [Banking Act], art. 2, para. 1, subpara. 10 regarding the concept of the large shareholder.

[24] Regarding the interpretation that they are excluded from voting shares, see Ko, *supra* note 21, at 64.

own name, or any other person's name, or has voting rights through a contract" (Art. 2, Para. 1, Subpara. 9, Item (c) of the Banking Act). However, if a person secures voting rights through a proxy, voting rights shall not be included in the category of 'holding.'[25]

### 4. Exceptions

#### (a) Exceptions for Certain Shareholders

The government, the Korea Deposit Insurance Corporation, and bank-holding companies are not subject to the regulations on limited stock ownership by the 'same person.' Since the regulation of the 'same person's' holding of stocks was introduced in the process of privatizing the government-owned banks, it was determined that the government would not be subject to the regulation. In the case of the Korea Deposit Insurance Corporation, it was exempted from the regulation in the Banking Act, amended in February 1998, in order to allow the corporation to invest unlimitedly in the insolvent banks being rescued. Lastly, the bank holding company is also exempt from the regulation because its major businesses control the banks (Article 13 of the Financial Holding Company Act).

#### (b) Banks

In the case of local banks, the large shareholder can own voting stock not exceeding 15% of the total voting stock issued (Art. 15, Para. 1 of the Banking Act). In the case of internet-only banks, the non-financial business operator can own voting stock not exceeding 34% of the total voting stock issued (Art. 5 of the Internet-Only Banking Act).

## *B. Regulation of the Non-Financial Business Operator's Holding of Stocks*

Non-financial business operators are regulated more strictly as far as stockholding is concerned. They cannot hold more than 4% (15% in the case of local banks) of the voting stock of the bank (Art. 16-2, Para. 1 of the Banking Act). If the non-financial

[25] JUNG, *supra* note 18, at 76.

business operator should be approved by the FSC on the condition that the operator would not exert voting rights over the 4% limit, it can hold up to 10% of the voting stock of the bank (Art. 16-2, Para. 2 of the Banking Act).

Non-financial business operators[26] are the industrial capitals among the category of 'same persons,' who should be determined by reference to their non-financial companies' total capital and asset values. Thus, the investment companies, the private equity funds or special purpose companies, may well be included among non-financial business operators if they meet certain criteria (Art. 2, Para. 1, Subpara. 9, items (c)-(e) of the Banking Act).

If a non-financial business operator submits a plan to be converted into other than the non-financial player in two years and the plan is approved by the FSC, the operator would be regulated by the limit on stock holdings. In addition, the non-financial business operator, who holds stocks within the scope of the stockholding ratio of a bank by a foreigner under the Foreign Investment Promotion Act, can hold stock of the bank exceeding 4% (Clause 16-2, Para. 3, Subpara. 2 of the Banking Act). The number of banks, the stocks of which can be owned by the non-financial business operator, is limited to one. If a non-financial business operator exceeds the ratio of stockholding by a foreigner as a result of a decline in the foreign shareholder's shareholding ratio of the bank, the operator shall not exercise voting rights in the excess stocks (Art. 16-2, Paras. 4 and 6 of the Banking Act).

In the case of internet-only banks, the non-financial business operator can hold the voting stock within the limit of 34% of the voting stock issued (Art. 5, Para. 1 of the Internet-Only Banking Act). If a non-financial business operator wants to hold more than 10% of the voting stock issued, the operator should be approved by the FSC (Art. 5, Para. 2 of the Internet-Only Banking Act).[27]

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[26] The 1994 amendment of Banking Act introduced 'the financial entrepreneur' (those individuals who are or will be engaged only in the banking business) system and, thereby, specified a special clause about the limit of the bank share holding, but the system would be abolished in a 1998 January amendment of Banking Act. The current Banking Act specifies that the persons contrasting the non-financial business operator shall be "those other than the non-financial business operator." *See* Eunhaengbeob [Banking Act], art. 16-2, para. 3, subpara. 1 (S.Kor).

[27] The non-financial business operators who are less regulated by the Internet-Only Banking Act were defined for the benefit of the ICT businesses. In the case of a non-financial business operator belonging to a conglomerate that is limited in its cross-investment, the asset value of the ICT businesses within the conglomerate should be 50% or more of the total asset value in order to be a limit-exceed-holding shareholder.

## *C. The 'Same Person's' Holding of Stocks beyond the Limit*

### 1. Principle

The 'same person' may hold stocks of a bank beyond the limit by obtaining approval from the FSC, and he/she should obtain approval whenever obtaining the voting stocks over 10% (15% in case of local banks), 25%, and 33% (Art. 15, Para. 3 of the Banking Act). The FSC can approve the acquisition by setting specific limits. If the 'same person' wants to hold stock beyond the previously approved limit, he/she should again obtain the approval of the FSC. The re-acquisition of the stock should also be approved by the commission (Art. 14-4, Para. 2 of the Banking Supervision Regulations).

### 2. Conditions for Approval

The FSC should approve the acquisition only if it would contribute to the efficiency and soundness of the banking business and in consideration of the distribution of the shares of the stockholders (Art. 15, Para. 3 of the Banking Act). The criteria suggested by the Banking Act are the possibility of undermining the safety and soundness of the bank, the propriety of the scale of assets and financing, the size of credit granted by the relevant bank, and the possibility of contributing to the efficiency and soundness of the banking business (Art. 15, Para. 5 of the Banking Act).

The FSC may allow exceptions for its approval conditions if the applicant is an insolvent financial institute (Art. 2, Para. 2 of the Restructuring of the Financial Industry Act), an insolvent financial company (Art. 2, Para. 5 of the Depositors' Protection Act), a would-be insolvent financial company (Art. 2, Para. 6 of the Depositors' Protection Act), a company that could not afford to comply with the banking management criteria (Art. 14-5 of the Banking Business Supervision Regulation), or other cases (Art. 15, Para. 7 of the Banking Act).

# III. REGULATION OF LARGE SHAREHOLDERS' ELIGIBILITY

## *A. Establishment of a Financial Company and Large Shareholders' Eligibility*

In order to establish a financial company, the applicant should obtain authorization or permission from the FSC or register the company with the commission. The financial companies that should be authorized by the commission are banks, mutual savings banks, investment dealers, investment brokers, collective investment companies, trust companies, and financial holding companies. Financial companies that should be permitted for establishment are insurance companies [28] and credit card companies. The financial companies that should be registered with the commission are investment advisers, investment managers, hedge fund companies, credit card companies operated by distribution companies, facility lease companies, installment financing companies, and new technology venture companies. The conditions and procedures for such authorization, permission and registration are specified by the relevant law.

The purposes of such regulations on the entry of the financial companies are to maintain the soundness of the companies and allow only those that would not be expected to disrupt the financial stability. The criteria for a financial company may well be different depending upon authorization, permission and registration. The commission will examine such aspects of the new financial company as a legal form, the financial conditions (including the capital adequacy), business plan, human and facility resources, executives, and large shareholders, etc. The large shareholders are the major equity capital investors. So, they will not only influence their financial companies in terms of financial soundness, and, after the establishment of their company, they will control the company by electing the directors and, thereby, affect the major management. They are expected to greatly affect the soundness of their company and the protection of financial consumers. Thus, their eligibility should be examined at their entry into the companies. Next, the eligibility for the large shareholders who will establish a financial company is discussed; then, the scope for examining the large shareholder's eligibility

[28] The sales organization in charge of the insurance business should be registered.

and its examination criteria are reviewed.

## 1. Concepts and Scope of the Large Shareholder

'Large shareholders' in the Capital Markets Act, Insurance Business Act, Credit Finance Business Act, and Financial Holding Company Act is defined according to the Financial Company Corporate Governance Act. The Banking Act and Mutual Savings Banks Act also define 'large shareholders.'

### (a) Banking Act

The scope of 'large shareholders' specified by the Banking Act is different from that of 'large shareholders' specified in other laws. A 'large shareholder' specified by the Banking Act is (1) the shareholder of a bank when the 'same person,' including the shareholder, holds more than 10% (15% in case of the local bank) of the total voting stock issued by the bank,[29] or (2) the shareholder of a bank when the 'same person,' including the shareholder, holds more than 4/100 of the total outstanding voting stock (excluding non-voting stock under Art. 16-2 Para. 2), and the 'same person' is the largest shareholder of the bank or exercises de facto influence over the major managerial matters of the bank by appointing or dismissing its executives or by utilizing other methods[30]

### (b) Financial Company Corporate Governance Act and Mutual Savings Banks Act

The 'large shareholder' specified by Mutual Savings Banks Act is the same as that by the Financial Company Corporate Governance Act. The major shareholder of the mutual savings bank corresponds to that of a financial company, which is not a financial investment services entity, under the Financial Company Corporate Governance Act. The scope of the large shareholder specified by the Financial Company Corporate Governance Act

[29] This person corresponds to the limit-exceed-holding shareholder.

[30] This person is recognized by the Financial Services Commission as the person who elects the president of the bank or the majority of the directors, or the person who exerts a controlling influence over important decision-making about management strategies or restructuring (Eunhaengbeob sihaengnyung [Enforcement Decree of the Banking Act], art.1(6), para.1 (S.Kor)).

will be discussed.

(1) The Largest Shareholder

The Financial Company Corporate Governance Act specifies that large shareholders are divided into the 'largest shareholder' and the 'major shareholder' (Art. 2, Subpara. 6 of the Financial Company Corporate Governance Act). The largest shareholder is the person who holds the largest portion of the outstanding voting stock (or equity), including those in the shareholders' own name or in the shareholder's specially-related person's name (including depository receipts related to such stock). The largest shareholders may be interpreted as follows.

First, the largest shareholder is identified by reference to controlling power. Since the largest shareholder holds the largest portion of the outstanding voting stock in its account regardless of the nominal names, the criteria should not be formal holding but the actual controlling power over the company. Second, Subparagraph 6 of Article 2 of the Financial Company Corporate Governance Act specifies that "the person himself" should not necessarily hold the largest amount of stock in the person's name. Third, there may be several large shareholders in a financial company. When the total amount of stock holdings by 'A' and 'A's' specially-related persons is the same as the total amount of stock holdings by 'B' and 'B's' specially-related persons, 'A' and 'B' are all the largest shareholders.[31]

(2) Major shareholder

The major shareholders may be divided into those holding 10% or more of the outstanding stock and those who can de facto exercise influence over the company. Shareholders with 10% or more stock are persons who hold 10% or more of the stock

[31] Interpretation of the Financial Services Commission, Concept of the Largest Shareholder (Aug. 15, 2015), Jabonsijanggwa geumyungtujaeobe gwanhan beoblyul [Jabonsijangbeob] [Financial Investment Services and Capital Markets Act], art. 9, para. 1, subpara. 1 specifies that, regardless of the names, the largest shareholder shall be the person having the largest share ownership when the shares are actually held in his or her own account. Hence, when more than one person holds the same number of shares and hold the largest number of shares respectively as a result of adding the persons' and their specially-related persons' shares, it is regarded that the persons shall all be the largest shareholders http://better.fsc.go.kr/user/extra/fsc/123/fsc_lawreq/view/jsp/LayOutPage.do?lawreqIdx=484.

(including depository receipts related to such stock) in the shareholder's account regardless of the nominal ownership. Shareholders who influence the management of the financial company are persons who actually control the company's important matters through appointments and dismissal of the executives (excluding operating officers). Such shareholders who influence the management of the financial company are specified in the Enforcement Decree of Financial Company Corporate Governance Act.[32]

## 2. Bank Authorization and Eligibility for Large Shareholders

### (a) Other than the Non-Financial Business Operator

If a person holds stock beyond his/her limit (limit-exceed-holding shareholder), the stockholder should be subject to screening for eligibility as a large shareholder. Thus, the shareholder should meet the requirements for excessive holding of stock as specified in Attachment 1 of the Enforcement Decree of Banking Act. In addition, he/she should be approved for holding of stock beyond the limit as a 'same person' (Art. 15, Para. 3 of the Banking Act). Since the screening criteria for eligibility as a large shareholder are the same as those for the approval of holding of the stocks beyond the limit, the person who is subject to the screening for large shareholder eligibility would meet the criteria for holding the stock beyond the limit.[33]

In the case of the largest shareholder or the person who influences the management of the company, he/she should be

[32] Shareholders who influence the management of the financial company are divided into two groups. For all financial companies, if a shareholder alone or through agreement or contract with other shareholders elects the CEO or the majority of the directors, he/she corresponds to the major shareholder. In the case of financial investment services entities, if shareholder who is an executive (Refer to Sangbeob [Commercial Code] art. 401-2, para. 1 (S.Kor)) and holds 1% or 5% and more of the voting stock, he/she corresponds to the major shareholder (Geumyunghoesaui jibaegujoe gwanhan beoblyul sihaengnyung [Geumyungsajibaegujobeob sihaengnyung] [Enforcement Decree of the Financial Companies Corporate Governance Act], art. 4, subpara. 2 item (a) (S.Kor)). In the case of financial companies who are not the financial investment services entities, the major shareholder is the person who has influences over the major decision-making of the company or its businesses (Geumyunghoesaui jibaegujoe gwanhan beoblyul sihaengnyung [Geumyungsajibaegujobeob sihaengnyung] [Enforcement Decree of the Financial Companies Corporate Governance Act], art. 4, subpara. 2 item (b) (S.Kor)).

[33] Financial Supervisory Service of Korea Consumer Service Center, *supra* note 19, at 123.

subject to eligibility screening for large shareholders. Hence, he/she should meet the conditions for the non-financial business operator's holding of non-voting stocks (Attachment 2 of the Enforcement Decree of Banking Act). In establishing a local bank, eligibility screening for large shareholders would not apply.

### (b) Non-Financial Business Operators[34]

Non-financial business operators are not subject to the eligibility screening for large shareholders. The non-financial business operator can own voting stock exceeding 4% and less than 10% of the outstanding voting stock but on the condition that the operator would not exercise the voting rights of stock exceeding 4%. So, the non-financial business operator needs to be approved by the commission for holding of stock beyond the limit (Art. 16-2, Para. 2 of the Banking Act; Attachment 2 of the Enforcement Decree of Banking Act).

### (c) Internet-Only Banks

An internet-only bank that is established according to the Internet-Only Banking Act provides for banking services primarily via electronic financial transactions. Hence, the special provisions will apply to internet-only banks. In principle, internet-only banks should be authorized according to the same criteria as ordinary banking institutions. But the two types of banks are different in scale of capital, non-financial business operator's ratio of the holding of the voting stocks, etc.

In the case of the internet-only bank, the non-financial business operator can hold between more than 10% and 34%, or less, of the outstanding voting stock. If the non-financial business operator wants to hold voting stock exceeding 10% of the outstanding voting stock, the operator should be subject to eligibility screening for large shareholders. According to the wording of the Internet Only-Banking Act, only those who will be a limit-exceed-holding shareholder by holding the voting stocks of

[34] The following persons shall not be regarded as "non-financial business operators": (1) Those who submitted a plan to the FSC for converting into a non-financial business operator within two years and, thereby, have been approved for the plan by the commission; (2) Those who hold stock within the scope of the foreign shareholder's stockholding ratio of a bank; and, (3) As the fund or as a corporation that manages and operates a fund, the person who has been approved by the commission for his/her holding of the stock of a bank.

an 'internet-only bank' should be subject to the screening. Those who do not hold any voting stock of the bank will not be subject to the screening (Art. 5, Para. 3 of the Internet-Only Banking Act). For example, a person who does not hold any stock of an internet-only bank but holds the voting stock of a 'limit-exceed-holding shareholder' of the bank, and who wants to hold an internet-only bank, will not be subject to the screening, even if the person exerts substantial influence over the limit-exceed-holding shareholder.[35]

The criteria for large shareholder eligibility screening are the ability to invest, financial conditions, and social credibility (Art. 5, Para. 2, Subpara. 1 of the Internet-Only Banking Act and its Attachment [Conditions for the limit-exceed-holding shareholder)). In this case, the person may need to be approved for 'same person' holding of the stocks beyond the limit (Art. 15, Para. 3 of the Banking Act). Here, the criteria for the eligibility of the large shareholder and those for holding stock beyond the limits are the same, so it is judged that, if a person has been approved for the holding of stocks beyond the limit, he/she shall be regarded as meeting the conditions for the eligibility screening.

### 3. Mutual Savings Banks and Financial Companies Regulated by the Financial Company Corporate Governance Act

#### (a) Eligibility Screening Subjects

In order to enter into the financial businesses, the mutual savings banks and the financial companies should obtain authorization or permission from the commission. The subjects of large shareholder screening are not only the largest and major shareholders but also the shareholder who are the largest shareholder's specially-related person (largest shareholder's specially-related shareholder), the largest shareholder of the corporation holding the largest share of the mutual savings bank or the financial company (largest shareholder of the largest shareholder corporation), and the CEO of the largest shareholder

[35] The Ministry of Government Legislation of Korea, Geum-Yung-Wi-Won-Hoe-Bi-Geum-Yung-Ju-Lyeog-Ja-ui Ju-Sig-Bo-Yu-Han-Do-e dae-han Sim-Sa Dae-Sang Beom-Wi (Internet-Jeon-Mun-Eun-Haeng Seol-Lib mich Un-Yeong-e gwan-han Teuglyebeob Je-5-Jo deung Gwan-Lyeon) [The Financial Services Commission–The Scope of Screening of Non-Financial Business Operator's Stock Holdings (Concerning Internet-Only Banking Act Article 5)] (statutory interpretation, June 24, 2019).

corporation.[36] In case the actual controller of the company differs from its largest shareholder, the actual controller shall be included.

In the case of the insurance company, the scope of screening for the eligibility of the large shareholder is narrowed. The scope of screening is limited to the largest shareholder, major shareholder, and the largest shareholder's specially-related shareholder.[37]

**(b) Conditions for Eligibility**

(1) Principles

The conditions for eligibility of the large shareholder are the ability to invest, sound financial state, and social creditability.[38] The companies subject to the Insurance Business Act are different from other financial companies, and the conditions of eligibility for the large shareholders are different. The conditions for eligibility of the large shareholder under the Insurance Business Act are the absence of the disqualifications specified in Paragraph 1 of Article 5 of Financial Company Corporate Governance Act, sufficient ability to invest, sound financial state, and no personal history of disturbing the sound economic order.[39]

In the case of mutual savings banks, the conditions are different from those for other financial companies. Their social creditability conditions for approval by the commission are no

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[36] Sanghojeochugeunhaengbeob [Mutual Savings Banks Act], art. 6-2, para. 1, subpara. 4 (S.Kor); Sanghojeochugeunhaengbeob sihaengnyung [Enforcement Decree of the Mutual Savings Banks Act], art. 6-2, para. 4 (S.Kor); Jabonsijanggwa geumyungtujaeobe gwanhan beoblyul [Jabonsijangbeob] [Capital Markets Act], art. 12, para. 2, subpara. 6 item (a) (S.Kor); Jabonsijanggwa geumyungtujaeobe gwanhan beoblyul sihaengnyung [Jabonsijangbeob sihaengnyung] [Enforcement Decree of the Capital Markets Act], art. 16, para. 7; Geumyungjijuhoesabeob [Financial Holding Companies Act], art. 4, para. ,1 subpara. 3 (S.Kor); Geumyungjijuhoesabeob sihaengnyung [Enforcement Decree of the Financial Holding Companies Act], art. 5, para. 2 (S.Kor); Yeosinjeonmungeumyungeobbeob [Credit Finance Business Act], art. 6, para. 2, subpara. 4 (S.Kor); Yeosinjeonmungeumyungeobbeob sihaengnyung [Enforcement Decree of the Credit Finance Business Act], art. 6-3, para. 3 (S.Kor).

[37] Boheomeobbeob [Insurance Business Act], art. 6, para. 1, subpara. 4 (S.Kor).

[38] Sanghojeochugeunhaengbeob [Mutual Savings Banks Act], art. 6-2, para. 1, subpara. 4 (S.Kor); Jabonsijanggwa geumyungtujaeobe gwanhan beoblyul [Jabonsijangbeob] [Capital Markets Act], art. 12, para. 2, subpara. 6 (S.Kor); Geumyungjijuhoesabeob [Financial Holding Companies Act], art. 4, para. 1, subpara. 3 (S.Kor); Yeosinjeonmungeumyungeobbeob [Credit Finance Business Act], art. 6, para. 2, subpara. 4 (S.Kor).

[39] Boheomeobbeob [Insurance Business Act], art. 6 para. 1, subpara. 4 (S.Kor).

possibility of disturbing the public interest and sound management and credit order. (If the large shareholder is a moneylender company, the company should have a proper mechanism for preventing conflict-of-interest with the mutual savings bank.)[40]

(2) Conditions for Eligibility

In order to set the conditions for the propriety of the large shareholder, the large shareholders are defined differently —financial institutions, domestic corporations, individuals, foreign corporations, private equity funds, or special purpose companies.[41] Only in the case of financial holding companies, the conditions for a shareholder holding stocks beyond the limits distinguish the fund from the individual foreigner similar to the Banking Act.[42]

The specific eligibility conditions may well be divided into financial conditions and social creditability ones. As a financial condition, the financial institution, domestic corporation, and individual should not be allowed to borrow the invested equity

[40] Such additional social creditability conditions were introduced when the Enforcement Decree of Mutual Savings Banks Act was amended in June 2013 after the 2011 savings bank incident. The conditions for the moneylender was introduced in February 2014 when the decree was amended. The Criteria for Authorization of Large Shareholder Change and Merger of the Mutual Savings Bank are as follows: (1) When a moneylender company acquires a mutual savings bank, a plan to close completely the money lending business should be submitted; (2) The same large shareholder who wishes to expand his/her business sphere should not be allowed to own and dominate three or more savings banks;and, (3) In case the PEF or SPC is a large shareholder, the period of operation and the actual large shareholder should be screened to secure responsible management and prevent the avoidance of regulations. Such criteria shall be applied for authorizing a mutual bank. Financial Services Commission of Korea & Financial Supervisory Service of Korea, Sang-Ho-Jeo-Chug-Eun-Haeng Dae-Ju-Ju-Byeon-Gyeong·Hab-Byeong deung In-Ga-Gi-Jun Ma-Lyeon [Arrangement of Authorization Criteria as Mutual Savings Banks' Large Shareholder Changes and Mergers.] (April 19, 2017). https://m.fss.or.kr:4434/fss/board/bodoBoardDetail.do?seqNo=20434&mId=M01050200000000&gubun=01.

[41] Sanghojeochugeunhaengbeob sihaengnyung [Enforcement Decree of the Mutual Savings Banks Act, Attachment 1] (S.Kor); Jabonsijanggwa geumyungtujaeobe gwanhan beoblyul sihaengnyung [Jabonsijangbeob sihaengnyung] [Enforcement Decree of the Capital Markets Act, Attachment 2] (S.Kor); Boheomeobbeob sihaengnyung [Enforcement Decree of the Insurance Business Act, Attachment 1] (S.Kor); Yeosinjeonmungeumyungeobbeob sihaengnyung [Enforcement Decree of the Credit Finance Business Act, Attachment 1] (S.Kor).

[42] Geumyungjijuhoesabeob sihaengnyung [Enforcement Decree of the Financial Holding Companies Act, Attachment 1] (S.Kor).

capital money. If the large shareholder is a financial institution, all the applicants should satisfy the social creditability conditions regardless of legal forms. In addition, if the large shareholder is an individual, the holder should not be disqualified according to Paragraph 1 of Article 5 of the Financial Company Corporate Governance Act.

### (c) Registration of a Hedge Fund Company, Investment Adviser, and Investment Manager

(1) Eligibility Screening Subjects

In the case of registration of a hedge fund company, investment adviser, and investment manager, the subjects of screening eligibility are the same as those for financial investment service businesses authorization (Art. 18, Para. 2, Subpara. 5 and Art. 249-3, Para. 2, Subpara. 5, Item (a) of the Capital Markets Act).

(2) Conditions for Eligibility

(A) Registration of Hedge Fund Businesses

Unlike public offering fund businesses, hedge fund businesses are not subject to an authorization by, but are registered with, the commission. Less strict conditions for registration of the hedge fund business are applied. When a hedge fund business is registered, a business plan is not required, unlike with a public offering business. Moreover, the financial conditions for the eligibility of the large shareholder are also less strict; only some of the conditions for their registration shall be applied. If the large shareholders are financial institutions, domestic corporations, or individuals, the financial conditions required are by an equity capital investment, not through a loan. However, conditions for the large shareholder's social creditability are required (Art. 271-2, Subpara. 5 and Attachment 2 for the Conditions for the Large Shareholder, of the Enforcement Decree of the Capital Markets Act).

(B) Registration of Investment Advising and Investment Managing Businesses

For investment advising and investment managing businesses, only the conditions of sufficient social creditability are required

for the eligibility of large shareholders (Art. 18, Para. 2, Subpara. 5, Item (a) of the Capital Markets Act). In principle, the requirements of social creditability for large shareholders are the same as those for financial investment services businesses authorization (Art. 21, Para. 5 of the Enforcement Decree of Capital Markets Act).

### *B. System of Approval for Change of the Large Shareholder*

The person who wants to be the large shareholder of a financial company should obtain approval from the commission. The large shareholder change system is aimed at preventing improper large shareholders from participating in the management of financial companies. Since the change of the large shareholder should be approved, the existing large shareholders' transfer of their stocks may well be limited.

In the case of banks and bank holding companies, the change of large shareholders may be approved by the commission, which regulates the shareholders' holding of stocks beyond the limit. For internet-only banks, establishments are deemed to be authorized according to Paragraph 2 of Article 3 of the Banking Act. The Mutual Savings Banks Act separately specifies a large shareholder eligibility screening system. Other financial companies are regulated by the Financial Company Corporate Governance Act for the change of large shareholders.

#### 1. Mutual Savings Bank

In the case of mutual savings banks, those who want to be large shareholders by acquiring or receiving voting stocks exceeding 30% of the outstanding voting stock should be approved by the commission in advance (Art. 10-6, Para. 1 of the Mutual Savings Banks Act). Also, if the change of large shareholders is caused by inheritance, the exercise of security rights, or other shareholders' disposal of their stocks, it should be approved ex post facto by the commission (Art. 10-6, Para. 1 of the Mutual Savings Banks Act; Art. 7-4, Para. 3 of the Enforcement Decree of the Mutual Savings Banks Act). The scope of screening a change in large shareholders is wider than that for screening the establishment of the savings bank. The scope of the large shareholder encompasses the largest shareholder, major

shareholder, largest shareholder's specially-related shareholder, and major shareholder's specially-related shareholder. In case the largest or major shareholders are corporations, the largest shareholder or (equity capital) investor (if the person controlling the corporation de facto is not its major shareholder or largest investor, he or she is considered the largest investor) and its CEO are included (Art. 7-4, Para. 1 of the Enforcement Decree of the Mutual Savings Banks Act). The eligibility for the large shareholder includes "prevention of a financial accident" (Attachment 2 to the Enforcement Decree of the Mutual Savings Banks Act).

### 2. Financial Companies Under the Financial Company Corporate Governance Act

#### (a) Approving Change of the Large Shareholder

According to the Financial Company Corporate Governance Act, those who want to be large shareholders by acquiring or receiving parts of the outstanding voting stocks (actually, those who want to dominate the stocks) should be approved in advance by the commission (Art. 31, Para. 1 of the Financial Company Corporate Governance Act). Like the Mutual Savings Banks Act, this act specifies that those who would be a large shareholder through inheritance, the exercise of security rights, or other shareholders' disposal of their stocks should be approved ex post facto by the commission (Art. 31, Para. 2 of the Financial Company Corporate Governance Act; Art. 26, Para. 5 of the Enforcement Decree of Financial Company Corporate Governance Act).

#### (b) Financial Companies Subject to Large Shareholder Approval

Financial companies subject to the approval of large shareholders are all financial companies except the following—banks, bank holding companies, mutual savings banks, investment advisers, investment managers, facility lease companies, installment financing companies, and new technology venture companies.[43] Hedge fund companies and crowdfunding platforms

[43] Such financial companies screened at the stage of their entrance into the market

shall be excluded from the large shareholders' change system according to Subparagraph 4 of Paragraph 4 of Article 26 of the Enforcement Decree of Financial Company Corporate Governance Act.[44]

### (c) Screening Subjects

The large shareholders are the largest shareholder, major shareholder, largest shareholder's specially-related shareholder, largest shareholder of the largest shareholder corporation (including the actual controller of the largest shareholder corporation), and CEO of the largest shareholder corporation (Art. 31, Para. 1; Art. 26, Para. 1 of the Enforcement Decree of the Financial Company Corporate Governance Act).[45] In the case of the insurance company, eligibility for the large shareholders is more strictly screened when it applies to the establishment of the insurance business.

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as an investment adviser, investment manager, facility lease company, installment financing company, and new technology venture company shall report to the commission ex post facto (Geumyunghoesaui jibaegujoe gwanhan beoblyul [Geumyungsajibaegujobeob] [Financial Company Corporate Governance Act], art. 31, para.1 (S.Kor)).

[44] Currently, hedge fund companies and crowdfunding platforms, (Geumyunghoesaui jibaegujoe gwanhan beoblyul [Geumyungsajibaegujobeob] [Financial Company Corporate Governance Act] (S.Kor)), are not regulated according to Article 31. Their exemption from reporting their shareholder changes to the commission, (Geumyunghoesaui jibaegujoe gwanhan beoblyul [Geumyungsajibaegujobeob] [Financial Company Corporate Governance Act], art. 31, para. 5 (S.Kor)), seems to be problematic. In 2018, in an effort to help solve such problems, the government submitted a draft amendment of the Financial Company Corporate Governance Act to the National Assembly, but the draft amendment was disposed of due to the expiration of the twentieth National Assembly. The government submitted the same amendment to the twenty-first National Assembly (Agenda No. 2101148). The draft amendment excludes only the hedge fund company and the crowdfunding platform from the requirement for prior approval of large shareholder changes (Art. 31, Para. 1 of the Draft), while including the hedge fund company and the crowdfunding platform for the ex post facto report (Art. 31, Para. 5 of the Draft). Financial Services Commission, "Notice of Legislation: Draft of Partial Amendment of Financial Company Corporate Governance Act," (May 19, 2020).

[45] If a company subject to the screening of large shareholder changes has already been screened for these, it would be excluded from screening by the authorities. For example, when 'A' corporation applies for change of its large shareholders in order to become the largest shareholder of 'X' financial company, and, thereby, the authorities have approved the change of the largest shareholder, and the largest shareholder 'B' of 'A' corporation (largest shareholder) has already been approved for his/her large shareholder position in 'X' financial company, he or she would be excluded from the screening. Hence, the application for the change of a large shareholder is only an entry condition for a large shareholder, and he/she would not be screened for maintaining eligibility as the large shareholder.

#### (d) Conditions for Approval

The conditions for approval of the large shareholder are specified differently depending on the types of entities—financial institutions, funds, domestic corporations, domestic individuals, foreign corporations, foreign individuals, and private equity funds or special purpose companies. The social creditability conditions for not violating the Fair Trade Act, Tax Evader Punishment Act, and other financial laws apply in common to all the large shareholders. If the large shareholder is a domestic individual, he or she should not be disqualified according to Paragraph 1 of Article 5 of the Financial Company Corporate Governance Act. The loan ratio should account for less than two-thirds of the domestic corporation's or individual's equity capital investment.

### *C. Periodic Regulation of Large Shareholder Eligibility*

#### 1. Banks

In the case of the bank and bank holding company, large shareholder eligibility is screened periodically in terms of stock holding beyond the limit. The holding of voting stock beyond the limit shall be checked when acquiring the voting stock and thereafter (Art. 16-4 of the Banking Act). Eligibility shall be screened every half-year. If the commission decides that there is a special need to screen a limit-exceed-holding shareholder, such as being suspected of an illegal transaction with the bank, the commission will investigate the shareholder (Art. 11-4, Para. 1 of the Enforcement Decree of Banking Act).

#### 2. Mutual Savings Bank

Large shareholders of mutual savings banks and persons related to them should be examined once every two years (every year, in case the same affiliated mutual savings bank and the mutual bank recorded total assets amounting to two trillion won at the end of the recent fiscal year) (Art. 10-6, Para. 3 of the Mutual Savings Banks Act; Art. 7-4 of the Enforcement Decree of the Act).

The subjects are the largest shareholder and major shareholder. The largest shareholder's specially-related shareholder and the major shareholder's specially-related

shareholder holding 2% or more of the outstanding voting stock are subject to screening. If the largest shareholder is a corporation, its largest shareholder or (equity capital) investor is also subject to screening (if the person who controls the corporation de facto is different from its largest shareholder or investor, he/she should be included in the examination). Hence, unlike screening for change of the large shareholder, the person who holds more than 30% of the outstanding stock but is not subject to screening, and the person specially-related to the largest or major shareholders but not holding 2% or more of the outstanding stock, are exempt from screening.

### 3. Financial Company Corporate Governance Act

#### (a) Financial Companies Subject to Screening for Eligibility and the Frequency

The Financial Company Corporate Governance Act specifies that the largest shareholders of the financial companies should be periodically subject to screening for their eligibility (Dynamic Propriety) (Art. 32 of the Financial Company Corporate Governance Act). The scope of financial companies subject to this screening is the same as that of financial companies subject to screening of large shareholder changes according to Article 31 of the Financial Company Corporate Governance Act. The following companies, among the companies controlled by the Financial Company Corporate Governance Act, are excluded—banks, bank holding companies, mutual savings banks, investment advisers, investment managers, facility lease companies, installment financing operators, and new technology venture companies. Also, hedge fund companies and crowdfunding platforms are excluded from the screening.

Eligibility for the largest shareholder shall be screened every two years, while it may be screened occasionally in case some illegal trade between the largest shareholder and the financial company is suspected (Art. 27, Para. 2 of the Enforcement Decree of Financial Company Corporate Governance Act).

#### (b) The Subject of Eligibility Screening (the One Largest Individual Investor)

The subject of eligibility screening for the largest shareholder

is the 'individual (natural person)' who is the largest (equity capital) investor among the largest shareholders. If the largest investor is a corporation, the largest investor is the person who has invested most in the corporation. If the largest investor of the corporation is another corporation, the selection is done in the same way until the largest shareholder becomes an individual. If the case involves cross-shareholding among corporations, the subject of eligibility screening is the 'same person' of the conglomerate (the corporation group according to Art. 2, Subpara. 2 of the Monopoly Regulation and Fair Trade Act) or the person equivalent to the 'same person' as determined by the commission (Art. 27, Para. 1 of the Enforcement Decree of the Financial Company Corporate Governance Act).

If the largest shareholder is any of the following persons, the commission shall screen him or her for eligibility as the largest shareholder:

1) In the case of a trust, the trustor (in case of an unspecified trust, the trustor and trust business company);
2) In the case of a mutual insurance company, the policyholder who is the largest shareholder;[46]
3) In the case of a limited liability company (LLC), the member who is the largest investor;
4) In the case of a fund, the largest investor and the asset management company; and,
5) In the case of a PEF, the general partner (GP).

If the largest shareholder is any of the following persons or institutions, the commission shall exclude them from eligibility screening—the nation, Korea Deposit Insurance Corporation, Korea Development Bank (only when the Korea Development Bank has acquired the stock with the Financial Stability Fund raised according to the Restructuring of the Financial Industry Act), the person wanting to be a large shareholder of a hedge fund company and crowdfunding platform (excluding the person who wants to be a large shareholder of a financial investment business established according to Attachment 1 of the Enforcement Decree of Capital Markets Act), the largest shareholder or his/her

[46] In case the largest shareholder is a mutual insurance company, the policyholder who is the largest shareholder should be subject to screening. But if all the insurance policyholders have same voting rights, they will be excluded from the screening pursuant to a National Agricultural Cooperative Federation case.

specially-related shareholder both of whom hold less than 1% of the outstanding voting stock (the person who controls his/her financial company by appointing and dismissing the directors shall be excluded), the Korea Asset Management Corporation, the National Pension Corporation, the person who has become a large shareholder by having been assigned new stock in a merger or division and, thereby, approved by the commission according to financial laws and regulations (Art. 26, Para. 4 of the Enforcement Decree of Financial Company Corporate Governance Act).

The FSC excludes foundations or pension funds from eligibility screening for the largest shareholder when they are the largest shareholder of a financial company because the concept of the largest shareholder of foundations or pension funds does not exist. Federations of mutual finance associations, such as the National Agricultural Cooperative Federation and Saemaeul Community Credit Cooperatives, are also excluded; they do not allow certain persons to hold the majority of the voting stock, so the largest investor (cooperative member) cannot be determined, or the need for the screening of their members is negligible.

When the largest shareholder has changed during the process of screening, the screening of the former largest shareholder would be meaningless, and, so, he/she would be excluded from the screening. In the case of large shareholders who have acquired the position of the largest shareholder, he/she would be excluded from screening at this point of time because the shareholder has already been screened when examined for eligibility as a large shareholder.

The largest shareholder specified by Subparagraph 6 of Article 2 of the Financial Company Corporate Governance Act is the person who holds the largest stock (or equity), including stock held in his/her account regardless of the nominal name (including the depository receipts related to such stock). The subject of eligibility screening of the largest shareholder is the one largest investor among the largest shareholders. Thus, the meaning of the 'largest investor' and 'one person' is important.

First, if the largest shareholder of a financial company is an individual, he/she would be the largest investor. Second, the screening of eligibility for the largest shareholder targets the person who actually controls the financial company. But Paragraph 1 of Article 32 of the Financial Company Corporate Governance Act does not suggest the criterion that the largest investor be based on 'his/her own account.' Hence, unlike the

concept of the largest shareholder, the largest investor should be determined according to the nominal holding by the shareholders.[47] The person who does not control the financial company actually would be screened for his/her eligibility as the largest shareholder, which means that the person who controls or influences the company would not be screened.[48]

Third, Paragraph 1 of Article 32 of the Financial Company Corporate Governance Act limits the subject of largest shareholder screening to one person who is the largest investor. So, one person should be identified as the subject of eligibility screening as the largest shareholder. If the largest shareholders are two or more, the problem arises regarding the subjects of the screening.[49] The screening for eligibility of the largest shareholder aims not at screening the largest shareholder and his specially-related persons but at screening the one person who has the most controlling power. Hence, in case there are many 'largest shareholders,' each should be subject to the screening.[50]

### (c) Conditions for Maintaining Eligibility

The conditions for maintaining the eligibility of the largest shareholder are to comply with the Monopoly Regulation and Fair Trade Act, Tax Evader Punishment Act, and other financial laws specified by the Enforcement Decree of the Financial Company Corporate Governance Act (Art. 32, Para. 1 of the Financial Company Corporate Governance Act; Art. 27, Para. 4 of the Enforcement Decree of Financial Company Corporate Governance Act). Hence, the conditions for maintaining the eligibility of the

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[47] In case the largest shareholder involves cross-shareholding among the corporations, the person actually controlling the conglomerate shall be screened (Geumyunghoesaui jibaegujoe gwanhan beoblyul [Geumyungsajibaegujobeob] [Financial Company Corporate Governance Act], art. 32, para. 1 (S.Kor)).

[48] Financial Services Commission of Korea, Geum-Yung-Hoe-Sa Ji-Bae-Gu-Jo Gae-Seon-Bang-An [Reform Measures for Financial Company Corporate Governance] 2 (March 15, 2018), https://m.fss.or.kr:4434/fss/board/bodoBoardDetail.do?seqNo=21181&gubun=01&mId=M01050200000000.

[49] For example, two or more shareholders have the same shares to control and operate a financial company together or through collaboration.

[50] If the largest investor cannot be identified, some opinions suggest that the appropriate financial company or the candidates for eligibility screening should determine their largest investor (Tae Jin Kim, *Geum-Yung-Hoe-Sa-ui Ji-Bae-Gu-Jo-e gwan-han Beob-Lyul-e-seo-ui Ju-Ju Tong-Je* [Control of the Shareholders in the Financial Company Corporate Governance Act], 79 GI-EOB-GWA GEUM-YUNG-E GWAN-HAN BEOB-LYUL-JEON-MUN JOURNAL [BUSINESS FINANCE LAW (BFL)] 61 (2016)).

largest shareholder are less strict than those for approval of the large shareholder change.

Since the conditions for maintaining eligibility of the largest shareholder apply to the largest individual investor, they are different from those for approval of a large shareholder change. The condition for approval of a large shareholder change (the fund raised by a loan should be less than two-thirds of the equity capital investment) should apply to the acquisition of shares of a financial company, and, in this case, it would be excluded from the conditions for maintaining eligibility. Moreover, the disqualification requirement specified in Paragraph 1 of Article 5 of the Financial Company Corporate Governance Act that five years must pass since the end of the imprisonment (including the case where the imprisonment is deemed ended) or since the imprisonment was exempted, or that the imprisonment is suspended for a certain period, shall not be effective regarding the eligibility of the largest shareholder. The social creditability requirements are not much different.

**Table 1: Conditions for Eligibility**

| Eligibility Maintenance Conditions | Conditions for Large Shareholder Change (Individual) |
|---|---|
| The subject should not have a criminal record of a fine or any heavier penalty imposed upon him/her for a violation of financial laws, the Monopoly Regulation and Fair Trade Act, or the Tax Evader Punishment Act for the last five years. | The subject should not have a criminal record of a fine or any heavier penalty imposed upon him/her for a violation of financial laws, the Monopoly Regulation and Fair Trade Act, or the Tax Evader Punishment Act for the last five years. |
| The subject should not be a large shareholder, or his/her specially-related person, of financial institutions, which were designated as insolvent financial institutions according to the Restructuring of Financial Industry Act or whose permission, authorization, or registration has been revoked. The person who has been declared not responsible for the insolvency by the court or | The subject should not be a large shareholder, or his/her specially-related person, of financial institutions, which were designated as insolvent financial institutions according to the Restructuring of Financial Industry Act or whose permission, authorization, or registration have been revoked. The person who has been declared not responsible for the insolvency by the court or the |

| | |
|---|---|
| the person who has taken over the economic liability as determined by the commission is excluded. | person who has taken over the economic liability as determined by the commission is excluded. |
| The person has never been subject to suspension of banking transactions due to insolvency, etc., for the last five years. | The person has never disturbed the order of credit due to default for the last five years. (Regulation) The person has never been subject to suspension of banking transactions due to insolvency, etc., for the last five years. |
| The person has never been recorded as disrupting the financial order or as a defaulter, with the centralized credit information collection agency, under Subparagraph 1 of Paragraph 2 of Article 25 of the Use and Protection of Credit Information Act, for the last three years. | (Regulation) The person has never been recorded as disrupting ~~of~~ the financial order or as a defaulter, with the centralized credit information collection agency, under Subparagraph 1 of Paragraph 2 of Article 25 of the Use and Protection of Credit Information Act, for the last three years. |
| The person has never been responsible for a revitalization or bankruptcy procedure under the Debtor Rehabilitation and Bankruptcy Act as the largest or major shareholder of the company and has never been related to a revitalization or bankruptcy directly or indirectly for the last five years. | (Regulation) The person has never been responsible for a revitalization, bankruptcy, or the equivalent procedure, as a company or the largest or major shareholder of the company, and who has never been related to a revitalization, bankruptcy, or the equivalent procedure directly or indirectly for the last five years. |
| | (Regulation) In the case of the person who wants to be the largest shareholder, he/she has never been subject to a suspension from performing his/her duties as an executive or staff of the financial company for the last five years. When the target financial company is an insurance company or a credit finance company, he/she has never been suspended from performing his/her duties for the last four years. |

The Capital Markets Act specifies the obligation to maintain the requirements for authorization (Article 15 of the Capital Markets Act) and the obligation to maintain registration conditions for a hedge fund business (Art. 249-3, Para. 8 of the Capital Markets Act). The obligation to maintain the authorization or registration conditions encompasses the obligation to maintain the eligibility for the large shareholder, but the conditions are mitigated.[51] The subjects who should maintain eligibility include all large shareholders, unlike the requirements for the largest shareholder eligibility. When such conditions are not met, instead of large shareholders, their financial investment services entities or hedge fund companies are deprived of authorization or registration (Art. 420, Para. 1 of the Capital Markets Act).

**(d) Obligation of Financial Company**

(1) Obligation to Provide the Data or Information

The FSC may request that the financial companies or persons subject to screening submit the data or information required for eligibility screening for the largest shareholder (Art. 32, Para. 3 of the Financial Company Corporate Governance Act). Thus, the financial companies are obligated to submit data about the largest investors of the upper stage to the commission. If the financial companies should not submit the data to the commission or should submit false data or information, the financial companies would be subject to an administrative fine of 100 million won or less (Art. 43, Para. 1, Subpara. 24 of the Financial Company Corporate Governance Act).

The Financial Company Corporate Governance Act requires that financial companies select the largest investor at the highest stage to screen his/her eligibility as the large shareholder. Hence, they should submit the data about the largest investor corporation at the intermediate stage of their corporate governance to the commission. However, the Financial Company Corporate Governance Act obligates the largest investor to submit the data to the commission while not specifying any largest investor

[51] The Credit Finance Business Act imposes the obligation of maintaining the permission conditions for credit card businesses, but the maintenance of eligibility for the large shareholder is not included in such obligation(Yeosinjeonmungeumyungeobbeob [Credit Finance Business Act] art. 6-2 (S.Kor)).

corporation, which is not subject to screening for submitting such data to the commission. Accordingly, if the shareholder at the intermediate stage does not submit the data, it would be impossible to identify the largest investor. Hence, even when the financial company does its best to meet the request from the commission, the largest investor corporation may not submit the data to the commission. In such a case, the commission cannot screen eligibility for the largest shareholders. Nevertheless, the commission should not sanction the financial company which has done its best to perform its duty to submit the data to the commission.

(2) Obligation to Report Nonfulfillment of the Eligibility Conditions

Financial companies may well recognize nonfulfillment of eligibility conditions for the largest shareholders earlier than the commission does. In such a case, the financial companies are obligated to report the fact to the commission without delay (Art. 32, Para. 2 of the Financial Company Corporate Governance Act).

**4. Measures for the Violation of Regulations about Eligibility**

Eligibility for the large shareholder is determined when the financial company is authorized, permitted or registered, when the large shareholder is changed, and when the eligibility for the large shareholder is periodically checked. If a financial company applies for authorization, permission or registration, but does not meet conditions for the large shareholder, it would not be authorized, permitted or registered. If a financial company applies for a change of the large shareholder, the person who wants to be a large shareholder would not be able to acquire the stocks to become a large shareholder. The following measures are enforced if regulations about the holding limit of bank shares are violated or if, in the case of financial companies other than banks, a person should become a large shareholder without the approval of the commission, should not apply ex post facto for the approval, or could not meet the conditions for the eligibility of the large shareholder.

### (a) Obligation of Meeting the Conditions and Order of Meeting the Conditions

The Banking Act obligates the person who holds the stock of the bank beyond the relevant limit[52] to meet the conditions thereof without delay (Art. 16, Para. 1 of the Banking Act). If the person could not maintain certain qualifications and approval conditions for the regulation of the large shareholder, the commission may order the person to meet the conditions. If the limit-exceed-holding shareholder should not meet the conditions for holding (conditions for qualification and approval), the commission would order the person to meet the conditions within six months (Art. 16-4, Para. 3 of the Banking Act). If a non-financial business operator has been approved for conversion into an operator other than a non-financial business operator, but has not implemented the conversion, the commission would order the operator to be converted into this other operator. If the large shareholder of a mutual savings bank should not meet the conditions for maintenance of eligibility for the large shareholder, the commission could order the large shareholder to meet the conditions within six months (Art. 10-6, Para. 6, of the Mutual Savings Banks Act).[53]

The commission can order a financial company's largest shareholder (the largest investor) to take measures to secure the soundness of its management within six months if he/she should not meet the conditions for eligibility (Art. 32, Para. 4, of the Financial Company Corporate Governance Act). Unlike the Banking Act and Mutual Savings Banks Act, the Financial Company Corporate Governance Act specifies that the commission can take not only measures to obligate the largest shareholders to meet the conditions for the maintenance of eligibility but also measures deemed necessary to prevent conflicts

[52] Eunhaengbeob [Banking Act], art. 15, para. 1 (S.Kor) (holding stocks beyond the 10% (15%)); art. 15, para. 3 (approved holding of stocks beyond 10%, 25%, or 33%); art. 16-2, para. 1 (non-financial business operator's holding of stocks beyond 4% (15%)); art. 16-2, para. 2 (non-financial business operator's approved holding of the stock within the limit of 10%).

[53] In case the largest shareholder of the mutual savings bank is a corporation (direct large shareholder), it is decided that the largest shareholder of the corporation who does not hold any shocks of the mutual savings bank (indirect large shareholder) could well control the savings bank through the corporation. Hence, the commission imposes an order on the corporation for meeting the conditions and disposing of the stocks for violation of the regulation by the indirect large shareholder.

of interests and secure the sound management of the financial companies.[54]

**(b) Prohibition of Exercising Voting Rights**

Since the regulation of the large shareholder aims at the person involved in the management of the financial company, he or she should not be allowed to exercise his/her voting rights if he or she is not eligible as the large shareholder. In the case of a bank, the stock prohibited to be exercised is as follows:

1) If the 'same person' holds bank stock beyond the limit, the prohibited stock is that beyond the limit (Art. 16, Para 1, of the Banking Act);[55]
2) If the convertible contingent capital bond should be converted to the stock of the bank and, thereby, the 'same person' would hold stock beyond the limit, the prohibited stock is that beyond the limit (Art. 16, Para. 2, of the Banking Act);
3) If a non-financial business operator holds the bank stock within the scope of the stockholding ratio of a bank by a foreigner under the Foreign Investment Promotion Act and, thus, the stockholding ratio of the non-financial business operator exceeds that of the foreign shareholder as a result of a decline in the foreign stockholder's shareholding ratio of the bank, the prohibited stock is that beyond the foreign shareholder's ratio (Art. 16-2, Para. 4 of the Banking Act);
4) If a non-financial business operator should be approved to be converted into a status other than a non-financial business operator, but if he/she should not implement the conversion plan and be ordered by the commission to implement the conversion plan or if he/she should conduct an illegal transaction, the prohibited stock is that held by

[54] (1) Corrective measures; limit of the transactions with the person subject to screening; (2) Publication of the reasons of non-fulfillment and measures imposed by the commission on the internet; and, (3) Request for the correction plan; request for changing the correction plan; request for implementing the correction plan, etc.

[55] Eunhaengbeob [Banking Act], art., 15 para. 1 (S.Kor) (holding of stocks beyond 10% (15%)), art. 15, para. 3 (approved holding of the stocks beyond 10%, 25%, or 33%), art. 16-2, para. 1 (non-financial business operator's holding of the stocks beyond 4% (15%)), art. 16-2, para. 2 (non-financial business operator's approved holding of the stock within the limit of 10%).

the person beyond the limit (Art. 16-3, Para. 4 of the Banking Act); and,

5) If a limit-exceed-holding shareholder should be ordered to meet the conditions for the eligibility of holding stock beyond the limit, the prohibited stock is that beyond the limit (Art. 16-4, Para. 4 of the Banking Act).

In the case of a mutual savings bank, the stock that cannot be exercised for voting includes (1) stock acquired with neither approval for the large shareholder change nor ex post facto approval (Art. 10-6, Para. 5 of the Mutual Savings Banks Act) and (2) stock 10% or more of the outstanding stock that is held by the large shareholder who has been ordered to meet the conditions for large shareholder eligibility (Art. 10-6, Para. 7 of the Mutual Savings Banks Act).

In the case of the Financial Company Corporate Governance Act, stock acquired without the approval or ex post facto approval of the commission cannot be used for voting (Art. 31, Para. 4 of the Financial Company Corporate Governance Act). The Financial Company Corporate Governance Act specifies, in relation to the maintenance of eligibility for the largest shareholder, that the person subject to screening cannot automatically exercise his/her voting rights and the commission can prohibit the exercise. If the person subject to eligibility screening for the largest shareholder should be sentenced to one year or longer punishment for violation of finance-related Acts (including Tax Evader Punishment Act Monopoly Regulation and Fair Trade Act), or should be deemed not eligible to maintain the sound financial order or sound management of the financial company, he/she would be ordered by the commission not to exercise voting rights which are 10% or more of the outstanding voting stock within five years (Art. 32, Para. 5 of the Financial Company Corporate Governance Act; Art. 27, Para.'s 7 and 8 of the Enforcement Decree of Financial Company Corporate Governance Act).

### (c) Stock Disposal Order

If the commission should impose the duty of meeting the regulatory criteria on the 'same person'[56] or request the same

[56] This occurs when the 'same person' holds the stock of the bank beyond the limit, the disposal order applies to the stock exceeding it (Eunhaengbeob [Banking Act], art. 16, para. 1 (S.Kor)).

person to complete a legal procedure,[57] the commission may order the same person to dispose of the same person's stock if the same person has not followed the request (Art. 16, Para. 3 of the Banking Act). In the case of mutual savings banks, stock acquired with neither advance nor ex post facto approval of the large shareholder change would be subject to the stock disposal order (Art. 10-6, Para. 4 of the Mutual Savings Banks Act). If the large shareholder of a mutual savings bank should not meet the order for fulfillment of the conditions for large shareholder eligibility, the commission may order the large shareholder to dispose of stock which is 10% or more of the outstanding stock (Art. 10-6, Para. 8 of the Mutual Saving Banks Act). In the case of financial companies subject to approval of the large shareholder change under the Financial Company Corporate Governance Act, the stock acquired without advance or ex post facto approval would be subject to the stock disposal order (Art. 31, Para. 3 of the Financial Company Corporate Governance Act). However, the Financial Company Corporate Governance Act does not introduce a stock disposal order system even if the company could not fulfill the conditions for eligibility of the largest shareholder.

If the commission orders the large shareholder of a mutual savings bank to dispose of the large shareholder's voting stock which is 10% or more of the outstanding stock because the large shareholder cannot meet the conditions for large shareholder eligibility, the following problems may arise. As discussed above, it is possible for the commission directly to order the direct large shareholder corporation to dispose of its stocks based on the ineligibility of the indirect large shareholder. Here, when the subjects of the order for stock disposal are two or more, it is not clear whether each of them may dispose of their stock that is 10% or more of the outstanding stock or dispose of the stock in total that is 10% or more. For example, each of five corporations ('A,' 'B,' 'C,' 'D,' 'E') holds 20% of the stock of 'X' savings bank. 'Y,' who controls the five corporations, has not met the conditions for large shareholder eligibility. In such a case, if each corporation should dispose of its voting stocks which are 10% or more, they would hold 50%-5 shares of the stock of 'X' savings bank. Then, 'X' would be able to intervene in the management of 'X' savings bank despite not meeting the conditions for large shareholder

[57] This occurs when the convertible contingent capital securities have been converted into stock of the bank, and, thereby, the 'same person' would hold the stock beyond the limit (Eunhaengbeob [Banking Act], art. 16, para. 2 (S.Kor)).

eligibility. Then, it would be reasonable for the commission to order the large shareholders to dispose of all stock, which is 10% or more of the outstanding stock, to achieve the goal of legislation or restriction on the large shareholder's intervention in the management of the bank.[58] The laws and regulations do not specify whether the commission can specify the methods for disposing of the stocks. Hence, the commission does not determine the methods of disposal in its stock disposal order.

The commission should order the large shareholder to dispose of the stocks within six months. Exceptionally, when a non-financial business operator exceeds its stock holding ratio after it has held the bank stock within the scope of the foreign shareholder's stockholding ratio of a bank, it would be ordered to dispose of its stock beyond the limit within a year. Such due date may be extended if the holding of the excessive stock is inevitable considering the scale of the stock held and the situation of the stock market (Art. 16-2, Para. 5 of the Banking Act).

**(d) Enforcement Fine**

The FSC can impose an enforcement fine on the person who was ordered to dispose of the excess stock but who has not followed the order. Here, the enforcement fine is estimated as the book value of the stock multiplied by 3/10,000 or less per day (Art. 65-9, Para. 1 of the Banking Act; Art. 38-8, Para. 1 of the Mutual Savings Banks Act; Art. 39, Para. 1 of the Financial Company Corporate Governance Act).

## IV. LEGISLATIVE IMPROVEMENT MEASURES

In 2018, the FSC suggested the following measures for improving the financial company corporate governance system.[59] The improvement measures were five-fold: (1) expansion of the scope of those subject to large shareholder eligibility screening, (2) reinforcement of the screening conditions for large shareholder eligibility, (3) adjustment of the scope of stock subject to the order limiting the exercise of voting rights, (4) establishment of the

[58] When the stock subject to prohibition of voting rights is exercised, the same problems would arise.
[59] Financial Services Commission of Korea, *supra* note 48.

grounds for the disposal order when the order limiting the exercise of voting rights has not been followed, and (5) arrangement of criteria for the order limiting the exercise of corporate shareholder's voting rights.

Since such measures were contingent on the amendment of the Financial Company Corporate Governance Act, the commission noticed them in advance.[60] After notice of the legislation, the Regulatory Reform Committee recommended that the commission withdraw the following reform measures: (1) expansion of the scope of those subject to large shareholder eligibility screening, (2) establishment of the grounds for the disposal order when the order limiting the exercise of corporate shareholder's voting rights has not been followed, and (3) arrangement of criteria for the order limiting the exercise of the corporate shareholder's voting rights.

The remaining suggestions of the commission were reflected in the amendment. This draft amendment did not become law due to the expiration of the National Assembly Session. In June 2020, the commission would suggest the same draft amendment to the National Assembly.[61] Next discussed are the establishment of grounds for the stock disposal order, as suggested by the commission to the National Assembly in 2020, and the expansion of those subject to large shareholder eligibility screening.

### *A. Expansion of Those Subject to Large Shareholder Eligibility Screening*

#### 1. The Draft Amendment

In September 2017, a member of the National Assembly, Chae Yi Bae, suggested the draft amendment to the Financial Company Corporate Governance Act (Agenda No. 209799). The purpose of this draft amendment was to expand those subject to large shareholder eligibility screening to all the large shareholders. In his reasons for proposing the amendment, Bae pointed out that in the screening of large shareholder eligibility, which had been performed for the first time since the enactment of the Financial

[60] Financial Services Commission of Korea Official announcement 2018-67 (March 15, 2018), https://www.moleg.go.kr/lawinfo/makingInfo.mo?mid=a10104010000&lawSeq=43965&lawCd=0&lawType=TYPE5&pageIndex=136&rowIdx=1352.

[61] Agenda No. 2101148.

Company Corporate Governance Act, the comatose largest shareholder was screened for eligibility as the largest shareholder, although the comatose person could not be involved in the management of the company, much less exert influence over the company. He concluded that such a practice would not be appropriate to the purpose of the screening system.[62] In addition, he argued that, when approving the change of large shareholders, the commission would screen the large shareholders as the joint decision-making group, but that, when examining the conditions for the maintenance of eligibility, the commission would dismiss the joint decision-making as an important factor and, thus, screen only the largest investor.

The 2018 draft amendment of the Financial Company Corporate Governance Act published in advance by the commission suggested that, rather than the person irrelevant to the actual control of the financial company, those actually influencing the company should be subject to screening for eligibility as the largest shareholder.[63] The 2018 draft amendment aimed to expand the subject of eligibility screening to the major shareholders who influence the financial company as well as the largest shareholders.[64] However, this draft amendment would continue to

[62] Refer to the following literature for contents about the screening of largest shareholder's eligibility in 2017. Youngkook Kim, *Geum-Yung-Hoe-Sa-Ji-Bae-Gu-Jo-Beob-Sang 'Dae-Ju-Ju Jeog-Gyeog-Seong' Sim-Sa-ui Beob-Jeog Jaeng-Jeom-gwa Gae-Seon Bang-An* [*The Legal Issues in the Review of Large Shareholder Eligibility under the Financial Company Corporate Governance Act*], 32(1) GI-EOB-BEOB-YEON-GU [BUSINESS LAW REVIEW] 43, 51-52 (2018).

[63] Financial Services Commission of Korea, supra note 48, at 2.

[64] Id. at 3 explains expanding the subjects to large shareholder eligibility as in the following table—Reference: Comparison of the Subjects between the Current Act and Its Draft Amendments.

Table 2: Screening of Major Shareholders

| Classification | | CurrentAct | Draft Amendments |
|---|---|---|---|
| Largest shareholder | Largest individual investor | 0 | 0 |
| | CEO and the largest investor of the largest investor corporation | x | 0 |
| | Largest individual investor's specially-related shareholder | x | 0 |
| Largest shareholder's specially-related shareholder | | x | x |
| Major shareholder | Shareholder actually controlling the financial company | x | 0 |
| | Shareholder holding more than 10% of shares | x | x |

use the same concept of 'the largest investor' as in the current act.

### 2. Consistency of Those Subject to the Large Shareholder Eligibility Screening

The large shareholders of financial companies are screened for their eligibility when they obtain their stock for the first time and, thereafter, continue to be screened for the maintenance of eligibility. The current subjects to such a screening are summarized in the following table.

Table 3: Subjects Screened for Eligibility as Large Shareholders

| Classification | At the time of Authorization, Permission or Registration | Change of the Large Shareholder | Maintenance of Eligibility for Large Shareholders |
|---|---|---|---|
| **Bank** | ▪Limit-exceed-holding shareholder (the same person)<br>▪Largest shareholder<br>▪Person actually controlling the company | ▪Limit-exceed-holding shareholder (the same person) | ▪Limit-exceed-holding shareholder (the same person) |
| **Mutual Savings Bank** | ▪Largest shareholder<br>▪Major shareholder<br>▪Largest shareholder's specially-related shareholder<br>▪Largest shareholder of the largest shareholder corporation<br>- If the person controlling the largest shareholder corporation is different from the largest shareholder of the corporation, the controller shall be included<br>▪CEO of the largest shareholder | ▪The person acquiring voting stock beyond 30% of the outstanding voting stock<br>▪Largest shareholder<br>▪Major shareholder<br>▪Largest shareholder's specially-related shareholder<br>▪Major shareholder's specially related shareholder<br>▪The largest shareholder or the largest investor of the largest shareholder or major shareholder corporation<br>- If the person | ▪Largest shareholder<br>▪Major shareholder<br>▪Largest shareholder's specially-related shareholder who holds 2% or more of the outstanding voting stock<br>▪Major shareholder's specially-related shareholder who holds 2% or more of the outstanding voting stock<br>▪The largest shareholder or the largest investor of |

| | | | |
|---|---|---|---|
| | corporation | controlling the largest shareholder or major shareholder corporation is different from the largest shareholder or the largest investor of the corporation, the controller shall be included<br>▪CEO of the largest shareholder or major shareholder corporation | the largest shareholder corporation<br>- If the person controlling the largest shareholder corporation is different from the largest shareholder or the largest investor of the corporation, the controller shall be included<br>▪CEO of the largest shareholder corporation |
| **Financial Investment Services Entity**<br>**Financial Holding Company**<br>**Credit Card Company** | ▪Largest shareholder<br>▪Major shareholder<br>▪Largest shareholder's specially-related shareholder<br>▪Largest shareholder of the largest shareholder corporation<br>- If the person controlling the largest shareholder corporation is different from the largest shareholder of the corporation, the controller shall be included<br>▪CEO of the largest shareholder corporation | ▪Largest shareholder<br>▪Major shareholder<br>▪Largest shareholder's specially-related shareholder<br>▪Largest shareholder of the largest shareholder corporation<br>- If the person controlling the largest shareholder corporation is different from the largest shareholder of the corporation, the controller shall be included<br>▪CEO of the largest shareholder corporation<br>*The financial company subject to registration shall not be approved for changing its large shareholder. | ▪The largest individual investor among the largest shareholders |
| **Insurance Company** | ▪Large shareholder<br>▪Major shareholder<br>▪Largest shareholder's specially-related shareholder | | |

The screening of eligibility for the large shareholders at the time of entry and, thereafter, aims to check periodically the soundness and social creditability of the large shareholders of financial companies and thereby to secure the sound financial order and sound management of the companies.[65] The eligibility for large shareholders is screened at the time of their entry (regulation of the entry) and, thereafter, such eligibility continues to be checked (regulated).

In order to achieve the above goal of screening the eligibility for large shareholders, the screening points need to be the same between the regulation of the entry and following checks of eligibility. To this end, the insurance companies' subjects of the screening at the time of entry should include the person actually controlling the largest shareholder corporation; if such controller is different from the largest shareholder of the corporation, the former person, as well as its CEO, should be included in the subjects to be screened.

In case of maintenance screening for such large shareholder eligibility, there is the opposing opinion that the subjects of screening at the stage of their entry should be different from those thereafter; it is argued that at the time of the entry when the actual controller of the financial company could not be identified, everybody who may control the company should be screened for their eligibility as large shareholders, but, thereafter, such an actual controller would be identified for screening.[66]

Such an argument does not mean that the subjects of screening at the stage of entry should be different from those thereafter. Rather, the argument may be understood in such a way that the subjects of the later screening should be limited to those persons who would actually control the management of the companies. Then, the later screening of the subjects, who were approved as large shareholders, would not deviate from the principle of consistent regulations. If the subjects of a later maintenance screening for eligibility were less strictly examined, all large shareholders who were approved at the time of entry would not need to be screened again. Only parts of them may need

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[65] Daebeobwon [S. Ct.], March 15, 2018, 2017Do21120 (S. Kor).

[66] Sang Su Jeon, A Report about the Draft Amendment of the Financial Company Corporate Governance Act, Expansion of the Subjects of Screening for Large Shareholder's Eligibility, National Assemblyman, Chae Yi Bae's representative proposal (Agenda No. 9799) 14 (The National Assembly of the Republic of Korea National Policy Committee, Nov. 2017).

to be screened for the maintenance of eligibility as large shareholders.

However, it is not deemed necessary to establish a new scope of screening for the largest investor among the largest shareholders. The reform measures of 2018 suggested by the FSC seem to select some of the subjects screened at the time of entry but seem to include the actual controllers of the financial companies, although they are not the shareholders. In this sense, the reform measures keep the concept of 'the largest investor' intact, and, thus, the subjects of the later screening seem to be much different from those at the entry. Moreover, persons who are not included in the scope of the largest shareholder might be selected as the largest investor, and, thereby, the subjects of the first screening would be different from those in the later screening. Hence, it may well be desirable to exclude the major shareholder's specially-related shareholder from the persons subject to the eligibility maintenance screening and, instead, include all subjects screened at their entries. Then, the subjects of eligibility maintenance screening may be limited to the following persons: (1) Largest shareholder, (2) Major shareholder,; (3) Largest shareholder's specially-related shareholder, (4) Largest shareholder of the largest shareholder corporation (if the actual controller of the largest shareholder corporation is different from its largest shareholder, the actual controller should be included), and (5) The CEO of the largest shareholder corporation.

Such an alternative would help solve the various problems[67] caused when the largest investor is selected while including the actual controller or the person influencing the financial company. Such reform measures may well take into consideration the problem of regulation disequilibrium because the non-bank financial companies would be more strictly regulated than the savings banks that exposed the problem of poor management due to the large shareholders' abuse of their authority, as well as considering the argument that the minority shareholder's specially-related shareholder, who is less likely to control the company, should be included in those subject to eligibility maintenance screening.[68]

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[67] The problems are that eligibility maintenance screening should be suspended due to the intermediate largest investor's poor cooperation or that the foundation or fund has no concept of largest shareholders. Refer to the above III.C.2. and III.C.3(d)(1) regarding periodic screening of eligibility for the large shareholder.

[68] Jeon, *supra* note 66, at 15.

### 3. Hedge Fund Business and Eligibility for the Large Shareholder

Banks and mutual savings banks are the lending institutions. In consideration of the fact that the safety and soundness of banks have a significant impact on the financial system and that mutual savings banks have some bad reputation because their consumers have occasionally suffered great damage, the scope of their regulations must be different from that of other financial companies. In the case of other financial companies, their entrance into the financial markets may be at least authorized (or permitted) or registered with the commission. Therefore, the scope of screening the eligibility of large shareholders would be much different between the two cases. In this context, the hedge fund business is subject to less strict regulation.

The hedge fund business that should be registered with the commission was originally subject to the authorization of the commission. Meanwhile, the hedge fund business has been much deregulated in terms of entry into the market, establishment, operation and sales. Thus, the hedge fund business is now registered with the commission rather be authorized by the commission.[69] As a result, some problems have arisen.[70] Particularly, in the cases of Lime Asset Management and Optimus Asset Management, the problems with the large shareholder that were exposed and the damages suffered by financial consumers were more serious than with the Dongyang Group and saving banks incidents. So, the problems exposed must be remedied.

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[69] *See* Financial Services Commission of Korea, Ja-Bon-Si-Jang-ui Yeog-Dong-Seong Ge-Go-leul wi-han Sa-Mo-Fund-Je-Do Gae-Pyeon-Bang-An [Reform Measures for the Private Equity Business System to Enhance the Dynamics of the Capital Markets] (Dec. 4, 2013), https://eiec.kdi.re.kr/policy/materialView.do?num=130107. The 2015 Amendment of the Capital Markets Act (1) simplified regulation of private equity business into specialized investment type private equity funds (hedge funds) and the management participant private equity funds (PEF); (2) changed the regulation of entry from authorization to registration for hedge fund business; and, (3) mitigated the regulation of private equity funds from registration to an ex post facto report.

[70] By 2019, the problem of the investor protection for private equity arose. In particular, in order to prevent investors' damage due to the derivative-linked fund (DLF) misselling, the regulation of private equity funds would be reinforced (Financial Services Commission press release, Purpose of Reforming the Private Equity Fund and Individual Professional Investors System and Their Expectation, Nov. 21, 2019). In case of misselling of the DLF, no special problems with regard to the large shareholder arose. So, the conditions for individual professional investors would be strengthened with the sales procedure reinforced.

In the case of Lime Asset Management, the operation CEO (vice-president) and CEO stood at the center of the controversy. According to the business management report of Lime Asset Management, the CEO held 31.3% of the common stocks (his specially-related person held 1.2%). The number of the common shares held by both of them was 550,000.

In March 2018, the CEO and vice-president became the largest joint shareholders. In May 2018, the company would be converted into a public offering operator and, thus, changed the common stock of the foreign ownership into convertible stock for evading the foreign large shareholder holding limit regulation.[71] Thus, the vice-president having foreign nationality would hold 3.5% of the common stock and 96.4% of the preferred stock. The number of shares held by the vice-president was 550,000, combining the common and preferred stock. Although being different in terms of voting rights, the CEO and the vice-president would hold the same number of shares. They used convertible stock so as not to change the original ownership scheme.[72] In its business report, Lime Asset Management inconsistently indicated the vice-president as a major shareholder and 'minor shareholder.'

According to its published business report, Optimus Asset Management issued 50,750 voting common shares and 330,000 convertible redeemable preferred non-voting shares. Among them, all the non-voting shares were held by the CEO. Thus, the CEO was classified as a major shareholder. The largest shareholder, holding 14.8% of the voting common stock, argued that he did not intervene in the management of the company.[73]

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[71] Eun Jin Choi, Lime-Un-Yong Choe-Dae-Ju-Ju, Da-Si Won-Jong-Jun 'One-Top' eu-lo [The Largest Shareholder of Lime Asset Management Has Returned to the 'One Top' Won Jong Joon], THE BELL, May 31, 2018, https://www.thebell.co.kr/free/content/ArticleView.asp?key=201805310100054910003429&lcode=00.

[72] The period for exercising the conversion of non-voting shares to voting common shares was set from three months to ten years from their issuance. See the company registry for the types of the stocks.

[73] Hwan Dong Jo, "Optimus Gyeong-Yeong Gwan-Yeo An-Haess-Da" Yang-Ho Jeon Na-La-Eun-Haeng-Jang, Tu-Ja-Sa-Gi Yeon-Lu-Ui-Hog Bu-In ["I Have Never Been Involved in the Management of the Company," Yang Ho, the Former President of Nara Bank Denies His Connection with the Investment Fraud Incident], HAN-GUG-IL-BO [THE KOREA TIMES], July 15, 2020, http://www.koreatimes.com/article/1319435. Lime Asset Management reported to the Financial Supervisory Service on Nov. 22, 2019 that its vice-president was dismissed (https://www.limeasset.co.kr/notice/detail/348). The report about the dismissal indicated that he would keep the title of registered director due to the failure to meet the quorum requirement for the registered directors. Since then, the business report would indicate that the vice-CEO was an outside director, while the register showed that he is an internal director.

In the case of these two financial companies, the actual large shareholder had the right to convert the convertible stock into common stock at any time, but their business reports indicated that he did not hold the voting stock, thus avoiding the regulations for large shareholders. Above all, the hedge fund business, which should be registered with the commission, is subject to screening for the eligibility of the large shareholder only at the time of entry. However, it is not subject to approval for the large shareholder change. Moreover, it is not subject to maintenance screening for large shareholder eligibility according to the Financial Company Corporate Governance Act. Thus, when an ineligible person acquires an existing asset management company and, thereby, manages the company as a large shareholder, or when the person uses convertible stock to evade the screening for eligibility of the large shareholder at the time of registration, and, then, uses the right of conversion to become a large shareholder, there is no legal provision regulating this person.

The current Financial Company Corporate Governance Act does not specify any obligation by the hedge fund business to report a change of the large shareholder. Here, an addition of the obligation to report the change would not help to solve such problems. It is deemed not necessary to require the hedge fund business to obtain authorization from the commission at the stage of its entry into the capital market because it operates hedge funds for professional investors. Hence, it is not a problem to have it register with the commission rather than obligate it to obtain authorization from the commission. However, in order to prevent the financial business from avoiding the regulations of the large shareholders and, at the same time, minimize the possibility of financial consumers' damages, it is deemed necessary to screen the eligibility of the large shareholders in case of their change and, thereby, encourage the trustworthy large shareholder to operate the financial business. Like other financial companies, the hedge fund business should be subject to screening the eligibility of large shareholders within a certain scope.

It is deemed necessary to impose an eligibility of registration maintenance obligation indirectly on the large shareholders of the hedge fund business. However, if the business cannot meet the mitigated conditions to be registered with the commission, the registration of the business itself, not the large shareholders, may be canceled. In this regard, the sanctions may be less likely than the order to dispose of the excessive stocks of the large

shareholders.

### *B. Introduction of a Stock Disposal Order System*

Unlike the Banking Act and Savings Banks Act, the current Financial Company Corporate Governance Act does not specify a stock disposal order system for the nonfulfillment of the order prohibiting the exercise of voting rights. Thus, the implementation of the order prohibiting the exercise of voting rights would not be well enforced. In order to solve such a problem, the draft amendment of the Financial Company Corporate Governance Act introduces the stock disposal order.

The stock disposal order may be the final enforcement measure to limit the large shareholders' property rights and, thereby, expel them from the management of financial companies. Under the current financial law system, the causes for the stock disposal order are two-fold. First, the large shareholder changes have not been approved in advance or ex post facto. Second, the order for the maintenance of eligibility for large shareholders has not been implemented. The draft amendment of the Financial Company Corporate Governance Act authorizes the commission to order the shareholders to dispose of the stocks not in case they do not implement the order meeting the conditions for eligibility but in case they do not implement the order prohibiting the exercise of voting rights. Namely, the current Financial Company Corporate Governance Act only specifies that, if the largest shareholder cannot meet the conditions for the maintenance of large shareholder eligibility, the commission can limit the voting rights which the largest shareholder 'holds.' And the draft amendment specifies that the commission can order the largest shareholder to dispose of the stock only if the largest shareholder does not implement the order prohibiting the exercise of voting rights.

If the draft amendment of the Act suggested by the government should pass the National Assembly, the measures against nonfulfillment of eligibility for large shareholders would be less strict than those against mutual savings banks. Hence, it is necessary to examine whether these countermeasures should be reinforced to match those for the mutual savings banks. If the order limiting the exercise of voting rights should be issued only when the sound financial order and financial companies' safety and soundness could hardly be possible, it is doubtful that such a prohibition against the exercise of ineligible large shareholders'

voting rights would ensure the sound management of financial companies. In the cases of Lime Asset Management and Optimus Asset Management, they used the non-voting preferred stock to avoid regulation of their large shareholders. Hence, if the voting rights should be simply limited, it may not be possible to exclude the ineligible persons from the management of the financial companies. Consequently, the relevant law should be amended as follows: If a large shareholder did not meet an important condition for the maintenance of eligibility, the commission would impose on the large shareholder an order to meet the conditions. If the large shareholder did not implement the order, the commission would issue a stock disposal order.

If the regulations should not be reinforced as above, and, thus, if the stock disposal order system should be introduced prohibiting the non-performance of the order against the exercise of voting right, as specified by the draft amendment suggested by the government, it would be necessary to make clear the scope and subject of the order prohibiting the exercise of voting rights and the stock disposal order. Since both the order limiting the exercise of voting rights and the stock disposal order restrict the shareholders' property rights greatly, it would be desirable to specify their criteria clearly in the law.

First, in "the outstanding voting stock held by the person subject to the screening of eligibility," the meaning of "held" is not clear.[74] It is deemed necessary to make it clear. The Financial Company Corporate Governance Act uses the term "holding" for restrictions on holding concurrent positions (Art. 10 of the Financial Company Corporate Governance Act) and the minority shareholders' rights (Art. 33 of Financial Company Corporate Governance Act), but does not define the term in relation to the screening of eligibility of the largest shareholder.[75] However, the

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[74] The regulation of stock ownership is based on the holding of stocks under the Banking Act. The Act specifies the meaning of stock holding. Namely, stock holding means the ownership in the persons' name or another's name or the voting right by means of a contract (Eunhaengbeob [Banking Act], art. 2, para. 1, subpara. 9 item (c) (S.Kor)). Hence, the order prohibiting the exercise of voting rights and the stock disposal order are based on the holding stocks.

[75] Geumyunghoesaui jibaegujoe gwanhan beoblyul sihaengnyung [Geumyungsajibaegujobeob sihaengnyung] ([Enforcement Decree of the Financial Company Corporate Governance Act]. art. 8, para. 3, subpara. 6 (S.Kor)) sees the concept of holding in relation to the outside director's eligibility as defined in Jabonsijanggwa geumyungtujaeobe gwanhan beoblyul [Jabonsijangbeob] ([Financial Investment Services and Capital Markets Act], art. 133, para. 3).

Financial Company Corporate Governance Act seems to distinguish "holding" from "ownership" because the definition of the large shareholder is based on "ownership."

Second, it is necessary to make clear the scope of the voting stock. For they would not be limited to the order prohibiting the exercise of voting rights and the stock disposal order, and, therefore, it is necessary to make clear the overall regulation of large shareholder eligibility. Particularly, it would be necessary to determine whether the stocks with temporarily restricted voting rights, such as treasury stocks, or the class stocks with their voting rights partially limited should be included in the outstanding stocks.

Third, it is also necessary to make clear the subjects of the order prohibiting the exercise of voting rights. The Financial Company Corporate Governance Act specifies that the scope of the stock is not all the stock targeted by the prohibition order as in the Mutual Savings Banks Act. Thus, the stock 10% or more of the outstanding stock is the target, which means the same problems would arise as those with the order prohibiting or limiting voting rights in the mutual savings bank situation.

Under the Financial Company Corporate Governance Act, the order prohibiting the exercise of voting rights (if the draft amendment passes the National Assembly, the stock disposal order would be included) targets the largest investor's voting stock. When the largest investor is a corporation and the subject of eligibility screening is the largest investor of the corporation, the act targets the voting stocks held by the corporation. If the largest shareholder corporations of a financial company are plural, and the largest investors of each shareholder corporation are different individuals, the order prohibiting the exercise of voting rights would target each of them. In such case, the subjects of the order are plural.

Let us assume that individual 'A' and corporation 'B' each holds 30% of the voting stock of 'X' financial company. The individual and corporation hold a total of 60% of the voting stock of 'X' company, and the largest controlling shareholder of corporation 'B' is 'A.' Here, the individual 'A' and corporation 'B' are related specially with each other. Since the largest shareholder may well be two or more persons, the individual 'A' and the corporation 'B' are the largest shareholders of 'X' financial company. Thus, the subject of screening for eligibility as the largest shareholder is individual 'A.' Regardless of whether the

largest shareholder is the individual 'A' or the corporation 'B,' the subject to the screening should be an individual.

If the individual 'A' could not meet the conditions for the maintenance of eligibility, the target of the order prohibiting the exercise of voting rights should be only 'A's' stock or individual 'A's' stock and corporation 'B's' stock combined. The question is whether the stock 10% or more of 'X' financial company's voting stock should be the target ('A's' 20%+1 stock and corporation 'B's' 20%+1 stock; total 40%+2 stock or 40%+1 stock). Hence, it is necessary to determine the criteria for the scope of the order prohibiting the exercise of voting rights.

## V. CONCLUSION

The development of the financial industry and emergence of diversified financial services would well serve to facilitate the national economic development and enhance financial consumers' welfare. But financial incidents continue to erupt, while financial consumers are suffering more and more from the resulting damages. The private equity incidents of Lime Asset Management and Optimus Asset Management have caused more damage to the consumers than the savings banks incidents and Dongyang Group incident. The financial incidents are caused by the structural problems of the financial system, but they erupt due to illegal acts or unsound management. The result would be insolvent financial companies and financial consumers' huge losses. Among various regulations imposed on the financial companies for their sound management, there is the 'fit and proper' or eligibility of management requirement. If the shareholder appointing the management is proper for controlling the financial company, the eligibility would well be met. Hence, not only management eligibility but also controlling shareholders (large shareholders) are important.

The regulations of the large shareholder's eligibility at the entry stage and their continued maintenance of eligibility are essential because ineligible large shareholders should not be permitted in the management of financial companies to establish a sound financial order and secure sound management of financial companies. To this end, sound management of the financial company and a sound financial system are essential. In addition, the financial companies should be appropriately checked to

prevent the financial consumers' damages and protect their benefits. The current financial law system arranges the criteria for regulation of financial companies while dividing financial companies into banks, mutual savings banks, and others at large. Since banks affect the financial system most, their large shareholders are checked through the regulation of their ownership.

On the occasion of mutual savings bank incidents in 2011, the mutual savings banks have been regulated by focusing on their large shareholders. Other financial companies such as financial investment services entities and insurance companies are regulated by their parent laws specifically and by the Financial Company Corporate Governance Act at large. They are less regulated than the banks and mutual savings banks. Nevertheless, they should be appropriately regulated to help prevent their consumers' damages as much as possible. In particular, it is essential to prepare some countermeasures against asset management malpractices to protect their consumers. In terms of regulating the large shareholders, it is not deemed necessary to reinforce or mitigate the regulation of banks and mutual savings banks. Under the Financial Company Corporate Governance Act, it is deemed necessary to maintain consistency in regulating the large shareholders' eligibility and impose the stock disposal order on the ineligible large shareholders. In the case of the hedge fund business, their large shareholders' eligibility should be screened, considering the Lime and Optimus scandals. Since the regulations of the large shareholders may cause controversy over the infringement on their property rights, it is desirable to specify the law's contents, especially the scope of the application and disposal.

**Keywords**
Controlling shareholder, fit and proper regulation, hedge fund business regulation, large shareholder eligibility, ownership restriction

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# CONSTITUTIONAL ADJUDICATION AND DEMOCRACY IN THE REPUBLIC OF KOREA: A QUEST FOR A REPUBLICAN REFORMULATION OF CONSTITUTIONAL DEMOCRACY

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**ABSTRACT**

*Establishing the democratic legitimacy of constitutional adjudication is a fundamental task of constitutional democracy. This paper takes the position that the democratic legitimacy of constitutional adjudication can be recognized for its roles or functions of contributing to the guarantee of human rights, which is the basis of the stable and effective operation of democratic political processes and civic autonomy. This paper will also attempt to reinterpret constitutional democracy based on the political philosophy of republicanism in order to justify the functions of constitutional adjudication. While republicanism has traditionally viewed the democratic legitimacy of constitutional adjudication with skepticism, constitutional adjudication may still function as an element of constitutional democracy even within the standards of the political philosophy of republicanism. The concept of liberty as non-domination and the value of substantive equality, as well as the state's obligation to materialize substantive equality, are used as key grounds for justifying active constitutional adjudication of the political party system, which, in nature, does not go really well with republicanism, or of social and economic policies. Further, the fact that the political system of the Republic of Korea is organized and operates in an undemocratic manner creates a unique context in Korea, which justifies active constitutional adjudication on 1) the laws on political parties, which are under the suppressive control of the state, for the effective establishment of democratic processes, and 2) the socio-economic policies designed to institutionally guarantee 'liberty as non-domination' of social minorities. The Constitutional Court of Korea has played an*

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*important role in advancing constitutional democracy despite its short history. As this paper aims to provide a functionalist approach towards the democratic legitimacy of constitutional adjudication, it is my sincere hope that this work can help the Constitutional Court in contemplating the necessity and the required conditions for passive constitutional adjudication and active constitutional adjudication, respectively. This would allow the Court to overcome past errors and establish itself as a fundamental element of constitutional democracy that has democratic legitimacy and as a coordinator for the stable and democratic advancement of constitutional government.*

## I. INTRODUCTION

Resolving the controversy regarding the democratic legitimacy of constitutional adjudication or judicial review is one of the fundamental tasks of modern constitutional democracy. Unlike the United States, countries such as the Republic of Korea (Korea) have adopted constitutional adjudication in their constitutional mechanisms[1] by stipulating it in their constitutions. These countries may take the view that resolving the issues regarding the democratic legitimacy of constitutional adjudication is merely the task of constitutional theory.[2] Such a view, however,

[1] Chapter 6 of the Constitution of the Republic of Korea, which consists of Article 111 through 113, provides for the establishment of the Constitutional Court as an independent constitutional organization and grants it exclusive jurisdiction over five matters, namely, 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 complaints as prescribed by law.

[2] For instance, there is an argument that the democratic legitimacy of constitutional adjudication cannot be denied just because of the fact that the members of the constitutional adjudication organization are not directly elected by the people. The rationale of this argument is that a decision made through a constitutional adjudication system adopted by the constitution has constitutional legitimacy, which includes democratic legitimacy (SEONG-BANG HONG, HUN - BEOB-SO-SONG-BEOB [CONSTITUTIONAL PROCEDURE LAW] iii (2015); KYUNG-KEUN KANG, SIN-PAN - HUN -BEOB [CONSTITUTIONAL LAW] 1229-1230 (2004)). There is also a position that, while recognizing the interrelationship between constitutional adjudication and politics on the premise that laws and politics are in conflict, "arguing the extent of the democratic legitimacy can work only between the organizations that exercise the authorities under the policies" and that "interpretation of the constitution will be most efficient when it is assigned to experts who are not engaged in politics." (YOUNG HUH, HEON-BEOB-SO-SONG-BEOB-LON [CONSTITUTIONAL LITIGATION LAW] 6-9 (13th ed. 2018)). This position appears to be in the same vein because it assumes the absolute necessity

appears to stem from an insufficient understanding of the basic values and structure of modern constitutional democracy.

The essence of modern constitutional democracy is 'government according to the constitution,' which means that the political system operates in accordance with the constitution.[3] Modern constitutional democracy, on the basis of popular sovereignty, upholds the principle of checks and balances and the doctrine of separation of powers as key elements.[4] In particular, the modern principle of separating the administration from the legislature is premised on the nature of law as the rules of conduct or its generality and prospective character. As such, the judicial review system, which is designed to control the legislature by way of an independent judicial power, has also developed into a key institutional mechanism for modern constitutional democracy.[5]

In short, modern constitutional democracy is, in essence, based on institutionalizing the constitutionalization of politics, which can refer to legal regulations on politics as well as judicial dispute resolution arising in relation to such regulations. Therefore, the constitutionalization of politics[6] cannot but accept the judicialization of politics to a certain degree.[7] Therefore,

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of constitutional adjudication while ignoring the relationship with democracy.

[3] For a classic work asserting that the legal control on arbitrary power and the complete political responsibility of the ruler for the ruled are the fundamental elements of constitutionalism, see CHARLES HOWARD MCLLWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN (1947).

[4] Even if we understand rule by constitution or constitutionalism as a political ideology that covers the rule of law and democracy, the concepts of the rule of law and democracy are diverse and complicated. As such, the connotation and denotation of constitutionalism are difficult to define. However, constitutionalism that embraces democracy or constitutional democracy cannot help but have as a common element the constitution and operation of state powers based on the principles of people's sovereignty, the separation of powers, and checks and balances. For more information on the elements of constitutionalism, see Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 39, 40-42 (Michel Rosenfeld ed., 1994).

[5] For a classic work on this argument, see Francis D. Wormuth, The Origins of Modern Constitutionalism (1949).

[6] The understanding of the characteristic of the constitutionalization of politics may vary depending on how we define the substance of politics and the constitution or the relationship between the two. For more information on the different treatment and evaluation of the issues involving the legitimacy of constitutional adjudication depending on such different understandings, see Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 633, 638-652 (2004).

[7] Jongcheol Kim, 'Jeong-Chi-ui Sa-Beob-Hwa'ui Ui-Ui-wa Han-Gye—Roh Moo-hyun Jeong-Bu Jeon-Ban-Gi-ui Sang-Hwang-eul Jung-Sim-eu-lo

regardless of whether the constitutional adjudication system is explicitly written in the constitution, it is an inherent problem for all constitutional democracies to determine how to establish the relationship between the constitutional adjudication system and the political system within the constitutional framework or how the constitutional adjudication system will operate within the constitutional reality.[8]

Above all, because the adoption of the constitutional adjudication system does not necessarily mean a 'government by the judiciary or juristocracy,'[9][10] it remains an open question to what extent the constitutional adjudication system should be balanced with the democratic political system, and the specific outcome depends on the actual operation of the overall constitutional system.[11] Further, as modern society becomes

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[Constitutional Implications and Limits of the Judicialization of Politics—with Reference to Judicial Activism in the Early Years of the Roh Moo-hyun Government], 33(3) GONG-BEOB-YEON-GU [PUBLIC LAW JOURNAL] 229-251 (2005).

[8] In particular, the scope or the subjects of constitutional adjudication are the key variables. If constitutional adjudication covers impeachment, dissolution of political parties, and competence disputes as in Korea, judicialization of politics would be more difficult to avoid compared to the constitutional review of laws or constitutional appeal of the violation of fundamental rights. For similar discussions, see Chaihark Hahm, *Hun-Beob-Jae-Pan-ui Jeong-Chi-Seong-e dae-ha-yeo "Heon-Beob-jeog Dae-Hwa" Mo-Del-eul wi-han Je-Eon* [*On the Political Nature of Constitutional Adjudication— A Proposal for a Dialogic Approach to Constitutionalism*], 16(3) HUN-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 613-651 (especially 623-634) (2010).

[9] For example, see Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1997); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[10] This problem cannot be resolved even if the constitutional adjudication organization is statutorily given the status of the final interpreter of the constitution. While a court decision can have the effect of the final resolution of a dispute regarding the case in question, the constitution itself may change. Thus, the interpretation of the constitution may change as well. Furthermore, the constitutional adjudication organization itself is also one of the state powers, and it should be recognized that all state powers under modern constitutional democracy may commit errors. As such, this is why the separation of powers and checks and balances are necessary. Therefore, it is an appropriate understanding that the result of constitutional adjudication undergoes a dialectical development through constitutional dialogues in the wide-ranging democratic political process (LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); Hahm, *supra* note 8, at 634-643).

[11] The view that only emphasizes the legal nature of the constitution seems to overlook that the specific contents of the constitution can be completed and the constitution's normative power can be secured through interactions with the political system. In particular, it should be kept in mind that any attempt to secure the normative power of the constitution through judicial proceedings can only succeed when it is effectively backed by the will of the sovereign people.

increasingly complex, the legitimacy of the constitutional system itself has become dependent upon complex and multidimensional democratic legitimacy, which differs from mere electoral and bureaucratic legitimacy.[12] After all, the democratic legitimacy of constitutional adjudication does not depend on whether it is constitutionally institutionalized. Rather, it should be supported by constitutional theoretical justification and functionalist (or empirical) justification.

The field of constitutional theory has presented various views on the democratic legitimacy of constitutional adjudication. This paper does not attempt to delineate these different views, ranging from denying the democratic legitimacy of constitutional adjudication[13] to justifying it ideologically.[14] The United States has consolidated the legitimacy of judicial review even without explicit grounds in its Constitution, based on the general roles of the judiciary(the interpretation and application of laws).[15] As illustrated by the judicial history of the United States, and with more than eighty countries in the twenty-first century having entrenched the constitutional adjudication system in their constitutions,[16] [17] the theoretical legitimacy of constitutional

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[12] *See* PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY (Arthur Goldhammer trans., Princeton University Press 2011) (2008).

[13] There existed views that entirely denied constitutional adjudication, especially the judicial review of legislation. However, such views have weakened as new democratic countries have increasingly adopted the adjudication system on the constitutionality of laws. As such, there remain only a few opinions that deny 'weak judicial review,' under which the legislature can exercise some discretion such as ignoring a decision that a law is unconstitutional or reversing a decision made by the judiciary. However, as to 'strong judicial review,' under which a law can be nullified, or the application of a law, whilst still maintaining its effect, can be prohibited for a certain case, or a law can be interpreted and applied in a way not originally intended so as to be consistent with the guarantee of fundamental rights, there still exist opinions which question its democratic legitimacy. For example, see JEREMY WALDRON, POLITICAL THEORY: ESSAYS ON INSTITUTIONS Chs. 2 and 9 (2016); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).

[14] For example, Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996); Ronald Dworkin, Law's Empire (1986).

[15] For its origin, see Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[16] Maurice Adams et al., *The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction*, *in* CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING REALISM AND IDEALISM 25 (Maurice Adams et al. eds., 2017).

[17] In addition, the fact that constitutional adjudications are being conducted in international courts such as the European Court of Human Rights or the European Court of Justice illustrates that constitutional adjudications are expanding.

adjudication can be considered a matter of degree[18] rather than a matter of right or wrong. For this reason, this paper will not attempt to differentiate these distinct views.

Rather, this paper aims to critically analyze and review the task of accomplishing the democratic legitimacy of Korea's constitutional adjudication in its empirical context, based on the functionalist approach[19] that the democratic legitimacy of constitutional adjudication can be secured only when it contributes to the promotion of human rights and the advancement of democracy, which are fundamental values of constitutionalism. From the functionalist perspective, constitutional adjudication can be sufficiently recognized as democratically legitimate if it helps promote democracy in the political process or consolidate the democratic empowerment of individuals in a constitutional system, irrespective of whether it is substantively democratic[20] or not.[21]

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[18] Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 96-97 (David Dyzenhous & Malcolm Thornburn eds., 2016).

[19] Jongcheol Kim & Jonghyun Park, *Causes and Conditions for Sustainable Judicialization of Politics in Korea*, *in* THE JUDICIALIZATION OF POLITICS IN ASIA Ch. 3 (Björn Dressel ed., 2012).

[20] The so-called 'counter-majoritarian difficulty' is a question of how to define the relationship among judicial review, democracy, and majoritarianism. Alexander M. Bickel explored this question earnestly. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986). As mentioned earlier, securing the democratic legitimacy of constitutional adjudication is a task of modern constitutional democracy, even if constitutional adjudication may be labelled as undemocratic in that it is non-majoritarian.

[21] There exists a view that the democratic legitimacy of constitutional adjudication can be understood from multidimensional perspectives, such as the 'organizational-personnel democratic legitimacy (*Organisatorisch-personelle demokratische Legitimation*)', 'functional-institutional democratic legitimacy (*Funktionell-institutionelle demokratische Legitimation*)' and 'substantive-contextual democratic legitimacy (*Sachlich-inhaltliche demokratische Legitimation*),' based on the reconstruction of the theory of the German academia and the German Federal Constitutional Court, and emphasizes the necessity of multidimensional reviews on the democratic legitimacy of constitutional adjudication. Against the backdrop of this view, the combination of the 'organizational-personnel democratic legitimacy,' 'functional-institutional democratic legitimacy' and 'supplementary democratic legitimacy' can be covered by my theory of functional legitimacy. Considering the historical and ideological backgrounds of the discussion on democratic legitimacy, the issue of democratic legitimacy can be understood in relation to the functions of constitutional adjudication in constitutional democracy, and others can be viewed as conditions or ancillary elements to secure such functional legitimacy. For the discussion on the multidimensional approach towards the democratic legitimacy of constitutional adjudication, see Wan-Jung Heo, *Heon-Beob-Jae-Pan-So-ui Min-Ju-Jeog Jeong-Dang-Seong* [*Demokratische Legitimation des Verfassungsgerichts*], 17(3) HUN-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 559-600 (2012).

In this sense, functionalism covers not only the processual approach[22] that promotes the participation of citizens, especially social minorities, in the political processes and strengthens the representativeness of the representative system but also the approach that locates the purpose of constitutional adjudication in promoting the values of democracy (e.g., the democratic rights of citizens)[23] in the context of the value theory of democracy, as well as the view that positions judicial review among the dialectical interactions between constitutionalism (or the rule of law) and democracy, while justifying constitutional adjudication as an exceptional process of democratic deliberation based on constitutionalism.[24] In other words, it holds that both the mechanism of representative democracy and the judicial mechanism to keep it in check are necessary to realize legitimate political processes or the values of constitutional democracy by promoting people's participation in politics and strengthening the democratic organization and responsibility of state power. The functionalist approach is based on the empirical recognition that the key issues in the traditional discussions (e.g., the discussion from the substantive perspective on whether judges are wiser than legislators or more suitable for the protection of fundamental rights or the discussion from the procedural perspective on whether legislators have greater democratic legitimacy in terms of their organization and functions) are in fact "questions of all or nothing."[25] Given that most of the prominent constitutional democracies have adopted both the mechanism of representative democracy and the mechanism of constitutional adjudication, and have reaped tangible results,[26] the question that remains is under

[22] *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

[23] *See* Corey Lang Brettschneider, Democratic Rights and the Substance of Self-Government (2007).

[24] Carlos Santiago Nino, *A Philosophical Reconstruction of Judicial Review*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 285-332 (Michel Rosenfeld ed., 1994).

[25] This is because democratic rule, whether it is by representative democracy or constitutional adjudication, does not require "special wisdom, virtue, competence of efficiency" and may give rise to a good government or a bad government. *See* Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7(4) PERSPECTIVES ON POLITICS 805-822 (806-807, 815-816) (2009).

[26] Even Richard Bellamy, a skeptic of constitutional adjudication, does not deny that both legal constitutionalism (which emphasizes constitutional adjudication) and political constitutionalism (which emphasizes the smooth operation of the representative system) are mixed in the modern democratic system. However, he remains very critical about the phenomenon that the judicialization of politics is

what practical conditions should we harmonize the two mechanisms.

In my previous study,[27] I sought to identify the conditions under which constitutional adjudication (or the rule of law as its theoretical premise) and democracy can be harmonized so that constitutional adjudication can serve as the basic institution for sustainable constitutional democracy. To begin, constitutional adjudication is limited in terms of its objective. Despite its codification in the constitution, the functional objective of constitutional adjudication should, in principle, be limited to strengthening the openness and representativeness of democratic political processes and protecting human rights that can realize personal autonomy to the fullest. If constitutional adjudication sought a purpose or an end that goes against these values, it would not be able to secure sufficient legitimacy.[28] Another condition is that in a constitutional democracy, constitutional adjudication is limited as a methodology. Constitutional adjudication must be implemented in a self-contained manner [29] rather than continuously fulfilling its functions to the maximum extent. Further, apart from ordinary politics, constitutional adjudication must secure the democratic organization of the constitutional courts or commissions[30], strict rationality[31] in judicial reasoning,

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intensifying in midst of such confusion, undermining the dynamism of political processes. *See* BELLAMY, *supra* note 13*,* especially at 5-7, 9.

[27] Kim, *supra* note 7, at 243-246; Kim & Park, *supra* note 19; Jongcheol Kim, *Government Reform, Judicialization, the Development of Public Law in the Republic of Korea*, *in* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES Ch. 6 (Tom Ginsburg & Albert Chen eds., 2008).

[28] A good example that constitutional adjudication in Korea exceeded the limitation of its objective is the decision that declared the special law on the new administrative capital unconstitutional (Hunbeobjaepanso [Const. Ct.], Oct. 21, 2004, 2004Hunma554, et al., (Hunjip 16-2ha, 1) (S. Kor.)), where constitutional adjudication overrode the people's right to amend the constitution and the National Assembly's right to enact laws by resorting to customary constitution (Kim & Park, *supra* note 19, at 40-42, 49-50; Jongcheol Kim, *Is the Invisible Constitution Really Invisible?: Some Reflections in the Context of Korean Constitutional Adjudication*, *in* THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE 329-334 (Rosalind Dixon & Adrienne Stone eds., 2018).

[29] This means that as constitutional democracy presupposes a rivalry between constitutionalism or the rule of law and democracy, the inherent limitations must be obeyed so that the autonomy of politics will not be undermined by the authority of law.

[30] While it cannot be the same as that of political representative organizations whose members are elected by the people, its organization must be formulated in a way that it can be, albeit indirectly, representative of the people in procedural or substantial terms. For instance, there should be procedures such as votes of confidence by the sovereign people or the intervention of a people's representative organization into its organization. For more discussion on the

and the institutional preservation of a critical public sphere for judicial decision-making.[32] This paper will critically analyze the experiences involving Korea's constitutional adjudication on the basis of these conditions.

The theoretical background upon which this paper follows the functional approach on constitutional adjudication is the republican reformulation of constitutional democracy. In fact, the theory of constitutional democracy based on republicanism treats the democratic legitimacy of constitutional adjudication with skepticism. The main issue at stake is that constitutional adjudication is not sufficient to satisfy the formative functions of democratic political procedures.[33] However, it cannot be denied that there exist exceptional circumstances in which such general skepticism can be dispelled under certain social conditions.[34] Above all, there is no reason to reject constitutional adjudication in principle in republican countries that uphold the compound system based on the rule of law and the separation of powers and are cautious against dictatorship. According to Adam Tomkins, the historical backgrounds and contents of republicanism are as

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necessity of achieving the democratic representativeness of, or the democratic legitimacy of, the organization and personnel for a constitutional adjudication organization, see Jongcheol Kim, *Hun-Beob-Jae-Pan-So Gu-Seong-Bang-Beob-ui Gae-Hyeog-Lon* [*A Proposal for Reform in the Composition of the Constitutional Court*], 11(2) HUN-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 9-48 (2005); Heo, *supra* note 21, at 577-586.

[31] Even if we do not follow the systems theory advocated by Niklas Luhmann, the rationality required exclusively for adjudication can be differentiated from the rationality required in the area of politics if we consider that the fundamental reason why the judiciary is separated from the legislature and the administration is to be independent. Michel Rosenfeld's approach, which differentiates *ordinary politics* from *judicial politics* in terms of 'language games,' can be said to presuppose the demand for the unique rationality of the judiciary (Michel Rosenfeld, *The Judicial Constitutionalization of Politics in Canada and Other Contemporary Democracies: Comparing the Canadian Secession Case to South Africa's Death Penalty Case and Israel's Landmark Migdal Constitutional Case*, *in* CANADA IN THE WORLD: COMPARATIVE PERSPECTIVES ON THE CANADIAN CONSTITUTION Ch. 7 (Richard Albert & David R. Cameron eds., 2018).

[32] Democratic control on judicial decisions is a basic element of constitutional democracy. A good case in point is Article 3, Clause 1, Paragraph 2 of the Assembly and Demonstration Act, which prohibits an assembly or demonstration that may affect, or is intended to affect, a court trial, making Article 21, Clause 2 of the Constitution, which prohibits licensing of association, meaningless. It is highly appropriate that the Constitutional Court found this provision unconstitutional (Hunbeobjaepanso [Const. Ct.], Sep. 29, 2016, 2014Hunga3, et al., (Hunjip 28-2 sang, 258) (S. Kor.)).

[33] For example, BELLAMY, *supra* note 13.

[34] Of course, constitutional adjudication should not be a reason for denying the participatory formation of powers or power-controlling mechanisms, which republican democracy emphasizes.

diverse as those of liberalism, but the common elements, from the perspective of modern constitutional democracy, are 'popular sovereignty,' the 'fundamental rights theory based on liberty as non-domination,' and the 'institutional design of accountability.'[35]

Of these, the area where the theory of republican constitutional democracy can serve as the theoretical background for the democratic legitimacy of constitutional adjudication is the theory of fundamental rights. Traditionally, constitutional democracy was centered on the liberalist theory of the protection of fundamental rights. However, the limits of this liberalist theory as the basis of constitutional democracy became more evident with the decline of neo-liberalism. The philosophical and empirical limits of libertarianism, which presupposes individuals isolated from the community, present the necessity of turning to the republican theory of fundamental rights protection. The political philosophy of republicanism emphasizes the interrelational aspect[36] of liberty as non-domination rather than liberty as non-intervention. It also stresses the principle that political governance must pursue the common or public good and seek the guarantee of people's autonomous participation in politics and the substantive equality that can support it.[37] This republican theory of fundamental rights can be an important theoretical element in securing the functional legitimacy of constitutional adjudication.

This paper, on the basis of the republican reformulation of constitutional democracy, will examine two categories of

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[35] *See* ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 57 (2005). Republican theorist Philip Pettit stated that the common elements of republicanism are liberty as non-domination based on political equality, acceptance of the constitutional limitations of civic liberty through the combined political system, and contestation against the public decisions and proposals based on collective virtues and individual virtues (PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 5-8 (2012)).

[36] Such a notion of freedom points out the emptiness of negative freedom, where there is no state intervention as advocated by liberalists, but views the laws, institutions, and customs of a country and a society as the enemies of freedom in that the non-intervention of the state in fact makes people's right to self-determination meaningless. (PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 108-124 (Jun-hyeok Kwak trans., Nanam Publishing House 2012)(1997)). However, liberty as non-domination itself is not considered the same as the right to political participation itself. Suffrage is a means to promote freedom as non-domination (*id.* at 89). Unlike the philosophical basis of liberalism, which assumes that individuals in communities across the country are isolated from one another, this presupposes that individuals in communities are supposed to be the constituting members of the communities (or citizens), and therefore freedom must be harmonized with the limitations in the community, which are envisaged in laws (*id.* at 98-107).

[37] TOMKINS, *supra* note 35, at 57-64; PETTIT, *supra* note 35, at 8.

constitutional issues through which we can review the democratic legitimacy of constitutional adjudication. First of all, I will select cases that have a clear and direct impact on the operation of the political system so as to review the possibility and conditions under which the democratic functions of constitutional adjudication can contribute to the advancement of democracy without producing negative side effects such as the excessive politicalization of constitutional adjudication. Ran Hirschl referred to the "matters of outright and utmost political significance that often define and divide whole polities" as "mega-politics" and presented five areas that pertain to this: ① cases related to electoral processes and outcomes; ② cases related to core executive prerogatives such as diplomacy, national defense, and fiscal policy; ③ cases related to the legitimacy of regime change; ④ cases related to measures to realize restorative or transitional justice; and ⑤ cases related to the raison d'être or the purpose of the polity.[38] The Constitutional Court of Korea has issued many rulings that fall under these five areas, which can be considered purely political from the traditional standpoint. Through a series of previous studies, I have introduced some of these important cases and critically reviewed the reasons.[39] In this paper, I aim to critically review the decisions made by the Constitutional Court of Korea that are related to the political party system and socio-economic policies, which I did not cover in my previous studies from the perspective of the judicialization of politics.

It is meaningful to focus on analyzing cases regarding the political party system in that they are related to most of the above areas of mega-politics. The political party system is closely connected with the election system, and it served as the backdrop for the key proposed amendments regarding the latest talks on constitutional amendment. In particular, cases regarding decisions to dissolve a political party may fall into the third, fourth, and fifth areas because they are related to the characteristics of the polity of Korea. In fact, my selection of cases regarding the political party system is grounded in very realistic intentions. Korea's Constitution from an early stage adopted party-centered democracy, a special form of representative democracy. However, this form of democracy allows extensive control by the state over

[38] Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 93-118 (2008).
[39] *See* Kim & Park, *supra* note 19; Kim, *supra* note 28.

political parties and maintains a political parties act and an election act that are very discriminatory against small parties, giving rise to the criticism that it hampers the normal operation of constitutional democracy. While it can be the task of constitutional adjudication to eliminate such legislative obstacles to party democracy, the Constitutional Court remains very passive when deliberating cases regarding political parties. As such, there is a stronger demand for advancement in this area than in any others. Indeed, this area is one in which we must verify the democratic legitimacy of constitutional adjudication.

However, there is one thing to keep in mind when choosing the party system as the subject of our review of the democratic legitimacy of constitutional adjudication. As will be discussed, the republican political philosophy has traditionally remained very critical about not only constitutional adjudication but also the pluralistic political system that is centered around political parties. The key reason for this is that political parties represent only partial interests and therefore are likely to go against the basic values of republicanism, which aims to pursue the common good or general public interest.[40] For the cases regarding constitutional adjudication, I will emphasize that there can be cases, albeit very exceptional ones, where the party system can positively affect republican constitutional democracy, and, by doing so, I will attempt to justify the combination of the two.

As the second category to be reviewed in this paper, I will discuss exceptional circumstances in which the active intervention of constitutional adjudication is required when the realization of social justice is hindered. To do this, I will examine examples of constitutional adjudication cases in the socio-economic area where the traditionally active intervention of constitutional adjudication is considered improper. Therefore, this paper is meaningful in that, while the second category traditionally calls for judicial self-restraint due to concerns of over-politicalization of the constitution,[41] it will nevertheless explore related conditions that call for active constitutional adjudication. The purpose for selecting this second category is rooted in the theoretical

[40] As is widely known, such skepticism served as a basis for the founders of the Federal Constitution of the United States to endorse the republican form of government. *See* James Madison, *No. 10 (The Union as a Safeguard against Domestic Faction and Insurrection)*, *in* THE FEDERALIST PAPERS: JAMES MADISON, ALEXANDER HAMILTON, JOHN JAY 45-52 (Mentor, 1999).

[41] Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1329 (2001); Rosenfeld, *supra* note 31.

background of this paper, which is the republican reformulation of constitutional democracy. As mentioned earlier, the republican concept of liberty as non-domination is connected with the theory of substantive equality, which justifies a state's active intervention such as through affirmative action. Under these exceptional circumstances, constitutional adjudication may have the space to actively intervene in social and economic policies.

Lastly, another perspective that this paper will take into account while reviewing the relationship between constitutional adjudication and democracy is the functional relation between the procedures of constitutional amendment and constitutional adjudication. Republican political philosophy, which emphasizes the formulative function of democracy, tends to require that people's voluntary demands for reform be met through legislative procedures, including a constitutional amendment. However, depending on the type of constitutional amendment procedures that a certain constitutional democratic country has in place, it is possible that constitutional adjudication can be more effective than legislation. Furthermore, it is worth noting that a constitutional amendment itself may be able to formulate the conditions under which the active functions of constitutional adjudication can be strengthened by means of changes in the interpretation of the constitution. As such, it is necessary to bear in mind that exceptional conditions related to the constitutional amendment procedures have certain implications [42] in demonstrating the degree of democratic legitimacy of constitutional adjudication.

In order to cover the objectives and perspectives mentioned above, this paper will focus on discussing the following. First, I will provide a brief introduction to the republican reformulation of constitutional democracy, which is an important premise of this paper. Second, I will examine the implications that the republican theory of fundamental rights, which is based on the concept of liberty as non-domination, has on the party system, and review the viability of constitutional adjudication in relation to the party system. Next, against the backdrop of the talks on constitutional amendments in the social and economic fields, this paper will review the conditions under which the democratic legitimacy of active constitutional adjudication can be secured in those fields.

[42] For the discussion that the difference between the procedures of constitutional amendment can result in distinct responses to the issue of the democratic legitimacy of constitutional adjudication, especially the non-majoritarian nature of judicial review, see Rosenfeld, *supra* note 6, at 654-655.

# II. REPUBLICAN REFORMULATION OF CONSTITUTIONAL DEMOCRACY IN THE CONSTITUTION OF KOREA

## *A. The Constitution of Korea and Republicanism*

Article 1, Clause 1 of the Constitution of the Republic of Korea proclaims that Korea is a democratic republic, and Article 1, Clause 2 pronounces the principle that the sovereignty shall reside in the people and all state authority shall emanate from the people. Under these principles, Korea has adopted in its Constitution the Bill of Rights,[43] which is designed to guarantee the civil, political, economic, social, and cultural human rights of the people, who are recognized as having dignity and value as human beings and are equal before the law, as well as the principles and institutions[44] such as representative democracy, the separation of powers, and the rule of law, to formulate and materialize state power, in a democratic and republican manner. Traditionally, academia and constitutional practice in Korea have interpreted constitutional democracy, or the governing value of a democratic republic, from the perspective of liberalism. Recently, however, there are moves to reflect republican perspectives in the interpretation of constitutional democracy.[45] In particular, the Constitution of

[43] Chapter 2, "Rights and Obligations of the People," of the Constitution of Korea, which runs from Article 10 through 39, adopts the Bill of Rights, which confirms the fundamental rights and basic obligations under the Constitution.

[44] The principles of representative democracy and the separation of powers can be found in the relevant provisions in Chapter 3 through Chapter 8, which distribute the legislative, administrative, and judicial powers to independent constitutional organizations such as the National Assembly, the government, the courts and the Constitutional Court, and proclaim the principles of independent election management and local autonomy. The principle of the rule of law is stipulated in Article 37, Clause 2 of the Constitution, which provides that the rights of citizens may only be restricted by laws.

[45] DONG-HUN KIM, HAN-GUG HUN-BEOB-GWA GONG-HWA-JU-UI [KOREAN CONSTITUTION AND REPUBLICANISM] (2011); Jongcheol Kim, *Gong-Hwa-Jeog Gong-Jon-ui Jeon-Je-lo-seo-ui Pyeong-Deung* [*Equality as the Basis of a Republican Co-existence*], 19(3) HUN-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 1-38 (2013); Jongcheol Kim, *Gwon-Lyeog-Gu-Jo Gae-Hun-ui Gi-Bon-Bang-Hyang-gwa Nae-Yong: Gyeon-Je-jeog· Gyun-Hyeong-jeog Min-Ju-Ju-Ui-Lon-eul To-Dae-lo* [*A Proposal for Constitutional Reform: With Special Focus on an Ideal of Contestatory and Balanced Democracy*], 8 BEOB-HAG-PYEONG-LON [(SNU) LAW REVIEW] 79-82 (2018); Il-shin Kang, Hun-Beob-Sang Gi-Bon-Ui-Mu-e Gwan-Han Yeon-Gu [On Basic Duties in the Constitution] (2014) (unpublished Ph.D. dissertation, Yonsei University); CHUN-HEE YI, Min-Ju-Gong-Hwa-Gug-Won-Li-ui Sa-Hoe·Gyeong-Je-jeog Ui-Ui-wa Sil-Hyeon-e

Korea requires reformulation from a republican perspective because economic, social, and cultural human rights (fundamental social rights) are stipulated in the Constitution as a category of fundamental rights, and also because Chapter 9 of the Constitution, titled Economy, provides for the state's obligations to make active efforts to realize social and economic justice, presenting a democratic welfare state as the ideal of the Republic of Korea. As discussed below, this is because republican constitutional democracy designed to realize liberation as non-domination through substantive equality calls for the practical and equal materialization of civil autonomy through the guarantee of fundamental social rights as well as the state's obligations to actively pursue this end in social and economic areas.

### *B. Fundamental Rights Theory of Republicanism: Liberty as Non-Domination and Substantive Equality, and Formative Politics*

Republicanism pursues a political community where individuals recognized as having dignity and value as human beings overcome all social discrimination and live among their fellow citizens in a free and democratic political and social order, in other words, a political community where the people of a republican country live lives of 'republican coexistence.' This political community allows the people, as members of the community, to autonomously make decisions regarding their form and method of political existence, and requests that the autonomy of all people be harmonized with the common good.[46] The autonomy of the people mandates that substantive equality and liberty as non-domination be realized. The people are not discriminated against and are given equal opportunities in all areas of life.[47] Further, the people are in the position to enjoy liberty as non-domination, which means "social good that generates from the checks and balances against the abilities of others who intend to dominate."[48] Substantive equality and liberty as

Gwan-Han Yeon-Gu [Study on Socio-economic Significance and Realization of Democratic Republic Principle] (2018) (unpublished Ph.D. dissertation, Sungkyunkwan University ).

[46] TOMKINS, *supra* note 35, at 61-62.

[47] For the discussion on the meaning of equality in a democratic republic against the backdrop of the Korean Constitution, see Kim, *supra* note 45.

[48] PETTIT, *supra* note 36, at 241-242.

non-domination are the basis of the autonomous operation of the community by the people, and as a result, a democratic republican country calls for formative politics led by the people.[49] Politics is a sphere in which people can exercise their autonomy and is also a mechanism through which people can develop their sense of public-spiritedness,[50] a character required for autonomy, as a civic virtue. The freedom enjoyed by the members of a democratic republican country is the fruit of such autonomy, and individuals as citizens achieve their freedom by individually or collectively participating in the decision-making process on matters of public interest, thus realizing their civic virtue.[51]

### *C. Contestatory Democracy as the Republican Principle for Materializing Constitutional Democracy*[52]

Philip Pettit, a republican political philosopher, advocates contestatory democracy[53] as part of the attempt to restore republicanism, which has disintegrated in Western political history, within the modern constitutional democracy. In a democratic republic based on contestatory democracy, the contestability between political units is the key element of constitutional order. It pursues the democratic ideal based on the contestation of the people across all aspects of government activity, rather than democracy based on the consent of the people. According to Pettit, it is important to ensure that the activities of the government are not the product of the will of the public. Instead, these activities should withstand the contestation of the public. A contestatory democracy pursues a deliberative, inclusive, and responsive republic so that the people can challenge the activities of the government.[54] People may challenge the activities of the

[49] PETTIT, *supra* note 36, at 18-20.
[50] TOMKINS, *supra* note 35, at 62-63.
[51] TOMKINS, *supra* note 35, at 44-45.
[52] Hereinafter, all statements regarding contestatory democracy are, without separate citations, the summary of or excerpts from Il-shin Kang & Jongcheol Kim, *Hwan-Gyeong-Min-Ju-Ju-Ui-wa Sim-Ui-Jeog Si-Min-Cham-Yeo* [*Environmental Democracy and Deliberative Citizen Participation*], 45 GANG-WON-BEOB-HAG [KANGWON LAW REVIEW] 250-255 (2015); Jongcheol Kim, *Jeong-Dang-Beob-Sang Wi-Hun-Yo-So-e Gwan-Han So-Go: Jeong-Dang-ui Hun-Beob-Sang Ji-Wi-leul Jung-Sim-eu-lo* [*On Unconstitutional Elements of the Political Parties Act in South Korea*], 7 SEON-GEO-YEON-GU [THE STUDY OF ELECTION (National Election Commission)] 39-41 (2016).
[53] PETTIT, *supra* note 36, at 341-376; PETTIT, *supra* note 35, at 239-292.
[54] PETTIT, *supra* note 36, at 347-368.

government in various ways, such as raising objections against policies that do not serve the public interest and withdrawing consent.[55]

In addition, contestatory democracy must take on an inclusive form to guarantee the opportunity for people of all classes to challenge the decisions made by the legislature, administration, and judiciary. Thus, it is necessary to design an institution that allows the different values of all classes to be reflected in the democratic decision-making process.[56] Lastly, contestatory democracy must be responsive to the people's contestation of policies. It is important to secure channels for contestation and guarantee the participation of the people to the maximum extent possible. However, of more importance is ensuring that contestation can actually affect the results of decision-making. The heart of this new concept of democracy is to create an environment where people can review and choose their laws rather than simply live under laws that are devised through consent.[57]

## III. NECESSITY FOR ACTIVE CONSTITUTIONAL ADJUDICATION OF THE POLITICAL PARTY SYSTEM

### *A. Relationship Between Republican Constitutional Democracy and the Political Party System*

Republicanism, which emphasizes people's autonomy and the common good, remains skeptical about party politics, which stand at the center of pluralistic, interest-centered politics.[58] However,

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[55] For further discussion on the various forms of constitutional civic participation such as consultation, ratification, veto, and public oversight, see Justin Blount, *Participation in Constitutional Design*, *in* COMPARATIVE CONSTITUTIONAL LAW 38-52 (Tom Ginsburg & Rosalind Dixon eds., 2011).

[56] As an institutional mechanism to reflect the inclusive nature of contestatory democracy, Pettit proposes the jury system where ordinary citizens can participate in administrative and judicial decisions. He asserts that the jury system must have statistical representativeness so as to include the opinions of citizens, as opposed to the electoral representativeness required of a national assembly. PETTIT, *supra* note 36, at 355-358.

[57] Pettit describes contestatory democracy as being 'editorial' for these characteristics, while he views the traditional elective democracy as 'authorial' (Philip Pettit, *Democracy, National and International*, 89(2) THE MONIST 301-324 (2006)).

[58] The distortion of representative political procedures due to the imbalance between the powers of interest groups in a community is considered a problem inherent in a politics based on pluralism, which takes the view that society

during the transition period towards an ideal republic, an unrestricted party system can be an outpost for people's autonomy. People's participation can have significant meaning in the political and administrative processes that enable not only government but also governance, but it can also materialize civic republicanism[59] by means of intermediate associations such as political parties. In addition to deliberative democracy, which is a channel that enables direct participatory democracy, people can also counteract the defects inherent in the decisions made by their representatives or bureaucrats by engaging in the setting of political agenda and decision-making via political parties. Although a political system dominated by political parties may give rise to an oligarchic political process, undermining civic autonomy and the common good, it is unrealistic to expect a political environment where civil autonomy can be fully materialized if unrestricted party activities are not guaranteed. After all, a political community led by civic autonomy, which is pursued by republicanism, is bound to be one in which an unrestricted party system and participatory democracy such as deliberative democracy interact with and complement each other. As such, contestatory democracy is effective in materializing a balanced representative democracy, the republican ideal where unrestricted political parties and direct participatory democracy interact as counterparts.[60]

The concept of contestatory democracy provides a clear

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consists of many independent interest groups or associations, and the competition, conflicts, and cooperation between interest groups and associations are what operate politics and society. In particular, the 'interest-group theory of politics,, which views the political mechanism from the same perspective as the market mechanism, is the main subject of criticism of republicanism or deliberative democracy. For more about this, see KIM, *supra* note 45*,* at 188-199.

[59] Republicanism is based on political equality in the sense that it understands politics as the process of citizens' participation in rational dialogues and deliberation procedures in order to find and pursue the common good, and that all citizens must have equal access to these political procedures. A democratic republic values participation in order to form the will of the sovereign. Nevertheless, it does not view unconditional participation or mobilization as the core of democracy, and focuses on providing the contestatory power so that a republic can materialize the common good and serve all citizens, while recognizing the functions of the representative system. While it recognizes that at the heart of democracy is the self-governance of the citizens, it places the greatest emphasis on 'governance for the citizens' by means of the common good (Kim, *supra* note 52, at 40).

[60] Philip Pettit maintains a very practical position that while a contestatory democracy avoids the pluralism of interest groups, it is not hostile to every form of market arrangement; "The ideal of a contestatory democracy is revisionary, but not so revisionary as to be hostile to every form of market arrangement" (PETTIT, *supra* note 36, at 376).

alternative to the forms of interest-group pluralism and participatory democracy, on which party democracy has traditionally been based. The ideal of democratic republicanism is to overcome the limits of constitutionalism, which is that governance for the people cannot be realized despite taking the form of representative democracy. In other words, democratic republicanism, while not denying the values of the representative system, aims to counteract its flaws by identifying the common good that has gone through deliberative procedures, while at the same time attempting to overcome the limitations of participatory democracy through the contestatory authority of the people rather than their decision-making authority.[61] In this sense, political parties can be an important foundation for securing the contestatory authority of the people. The key is to establish intraparty democracy within political parties so that they do not turn into a means for oligarchic governance and be demoted to another mechanism for civil mobilization.[62] This is why it is important to ensure that the constitution mandates that the organization and activities of a political party be democratic.

## *B. Status of Political Parties in the Constitution of Korea and Constitutional Realities*

### 1. Constitutionalization of the Freedom of Political Parties and the Multiparty System

The status of political parties in the constitution depends on what functions and roles are authorized in a democratic constitutional government, which is based on contestatory democracy. The Constitution of Korea grants a special constitutional status to political parties in Article 8, Chapter 1,

[61] John Keane calls the modern democracy a "monetary democracy" based on these latest moves (*See* JOHN KEANE, THE LIFE AND DEATH OF DEMOCRACY (Hyun-soo Yang trans., Gyoyangin 2017) (2009). David Held distinguishes 'developmental republicanism,' which emphasizes the value of participation as an objective, from 'protective republicanism,' which emphasizes the value of participation as a means. The republican theories of Pettit or Keane, which place contestatory power before citizen's decision-making power, are thought to have followed the intellectual tradition of the latter (DAVID HELD, MODELS OF DEMOCRACY 65-115 (Chan-pyo Park trans., Humanitas 2010) (2006)).

[62] For further discussion about this, see Jong-soo Lee, Jeong-Dang-Hwal-Dong-e-ui Si-Min-Cham-Yeo-wa Dang-Nae-Min-Ju-Ju-Ui [Mitwirkung der Bürger an den Parteitätigkeiten und die innerparteiliche Demokratie], 41(1) GONG-BEOB-YEON-GU [PUBLIC LAW JOURNAL] (2012).

which stipulates the basic order and institutions of the nation. Political parties are given the freedom of association as "the establishment of political parties shall be free, and the plural party system shall be guaranteed (Article 8, Clause 1)." [63] The Constitution also provides that "(only) if the purposes or activities of a political party are contrary to the basic order of democracy, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court (Article 8, Clause 4)." Therefore, not only are political parties free to exercise their freedom of association without any intervention or interruption by the state, but their existence cannot be denied by state action. Further, political parties shall enjoy the protection of the state and may be provided with operational funds by the state under the conditions prescribed by laws (Article 8, Clause 3). As such, assuming the special status of political parties, the Constitution provides that political parties shall be democratic in their objectives, organization, and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will (Article 8, Clause 2).

### 2. Normative Meaning of the Constitutionalization of the Political Party System

The constitutionalization of political parties' freedom of association and the multiparty system suggest that the Constitution recognizes that intervention by a state organization into political parties cannot be allowed in principle as they represent the voluntary association of the people, and that they should serve as venues for the free association of the people's political selves based on civil autonomy. In other words, the Constitution clearly stipulates the essence of the freedom of political association with respect to political parties. From the perspective of contestatory democracy, the freedom of political parties is the most fundamental freedom necessary for the formation and maintenance of the basic order of democracy, which is the basis for enabling both the authorization and contestation of the people with regard

[63] Constitutionalization of the multiparty system means that its fundamental elements cannot be encroached even by laws and that the freedom of political parties, which is the prerequisite to the realization of the multiparty system, should receive strong protection.

to policy decisions. In particular, the freedom of establishment of political parties stipulated in Article 8, Clause 1 of the Constitution should be interpreted as covering not only the freedom to establish political parties but also the freedom of party organization (deciding and implementing the organizational form of a political party) and the freedom of party activities (formulating political objectives and taking necessary measures to carry out the objectives).[64]

Also, within the framework of a republican constitutional democracy, which stands on the basis of civil autonomy and voluntary participation in politics, any state regulation on the organization and activities of a political party must be considered anti-democratic. Further, if it is to be justified, any such regulation should represent a highly significant public need determined by a highly stringent test, and the methods of regulation should abide by limitations according to the principle of proportionality, which are the "restrictions imposed in a law-governed state on the exercise of state powers that may undermine the interest of the people."[65] Considering the importance of the autonomy of the people and of the political parties that form the foundation of the affairs of the state as a democratic republic, any law that restricts the freedom of political parties can be allowed only when it is shown not to be arbitrary and the objective of the restriction is

[64] *See* Hunbeobjaepanso [Const. Ct.], Jan. 28, 2014, 2012Hunma431, et al. (Hunjip 26-1sang,155) (S. Kor.); Hunbeobjaepanso [Const. Ct.], Dec. 16, 2004, 2004Hunma456 (Hunjip 16-2ha, 618) (S. Kor.); Hunbeobjaepanso [Const. Ct.], Dec. 23, 1999, 99Hunma135 (Hunjip, 11-2, 800, 812) (S. Kor.); Hunbeobjaepanso [Const. Ct.], March 28, 1996, 96Hunma9 et al. (Hunjip 8-1, 289, 304) (S. Kor.); Hunbeobjaepanso [Const. Ct.], Oct. 25, 2001, 2000Hunma193 (Hunjip 13-2, 526, 537) (S. Kor.). The Constitutional Court of Korea judges that the freedom of political parties is based on Article 8, Clause 1 of the Constitution and that Article 8, Clause 2, which provides for political parties' obligation to be democratic in their organization, cannot be the constitutional basis for the freedom of political parties (Hunbeobjaepanso [Const. Ct.], Dec. 16, 2004, 2004Hunma456 (Hunjip, 16-2ha, 618) (S. Kor.)). It is correct that Article 8, Clause 2 of the Constitution obliges political parties to have a democratic organization and also requires legislators to enact laws to impose the obligation. However, it is clear that this legislative obligation does not entail a formative right to undermine the fundamental ideas of the party system, that is, the free formation of democratic organization. Thus, it can be said that this Clause not only provides for the obligation to legislate but also sets a legislative limitation, which means the maximum protection for freedom to organize political parties. Therefore, it is appropriate to note that Article 8, Clause 2 can be the basis for the freedom to organize political parties.

[65] *See* Hunbeobjaepanso [Const. Ct.], Dec. 19, 2014, 2013Hunda1 (Hunjip 26-2ha,1, 23) (S. Kor.); Hunbeobjaepanso [Const. Ct.], Jan. 28, 2014, 2012Hunma431, et al. (Hunjip 26-1sang, 155) (S. Kor.).

legitimate. Further, there should exist no less severe means to achieve the objective while minimizing the violation of freedom. Lastly, the interest to be achieved by limiting the freedom of political parties should be greater than the interest that can be achieved by guaranteeing the freedom of the political parties.[66]

Political parties are no different from any other associations in that they are also an association of the people. However, under the Constitution, they are given the status of special associations as they engage in the composition and operation of state powers by formulating their political will. Thus, it is necessary to clarify their constitutional implications in relation to the basic values of republicanism. In particular, given that in today's democracy the roles of political parties are very important in elections, it is necessary to ensure that the political procedures by political parties and the competition among them are conducted under the nondiscriminatory management and support of the state. Article 114 of the Constitution of Korea stipulates the National Election Commission as an independent administrative organization for the management of elections, and Article 116 provides for equal opportunities for election campaigns and the state provision of election expenditures. Also, Article 8, Clause 3 states that political parties may be provided with operational funds by the state. These stipulations are based on political parties' public status beyond associations of private individuals.[67] What we need to bear in mind is that the status of political parties as voluntary associations should not be undermined because of their public status. In particular, given that republicanism views civic autonomy based on substantive equality as the basis of democracy, the

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[66] Kim, *supra* note 52, at 44-45.

[67] The Constitutional Court of Korea has also confirmed that political parties have a public status under the Constitution. Hunbeobjaepanso [Const. Ct.], April 24, 2014, 2012Hunma287 (Hunjip 26-1ha, 223) (S. Kor.):

> It is because political parties not only take part in the formation of the political will of the people by actively formulating the political will of the people and representing the interests of all classes, but also have significant influence on the formulation of the state will by playing a pivotal role in selecting, appointing, and dismissing officers in key posts of the government and the National Assembly, and exercising their influence on the policies and decisions made by political organizations such as the National Assembly and the government. As such, they play an important public function, serving as a medium that collects and organizes the political will of individuals, presenting specific courses and directions, and serving as a public force that takes on responsibilities for national affairs

(*See* Hunbeobjaepanso [Const. Ct.], Dec. 23, 1999, 99Hunma135 (S. Kor.); Hunbeobjaepanso [Const. Ct.], Oct. 29, 2009, 2008Hunba146, et al. (S. Kor.)).

non-discrimination and equal treatment of political associations, not to mention equality among the people, are essential. For instance, the process of recommending candidates for an election for public posts should be managed in a fair manner because the recommendation process is a key element of representative democracy that is necessary for selecting and maintaining legitimate representatives. However, political parties' activities, such as the nomination of electoral candidates, should not be overly restricted simply because of the call for fairness. In addition, behaviors such as providing excessively special treatment to political parties compared to other political associations due to their constitutionalized status, or using political parties as a criterion for discriminatorily suppressing the people's participation in politics, cannot be harmonized with the republican understanding of democracy, which upholds autonomy based on political equality.

## 3. Realities of the Constitutionalization of the Political Party System[68]

However, the realities of the party system in Korea cannot be seen as serving the determination and will of the constitution-makers who have chosen to entrench the political party system in the Constitution.

### (a) Excessive Regulation on Freedom of Political Parties

First, the principle of guaranteeing the freedom of political parties and the multiparty system is not being properly implemented in Korea due to the political parties' obligation to organize themselves in a democratic way to the effect that a political party can be established, organized, and operated only when it satisfies the stringent criteria set by the state.

Article 3 of the Political Parties Act prohibits the establishment of district chapters as it provides that political parties shall comprise a central party located in the capital and city and provincial parties located in the Special Metropolitan City, and in each Metropolitan City and provinces, respectively. Also, Article 39, Clause 3, while allowing political parties to have a

[68] This part is a selective summary and modification of pp. 45-53 of Kim, *supra* note 52, which can be referenced for further details.

party members council for each local area district of National Assembly members, and an autonomous Gu, Si (city)/Gun (county), and Eup/Myeon/Dong (sub-counties) in place of district chapters, prohibits the establishment of physical offices of party members' councils, regulating not only the scope of the internal organization of political parties but also the establishment of offices for their subordinate organizations, which are the physical foundations for political parties. In particular, as discussed below, given that the existence of political parties depends heavily on elections, the prohibition of the establishment of their subordinate organizations or offices in electoral precincts should be regarded as undermining the essence of the freedom of organization of political parties. However, the Constitutional Court of Korea holds that this legislation prohibiting the establishment of local chapters is constitutional, stating that the objective of the legislation, which is to address the high-cost and low-efficiency political party structure, is legitimate and that the prohibition on the establishment of local chapters or offices has met the test of proportionality.[69]

Article 4, Clause 1 of the Political Parties Act provides that a political party shall come into existence when its central party is registered with the National Election Commission, and Clause 2 provides that the registration must satisfy the requirements of Articles 17 and 18, which provide for the number of city and province parties and the number of members of city and province parties. Article 17 of the Political Parties Act stipulates that a political party must have at least five city/province parties. The Constitutional Court decided that this provision was constitutional, stating that the legislative objective of this provision is to prohibit the establishment of local parties and prevent the emergence of an excessive number of small-sized parties, and that this is a reasonable restriction aimed at ensuring the constitutional requirements that a political party must participate in the process of formulating the political will of the people in a "considerable number of areas" for a "considerable period of time."[70] However, there is criticism that considering the objectives of the multiparty

[69] Hunbeobjaepanso [Const. Ct.], March 31, 2016, 2013Hunga22 (Hunjip 28-1sang, 305) (S. Kor.) (declaring constitutional the prohibition on the establishment of offices of party members' councils ); Hunbeobjaepanso [Const. Ct.], Dec. 16, 2004, 2004Hunma456 (Hunjip 16-2ha, 618) (S. Kor.) (declaring constitutional the prohibition on the establishment of local chapters).

[70] Hunbeobjaepanso [Const. Ct.], March 30, 2006, 2004Hunma246 (Hunjip 18-1sang, 402, 415) (S. Kor.).

system—which is to allow the establishment and operation of a political party without restriction as long as it does not undermine the basic order of democracy—this restriction on the establishment of a political party, along with Article 3 of the Political Parties Act which provides that the central party must be located in the capital, goes directly against the freedom of establishment of political parties.[71]

Article 22 of the Political Parties Act provides that only those who have the right to elect members of the National Assembly are entitled to become members of a political party and that many categories of people, such as those under nineteen, public officials, and teachers (including teachers at private schools, except for universities), cannot join a political party. Such a wide-ranging restriction on membership in a political party[72] seriously undermines the essence of republican constitutional democracy, which pursues civic autonomy. Nevertheless, the Constitutional Court has consistently confirmed the constitutionality of this provision.[73]

Another problem is Article 44 of the Political Parties Act, which provides for the revocation of party registration. In addition to failure to satisfy the aforementioned requirements for registration, Article 44, Clause 1, Paragraph 2 stipulates that the

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[71] Tae-ho Chung, Hyeon-Haeng Jeong-Dang-Beob-Sang-ui Jeong-Dang-Gae-Nyeom-ui Hun-Beob-Jeog Mun-Je-Jeom [Verfassungsrechtliche Problematik des gesetzlichen Begriffs der politischen Parteien], 40(2) GYEONG-HUI-BEOB-HAG [KYUNG HEE LAW JOURNAL] 147-150 (2005).

[72] One of the key functions of a political party is to participate in the formation of the will of the state through elections, but most importantly, the will of the people. Given that another essential function of a political party is to formulate public political opinion in everyday lives and not necessarily during elections, it can be reasoned that the will of the people is manifested through political parties as a medium. Thus, the requirement that only those who have the right to vote can be members of a political party is not consistent with the nature of a political party.

[73] In Constitutional Court decision 2011Hun-Ba43 (Hunbeobjaepanso [Const. Ct.], March 27, 2014, 2011Hunba43 (S. Kor.)), four judges opined that the provision prohibiting public officials from joining a political party is unconstitutional. However, as the quorum for declaring unconstitutionality was six, the provision was declared constitutional. In Constitutional Court decision 2011Hun-Ba42 (Hunbeobjaepanso [Const. Ct.], March 27, 2014, 2011Hunba42, (Hunjip 26-1sang, 375) (S. Kor.)) the provision prohibiting teachers serving at national elementary or middle schools from joining a political party was found constitutional, with five judges finding it constitutional and four unconstitutional. Also in Constitutional Court decision 2012Hun-Ma287 (Hunbeobjaepanso [Const. Ct.], April 24, 2014, 2012Hunma287, (Hunjip 26-1ha, 223) (S. Kor.)), three judges opined that the provision prohibiting citizens under 19 from joining a political party is unconstitutional, but the provision was ultimately found constitutional.

registration of a party shall also be revoked when it fails to participate, during the previous four years, in an election of National Assembly members due to the expiration of term of office or an election of the heads of local governments due to the expiration of term of office or that of the members of city/province councils.[74] It appears that the revocation of registration, which presupposes that a political party must participate in elections, needs to be abolished or be required to meet more stringent conditions.[75]

Lastly, the Constitutional Court dissolved a political party named the United Progressive Party on the grounds that the objectives and activities of the party went against the basic order of democracy and deprived the National Assembly members belonging to the party of their status as members of the National Assembly without any proper legal grounds.[76] In fact, Article 8, Clause 4 of the Constitution was created in order to provide special protection to the existence of political parties, but it had never been invoked until the Constitutional Court applied it in the case of the dissolution of the United Progressive Party. Even considering the special political situation on the Korean Peninsula, which is divided into the South and the North, the act of dissolving a political party forcefully in a democratic republic that proclaims to be a constitutional democracy should meet strict requirements according to the principle of the rule of law. However, there was controversy over the procedural aspect of the decision as the Constitutional Court applied the less strict rule of evidence of civil

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[74] Also, Article 44, Clause 1, Paragraph 3, which provides that party registration shall be revoked "when failing to obtain a seat in the National Assembly after participating in an election of National Assembly members due to the expiration of term of office, and failing to obtain more than 2/100 of the total number of effective votes," was declared unconstitutional by the Constitutional Court(Hunbeobjaepanso [Const. Ct.], Jan. 28, 2014, 2012Hunma431, et al. (Hunjip 26-1sang,155) (S. Kor.)).

[75] Four years is not a long enough period for the revocation of registration of a political party. The Federal Constitutional Court of Germany declared constitutional the provision in the Law on Political Parties, which deprives political parties of their status if they do not participate in elections for six years (Soo-woong Han, *Jeong-Dang-ui Gae-Nyeom-gwa Jeong-Dang-Deung-Log-Je-Do-ui Hun-Beob-jeog Mun-Je-Jeom* [*Der verfassungsrechtliche Parteibegriff und verfassungsrechtliche Probleme des Parteiregistrierungsverfahrens*], 104 JUSTICE 176, n.35 (2008)). In the nineteenth National Assembly, the draft bill on the amendment of some provisions of the Political Parties Act (Bill No. 10024, April 3, 2014, proposed by National Assembly member Yong-gyo Suh), in which it was suggested that the period be extended to ten years, was submitted.

[76] Hunbeobjaepanso [Const. Ct.], Dec. 19, 2014, 2013Hunda1 (Hunjip 26-2ha, 1) (S. Kor.).

procedures. Further, the Constitutional Court was also criticized for failing to faithfully apply the international legal requirements and principles regarding the dissolution of political parties in developing its substantive arguments.[77]

### (b) Overprotection of and Discrimination Among Political Parties

As discussed earlier, the provisions on political parties in the Constitution, specifically the provision on state subsidies to political parties, may be justified in that they are aimed at preventing political procedures from being influenced by donors to political funds, encouraging fair competition by narrowing the gap between the amount of funds secured by political parties and thus allowing them to focus on pending public issues.[78] A fundamental problem, however, is that this may intensify the bureaucratization and centralization of party organizations and weaken the fundamental viability of political parties, therefore undermining their nature as a medium for political participation. In particular, under Korea's laws on political funds and current practices in the nation, the difference between the amount of state subsidies granted to large-sized parties and small-sized ones seriously hinders fair competition between political parties and between factions within a party. Above all, there is criticism that new political parties are inherently discriminated against in the competition with existing parties, leading to the weakening of the political ecosystem and the strengthening of the monopoly in political procedures.[79]

State subsidies are not the only area where the constitutionalization of political parties does not reap the intended

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[77] For a critical review of this decision, see Jongcheol Kim, Hun-Beob-Jae-Pan-So-neun Ju-Gwon-Jeog Su-Im-Gi-Gwan-In-Ga?: Dae-Han-Min-Gug-ui Hun-Beob-jeog Jeong-Che-Seong-gwa Tong-Hab-Jin-Bo-Dang Hae-San-Gyeol-Jeong [Is the Constitutional Court the Sovereign Institution?—Dissolution of the Unified Progressive Party and Constitutional Identity of the Republic of Korea], 151 JUSTICE 29-71 (2015); Jongcheol Kim, Dissolution of the Unified Progressive Party Case in Korea: A Critical Review with Reference to the European Court of Human Rights Case Law, 10(1) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 139-155 (2017).

[78] Hunbeobjaepanso [Const. Ct.], July 27, 2006, 2004Hunma55 (Hunjip 18-2, 242, 249) (S. Kor.).

[79] Beom-young Park & Seung-beom Sohn, Jeong-Dang-Jae-Jeong-e dae-han Gug-Go-Bo-Jo-ui-Hun-Beob-Sang Jeong-Dang-Hwa Gi-Jun [The Constitutional Justification for State Subsidies of Political Parties], 18(1) UI-JEONG-YEON-GU [KOREAN JOURNAL OF LEGISLATIVE STUDIES] 96-102 (2012).

outcome. The Public Official Election Act of Korea provides for excessive regulations on elections, which are the main venues for political parties, allowing excessive discrimination between existing parties and new parties, between parties and non-party associations, and between parties and ordinary citizens.[80] This is far from the ideal of republican constitutional democracy, which emphasizes civic autonomy based on political equality through political order based on party supremacy. Against this backdrop, it is encouraging that the Constitutional Court declared in its 2015 decision that some provisions, including Article 45, Clause 1 of the Political Funds Act that provides for the prohibition of financial supporters associations for political parties and the criminal penalty for noncompliance, are unconstitutional as they violate the freedom of political parties and the people's freedom of political expression.[81] Nevertheless, more reforms need to be carried out in order to formulate an environment for fair political competition.

### *C. Constitutionalization of Political Parties and the Democratic Legitimacy of Constitutional Adjudication*

While amendment bills have continuously been proposed and constitutional adjudication has been conducted regarding laws that had been criticized for excessively restraining people's participation in politics, several problems have yet to be addressed.[82] The basic conditions for realizing the fundamental

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[80] Examples include the regulations on election-related public relations activities, which are unfair and discriminatory against small-sized or newly established political parties, difficulty of entry due to excessive deposit funds, discrimination in the distribution of election subsidies, and, most fundamentally, the election system based on plurality voting, which generates a substantial amount of ineffective votes. (Jongcheol Kim, *Gong-Jig-Seon-Geo-Beob-Sang Internet-Eon-Lon-Gyu-Je-e dae-han Bi-Pan-jeog Go-Chal* [*A Critical Review on the Regulation of Internet News Media in the Public Official Election Act*], 8(2) EON-LON-GWA BEOB [JOURNAL OF MEDIA LAW, ETHICS AND POLICY] 1-27 (2009); Hyunsik Yoon, *Gong-Jig-Seon-Geo-Beob-gwa Gun-So-Jeong-Dang-ui Gwan-Gye* [*The Relation of POEA and Minor Party*], 61 MIN-JU-BEOB-HAG [DEMOCRATIC LEGAL STUDIES] 177-208 (2016)).

[81] Hunbeobjaepanso [Const. Ct.], Dec. 23, 2015, 2013Hunba168 (Hunjip 27-2ha, 511) (S. Kor.).

[82] Regarding the establishment of the offices of local chapters and party members' councils, an amendment bill proposing the amendment of some of the provisions of the Political Parties Act (Bill No. 544, June 28, 2016, proposed by National Assembly member Tae-nyon Kim), which was intended to revive local chapters in the name of 'regional chapters,' was presented in the twentieth National Assembly. In the nineteenth National Assembly, a number of amendment bills

values and principles of constitutional democracy are not being realized due to legislative or judicial realities.

President Moon Jae-in's constitutional amendment bill[83] proposed revisions to the provisions regarding political parties in consideration of the legislative and judicial realities in which the fundamental values of constitutional democracy are being

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proposing amending some of the provisions of the Political Parties Act were presented. They include, Bill No. 1802, Sep. 14, 2012, proposed by National Assembly member Jae-kwon Shim, which sought to revive local chapters in the name of 'regional committees;' Bill No. 14760, April 16, 2015, proposed by National Assembly member Hae-jin Cho, which allowed the establishment of the office of the party members' council on the condition that it is run by volunteers only; Bill No. 3911, Feb. 28, 2013, proposed by National Assembly member Won-wuk Lee, which allowed the establishment of a permanent office of the party members' council without any conditions; and Bill No. 3727, Feb. 14, 2013, proposed by National Assembly member Ki-jeong Kang, which allowed each local district of National Assembly members to have a 'life politics center.' However, none of the amendment bills were passed.

Regarding the preconditions for the establishment of a political party under the Political Party Act, a number of amendment bills proposing the amendment of some of the provisions of the Political Parties Act were submitted in the nineteenth National Assembly but were later scrapped. They include, Bill No. 12244, Nov. 3, 2014, proposed by National Assembly member Ju-hong Hwang, which eased the conditions for the establishment of city/province parties and deleted the provision requiring that the central party be located in the capital and Bill No. 14390, March 20, 2015, proposed by Hye-young Won, which provided for 'autonomous parties,' through which region-centered policies can be implemented and the political participation of local citizens can be promoted.

Regarding the age limit for enrollment in a political party under the Political Party Act, an amendment bill proposing the amendment of some of the provisions of the Political Parties Act (Bill No. 4601, April 19, 2013, proposed by National Assembly member Chang-il Kang) was submitted in the nineteenth National Assembly, in which it was proposed that the age limit be reduced to seventeen but was later scrapped. Also in the twentieth National Assembly, Bill No. 402, Aug. 4, 2016, has been proposed by National Assembly member Ju-min Park. Regarding the provision prohibiting the enrollment of public officials and teachers in political parties, Bill No. 2435, Nov. 5, 2012, proposed by National Assembly member Jin-hu Jeong and Bill No. 1621, Sept. 6, 2012, proposed by National Assembly member Sang-gyu Lee, were presented in the nineteenth National Assembly but were not passed.

[83] For a brief introduction to the basic contents and significance of this amendment bill, see Jongcheol Kim, *Presidential Proposal for Constitutional Revision in South Korea: Unlikely to be Passed but Significant Step Forward*, CONSTITUTION NET NEWS / VOICES FROM THE FIELD (May 16, 2018), http://www.constitutionnet.org/news/presidential-proposal-constitutional-revision-south-korea-unlikely-be-passed-significant-step.

undermined.[84] However, this amendment bill was scrapped as it failed to obtain the approval of the National Assembly, which is a prerequisite to being referred for a referendum.

President Moon's proposed amendment bill deleted Article 8, Clause 2 of the Constitution ("Political parties...shall have the necessary organizational arrangements for the people to participate in the formation of the political will."), which has been used as the constitutional basis for the provision in the current Constitution regarding regulating the conditions for the establishment of political parties. In fact, Article 8, Clause 2 merely states the basic principle of people's voluntary association. However, this provision has been misused by the regulatory legislation that arbitrarily interpreted the terms such as "people" and "necessary organizational arrangements" as well as court decisions affirming

[84] Table 1: Comparison between the Provisions on Political Parties in the Existing Constitution and President Moon's Constitutional Amendment Bill

| Current | Amendment Bill |
|---|---|
| Article 8 ① The establishment of political parties shall be free, and the plural party system shall be guaranteed. | Article 8 ① Political parties can be established freely, and the plural party system shall be guaranteed. |
| ② Political parties shall be democratic in their objectives, organization and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of political will. | ② Political parties **shall be democratic** in their objectives, organization and activities. |
| ③ Political parties shall enjoy the protection of the state under the conditions prescribed by laws and may be provided with operational funds by the state under the conditions prescribed by laws. | ③ Political parties shall enjoy the protection of the state, according to the conditions prescribe by laws, and may be provided with operational funds by the state, according to the conditions prescribed by laws and **based on legitimate objectives and fair standards.** |
| ④ If the purposes or activities of a political party are contrary to the fundamental democratic order, the government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court. | ④ If the purposes or activities of a political party are contrary to the fundamental democratic order, the government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the adjudication of the Constitutional Court. |

the constitutional legitimacy of the legislation. Thus, the deletion of Article 8, Clause 2 in President Moon's proposed amendment bill is understood as an attempt to address this situation.

Also, Article 8, Clause 3 has served as a constitutional basis for the state provision of operational funds, which has hampered the substantive equality between large parties and small parties, between old parties and new parties, and between political parties and ordinary citizens. The prevailing argument was that this provision should be deleted so as to preserve the autonomy of political parties, which is a basic value of democracy. However, in consideration of today's constitutional realities, where political parties do not have sufficient capacity to maintain their existence, an alternative proposal has been made to establish a basic principle for the allocation of state funds in the Constitution so as to address the negative aspects of state subsidies. The amendment bill set out certain limitations regarding the objectives and criteria of the provision of state funds to political parties, stating that it should have a 'legitimate objective' and 'fair criteria.' However, as all these limitations are set out in general provisions only, their practicability is still in question. Still, as the amendment bill laid out the purpose of the legislation and presented explicit constitutional criteria, there were expectations that the stipulation of the limitations would at least provide the minimum criteria in future legislation or litigation. However, as the amendment bill was not passed, the political reform aimed at guaranteeing the freedom of political parties and the multiparty system has been delayed.

One of the reasons that the proposed constitutional amendment regarding the party system was not passed is that the requirements for amending the Constitution of Korea are rigid, such that a constitutional amendment bill can only be referred for a referendum after a two-thirds vote of the enrolled members of the National Assembly. As such, when an attempt at political reform through constitutional amendment encounters an institutional obstacle, the political and institutional conditions call for greater emphasis on the necessity of political reform through constitutional adjudication.

There are both skeptical and endorsing views on the democratic legitimacy of constitutional adjudication. However, there is ample reason to expect that constitutional adjudication can provide an important opportunity to improve the constitutional realities, which remain unsatisfying despite the

constitutionalization of political parties. More than thirty years have passed since democratization began in earnest, but there still are many improvements to be made through legislation. Against this backdrop, constitutional adjudication has not been very successful in addressing the situation. However, constitutional adjudication, backed by reform movements in the legislative field, is expected to serve as an important means to bring about political reform to advance constitutional democracy. Indeed, this expectation is based on past decisions of the Constitutional Court that are thought to have paved the way for political reform.

These decisions include one that declared unconstitutional the election law providing that the outcome of local chapters shall be used as the basis for the allocation of seats of National Assembly members as proportional representatives[85] as well as one that developed the principle of 'one person, one vote, one value' and nullified the designation of electoral precincts which allowed excessive gaps between the populations of each precinct.[86] In addition, the fact that the provision in the Assembly and Demonstration Act, which excessively suppressed freedom of assembly,[87] and some of the provisions in the Public Official Election Act, which may have undermined democracy, were deleted also helps create the historical and social conditions under which the democratic legitimacy of constitutional adjudication can be secured.

[85] Hunbeobjaepanso [Const. Ct.], July 19, 2001, 2000Hunma91, et al. (Hunjip 13-2, 77) (S. Kor.).

[86] Hunbeobjaepanso [Const. Ct.], Oct. 30, 2014, 2012Hunma192 et al., (Hunjip 26-2sang, 668) (S. Kor.) (limiting the deviation in population in redistricting for the election for the National Assembly members to 1:2 between the smallest and the largest election precincts); Hunbeobjaepanso [Const. Ct.], June 28, 2018, 2014Hunma189 (S. Kor.) (changing the constitutionally allowed deviation in population to an upper and lower 50% (population ratio 3:1) in relation to the redistricting of local constituencies for city/province council members).

[87] For instance, Hunbeobjaepanso [Const. Ct.], Sep. 24, 2009, 2008Hunga25 (Hunjip 21-2sang, 427) (S. Kor.) (provision on the prohibition of an outdoor assembly at nighttime was found non-conforming to the Constitution); Hunbeobjaepanso [Const. Ct.], Sep. 29, 2016, 2014Hunga3, et al. (Hunjip 28-2sang, 258) (S. Kor.) (provision on the prohibition of an assembly or demonstration that may or is intended to influence a trial was found unconstitutional).

# IV. NECESSITY OF ACTIVE CONSTITUTIONAL ADJUDICATION FOR SOCIAL AND ECONOMIC POLICIES AND THE REQUIRED CONDITIONS

## *A. Republican Implications of the Constitutional System Regarding Social Equality in the Constitution of Korea*[88]

Liberty as non-domination cannot be realized with formal equality only, which aims to provide equal opportunities for the realization of the freedom of individuals and prohibits arbitrary discrimination. This is because as long as capitalistic production methods based on the guarantee of property rights and economic freedom remain the basis of the economic order, poverty can be an important cause for domination.[89] Thus, in order to materialize liberty as non-domination, substantive equality is needed. Here, substantive equality refers to 'equality of condition' or 'equality of outcome or results.' The former means that the minimum material conditions should be guaranteed by laws and institutions so that the equality of opportunity to realize freedom is not undermined due to the structural obstacles of social reality, and the latter refers to the equality of outcome or results, which can be limited to a certain degree.

The Constitution of Korea envisages the ideology of a democratic welfare country based on social justice in its Preamble;[90] the provisions on economic, social, and cultural human rights[91] including Article 10;[92] and the provisions in

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[88] For more about the subject of this section, see Jongcheol Kim, Han-Gug Hun-Beob-gwa Sa-hoe-Jeog Pyeong-Deung : Hyeon-Hwang-gwa Beob-Jeog Jaeng-Jeom [The Constitution and Social Equality in the Republic of Korea: Current Circumstances and Legal Issues], 4(1) HUN-BEOB-JAE-PAN-YEON-GU [JOURNAL OF CONSTITUTIONAL JUSTICE] 213-230 (2017).

[89] TOMKINS, *supra* note 35, at 64.

[90] The Preamble presents the objectives in the enactment of the Constitution, which are "to destroy all social vices and injustice," "to afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life," and "to elevate the quality of life for all citizens".

[91] The provisions in the Constitution on social rights, namely, Article 31 of the Constitution (Right to Equal Opportunity to Receive Education), Article 32 (Right to Work), Article 33 (Three Rights of Laborers), Article 34 (Right to Receive Social Guarantee (including right to live a life worthy of a human being)), Article 35 (Environmental Right), Article 36 (Family Right), etc., are the most direct constitutional grounds for the guarantee of adjustments for substantive equality or the pursuit of social equality.

[92] Article 10 of the Constitution provides that "all citizens shall be assured of

Chapter 9, Economy including Article 119, Clause 2 on economic democratization.[93] The Constitutional Court also confirms this philosophy and pronounced that the ideal for Korea as a democratic republic is to become a 'social state,' which it described as "a country that has adopted the philosophy of social justice in its Constitution; that intervenes in and interferes with social phenomena and allocates and coordinates for the formation of social orders that are fair in all areas of the economy, society, and culture; and that is obliged to provide a substantive condition where citizens can actually exercise their freedom."[94]

In order to materialize a social state, the Constitution of Korea guarantees economic, social, and cultural human rights as the constitutional rights of individuals and grants extensive power to the state to coordinate and regulate the economic order. This differs from the cases of Germany or the United States, as Germany proclaims the principle of the social state for the realization of social justice only in general provisions of its Constitution, and the United States depends entirely on society-related legislative policies through political processes, rather than constitutionalizing the authorities and obligations of the state for social equality.

In countries like Korea where social equality is provided for in the constitution as a constitutional right of the individual, fundamental social rights are understood as the "constitutional rights of a citizen who has lost negotiating power in his/her economic or social life to ask for the state to provide the minimum level of physical and institutional conditions necessary for the realization of freedom and rights, such as by providing assistance or establishing institutions."[95] With the constitutionalization of social rights, the provision of social assistance through the establishment of institutions is considered a legal right of the

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human worth and dignity and have the right to the pursuit of happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

[93] Article 119, Clause 2 provides for the state's functions under the Constitution to achieve substantive equality as it provides that

> The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power, and to democratize the economy through harmony among the economic agents.

[94] Hunbeobjaepanso [Const. Ct.], Dec. 18, 2002, 2002Hunma52 (Hunjip 14-2, 904, 909-909) (S. Kor.).

[95] Kim, *supra* note 88, at 221.

beneficiaries, rather than a favor endowed from the state, thus making the state's obligation to make active efforts more evident and providing the citizens with the legal means to exercise their rights in specific areas of life.

Under this social rights guarantee, the state should provide all citizens with 'assistance for their living' and make active efforts to secure 'social security and safety' for the socially vulnerable. Further, the state should also focus on its social coordination function, ensure that the freedom and rights of the socially privileged are not abused, and provide restrictions, for the sake of public welfare, on such social and economic freedoms that are not directly related to people's living.[96]

### *B. Realities in Korea Concerning Social Equality*

There are concerns that the widening economic gap between countries worldwide[97] poses a risk to modern constitutional democracy. In this regard, Korea is not an exception. In line with the neo-liberalism trend, as demonstrated by the financial crisis in Korea in 1998, the unequal distribution of economic wealth has intensified since the mid-1990s, with the increase of earned income slowing down, and the average income of the lower 40% income group decreasing while the average income of the top 10% increases.[98] Another chronic problem that persists in Korea's social and economic structure is the increasing income gap and discrimination among workers.[99] In fact, the income gaps among wage earners and between male and female workers in Korea are among the widest of the major OECD countries. Further, the income gap between regular workers and non-regular workers is as wide as 30-70%, and the income gap between workers in

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[96] Soo-woong Han, Hun-Beob-Hag [Constitutional Law] 294-296 (2nd ed. 2012).

[97] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Belknap Press of Harvard University Press, 2014) (2013). In this book, Piketty and Goldhammer argued that the rate of return on capital had remained higher than the rate of economic growth for a long period of time, leading to the unequal distribution of wealth as capital income exceeds labor income. They further claimed that a global system of progressive wealth taxes should be established, creating a much controversy around the world.

[98] The average income gap between the highest income class (top 0.1%) and the lowest income class (bottom 20%) further widened in 2010 compared to 1996. *See* Nak-nyeon Kim, *Han-Gug-ui So-Deug-Bul-Pyeong-Deung, 1963-2010* [*Earned-Income Inequality in Korea, 1963-2010*], 18(2) GYEONG-JE-BAL-JEON-YEON-GU [JOURNAL OF KOREAN ECONOMIC DEVELOPMENT] 151 (2012).

[99] Decile Ratios of Gross Earnings, OECD. Stat, https://stats.oecd.org/Index.aspx?DataSetCode=DEC_I (last visited May 8, 2017).

large-sized companies and small-sized companies continues to increase.[100] It appears that this economic polarization and intensifying social discrimination are giving rise to various social problems. Korea's suicide rate[101] is the highest among OECD countries, and the elderly poverty rate is also among the highest. Against this backdrop, Korea's welfare expenditure in the public sector[102] is among the lowest among OECD countries.[103]

The fact that economic and social polarization in Korea is aggravating is very disappointing given that its Constitution confirms economic, social, and cultural human rights as constitutional rights. Nevertheless, there has not been any considerable improvements in laws or legal theories that may address this situation.

Traditionally, the realization of social equality through fundamental social rights has encountered limitations. The intrinsic limitation is that it is hard to reach social consensus about the substantive level of social equality, and this lack of social consensus makes it difficult to force the legislature and the administration into taking certain actions. The extrinsic limitation is that the realization of social equality entails tensions with other parties in the reorganized legal relationships, thereby incurring costs and expenditures.[104] These limitations have been the basis for skepticism that, despite their constitutionalization, rights for social equality cannot function as specific rights of claim.[105] This

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[100] Wage Gap Index, Statistics Korea, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=2898 (last visited May 8, 2017).

[101] Suicide Rate Index for Key OECD Countries, Statistics Korea, http://www.index.go.kr/potal/stts/idxMain/selectPoSttsIdxSearch.do?idx_cd=2992&stts_cd=299202&clas_div=&idx_sys_cd=602&idx_clas_cd=1 (last visited May 8, 2017).

[102] Korean Government, Je-3-Cha Jeo-Chul-San·Go-Lyeong-Hwa Gi-Bon-Gye-Hoeg 2016-2020 [The Third Basic Plan on Addressing Low-Birth and Aging Society 2016-2020] 8, 10 (2016).

[103] Between 1990-2013, the ratio of the welfare expenditure of Korea to its GDP was merely 9.2%, compared to the average 22% of 34 OECD member nations.

[104] Kwang-seok Cheon, *Sa-Hoe-jeog Gi-Bon-Gwon-ui Non-Ui-Gu-Jo* [*Rethinking the Horizon of the Social Basic Rights*], 14 EUROPE-HUN-BEOB-YEON-GU [EUROPEAN CONSTITUTIONAL LAW REVIEW] 178-180 (2013).

[105] For instance, Hunbeobjaepanso [Const. Ct.], Dec. 18, 2002, 2002Hunma52 (Hunjip 14-2, 904, 908-909) (S. Kor.) addressed a constitutional petition regarding the introduction of low-floor buses and held that the right to live a life worthy of human beings does not provide the disabled with a specific right to mobility. *See also* Soo-woong Han, *Sa-Hoe-Bog-Ji-ui Hun-Beob-jeog Gi-Cho-lo-seo Sa-Hoe-jeog Gi-Bon-Gwon—Sa-Hoe-jeog Gi-Bon-Gwon-ui Gae-Nyeom-gwa Beob-jeog Seong-Gyeog-eul Jung-Sim-eu-lo* [*Die sozialen Grundrechte als verfassungsrechliche Grundlage des Wohlfahrtsstaates—vor allem bezüglich des Begriffs und der Rechtsnatur der sozialen Grundrechte*], 18(4) HUN-BEOB-HAG-

traditional view takes the position that the specific level and extent of fundamental social rights shall be determined democratically through political processes, and any intervention by constitutional adjudication will undermine the functional orders of democracy and the rule of law.[106]

### *C. Democratic Legitimacy of Constitutional Adjudication Regarding Socio-Economic Policies and the Required Conditions*

It cannot be denied that the realization of social equality through fundamental social rights is most likely to be achieved by the legislature through political processes and that there could be many practical limitations in relation to fiscal burdens. However, given that the realization of social equality is the basis of republican constitutional democracy, any interpretation that does not recognize fundamental social rights as legitimate rights cannot be accepted. Thus, it is necessary to explore ways to reify fundamental social rights in exceptional cases. Further, it should also be possible that such reification is achieved not only through the legislature or the administration but also through constitutional adjudication, which has the authority and the obligation to ensure that the legislature and the administration exercise their power in conformity with the Constitution. In other words, we need to explore exceptional circumstances and conditions where constitutional adjudication can actively intervene to improve the quality of constitutional democracy, rather than simply letting constitutional adjudication serve the legislature and the administration unconditionally, which preserves the gap between constitutional norms and constitutional realities.

Most importantly, it is necessary to develop a highly prospective and proactive interpretation of the Constitution, upon which we can overcome the passive approach towards social and economic policies and define the roles of active constitutional adjudication accordingly.[107] First, it is necessary to confirm that the specific and actual rights to claim for a minimum guarantee can be derived through the 'interpretation' of the Constitution itself without specific legislation. For example, we need to

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YEON-GU [CONSTITUTIONAL LAW REVIEW] 51-104 (2012).

[106] Han, *supra* note 105, at 79.

[107] Hereinafter, the references to the active interpretational approach of social rights are a summary of Kim, *supra* note 88, at 221-230.

actively embrace the interpretation of the UN Committee on Economic, Social and Cultural Rights, which, with regard to the 1997 Covenant on Economic, Social and Cultural Rights, classified the obligations of a state to guarantee social rights as the obligation to respect, the obligation to protect, and the obligation to fulfill, and stated that such obligations are not just 'obligations of conduct', but 'obligations of result,' meaning that the state must guarantee certain results.[108] The obligation to respect is the obligation not to prevent people from exercising their rights, the obligation to protect is to preclude the infringement of rights by a third party, and the obligation to fulfill is the obligation to actively take appropriate actions to realize people's rights. Constitutional adjudication should serve as a catalyst for the state's fulfillment of the obligations of result.

Second, the obligation to fulfill requires active behavior by the state. It is worth noting that the interpretation of the UN Committee on Economic, Social and Cultural Rights suggests that each right has a minimum core that cannot be infringed upon and each signatory country has the obligation to guarantee it.[109] Further, even the argument of financial limitations should be reconsidered based on the constitutional interpretation that the state has the 'obligation to guarantee the minimum core by utilizing all available resources. Even though the Constitution may not mandate that the state place the "top priority" on guaranteeing the minimum core, the state's obligation for "appropriate consideration" is recognized. The fundamental elements of individual social rights are a necessary part of this consideration. Also, this means that, despite the financial limitations, the state is obliged to utilize its available resources to the maximum extent. In particular, the state has the obligation to first utilize available resources in areas such as the supply of public goods, transportation, and infrastructure (i.e., childcare, education, and others that are necessary for the effective functioning of the basic principles of constitutional democracy such as democracy and the rule of law), which cannot be expected to be supplied stably in the

[108] For more information about this, see Sang-hie Han, *Sa-Hoe-Gwon-gwa Sa-Beob-Sim-Sa* [*Judiciability of the Economic, Social and Cultural Rights*], 39(1) GONG-BEOB-YEON-GU [PUBLIC LAW JOURNAL] 96 (2010); Joo-young Lee, *Sa-Hoe-Gwon-Gyu-Yag-ui Bal-Jeon-gwa Gug-Nae-jeog Ham-Ui* [*The Development of the International Covenant on Economic, Social and Cultural Rights and Its National Implications*], 61(2) GUG-JE-BEOB-HAG-HOE-NON-CHONG [THE KOREAN JOURNAL OF INTERNATIONAL LAW] 135-138 (2016).

[109] Han, *supra* note 108, at 96, 122; Lee, *supra* note 108, at 136.

market, as well as social security benefits, which are designed to provide basic goods and services to those who cannot afford them in the market system.[110] And should the state violate this obligation, individuals should be able to claim direct and specific rights.

Third, even though the principles of a minimum substantive guarantee and minimum core of individual fundamental rights are recognized, if the judiciary is allowed to decide the optimal level of guarantee and determine constitutionality by itself, this may lead to concerns regarding the overreaching power of the judiciary. It is still possible, however, to determine the scope of the minimum guarantee required by the Constitution by objectively and empirically evaluating the real socio-economic conditions that would enable us to do so. Then, we can recognize the rights of the people to claim a guaranteed minimum level of welfare. Accordingly, should the legislature or the administration set the contents and timing of the benefits or services in a way that makes such objective determinations completely meaningless, we should be able to find such action as exceeding their formative discretion.[111] In addition, by setting the scope of the minimum guarantee, we can also classify the legal effect or the required level of benefits by their function or value and thus take phased or differentiated approaches. Here, the guaranteed level of the specific right of claim in the essential areas of social welfare should be sufficient to ensure that the people can enjoy freedom as non-domination, engage in social relationships with others, and realize their private selves as individuals as well as public selves as citizens, rather than simply surviving.

As such, active constitutional adjudication, which aims at achieving the minimum level of a substantive guarantee of social rights, may encounter challenges over its democratic legitimacy in that it denies the formulative discretion of the legislature and the administration regarding socio-economic policies, and it goes beyond the functional limit of constitutional adjudication by ignoring the principle of the separation of powers. However, it should be understood that such control of the abuse of discretion

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[110] Kwang-seok Cheon, Korean Constitutional Law 883 (1st ed. 2017).

[111] In the aforementioned decision (Hunbeobjaepanso [Const. Ct.], May 29, 1997, 94Hunma33 (Hunjip 9-1, 543) (S. Kor.)), the Constitutional Court found that the livelihood protection standards, whose amounts were lower than the minimum cost of living, was within the range of the formative discretion of the administration. However, questions remain as to whether it conducted a practical and empirical review.

by the legislature and the administration is exercised only in exceptional cases because liberty as non-domination cannot be realized without social equality and because we have a constitutional system recognizing social rights as fundamental constitutional rights in place.[112] Constitutional democracy will develop further when constitutional adjudication can function, albeit only in exceptional cases,[113] as a controlling mechanism against political powers such as the legislature and the administration when they attempt to exercise their formulative discretion in a way that undermines social equality, which is necessary to fully realize liberty as non-domination and the fundamental social rights that materialize it.

Despite the Constitution's pursuit of a democratic welfare state, which coincides with the values of the republican constitutional democracy, the legislature and the administration are only contributing to preserving the dismal level of social welfare in Korea. Then, what can be an alternative to overcome such a dramatic gap between the constitutional ideal and constitutional reality?

One way to help create, through active constitutional interpretation, constitutional realities that suit the spirit of the Constitution, which pursues a social welfare state, is to strengthen the provisions of the Constitution, which serves as the guideline for constitutional interpretation. President Moon Jae-in's constitutional amendment bill contains provisions aimed at further expanding social rights as a means to overcome social polarization by the substantive guarantee of social rights, which has been at a stalemate in the legislative and judicial processes.[114] In particular, the bill aims to strengthen labor-related fundamental rights, which have not been sufficiently guaranteed compared to other rights. Further, it provides constitutional grounds for affirmative actions

[112] In this sense, it can be said that constitutional adjudication's function to set a limit on the value-laden controlling norms is conditional.

[113] It is noteworthy to recognize that a couple of meaningful affirmative attempts were made in the constitutional cases to extend the protective scope of the right to live a life worthy of a human being, although they were in a form of concurring opinions, and their reasoning needs further refinement. See, for example, Justice Chang-ho Ahn's concurring opinion arguing that a strict scrutiny test is required to examine discrimination provision in the field of industrial accident compensation if such compensation can be regarded as a material element of social security (Hunbeobjaepanso [Const. Ct.], Sep. 29, 2016, 2014Hunba254 (Hunjip 28-2 Sang, 316, 328-332) (S. Kor.)).

[114] The contents of President Moon Jae-in's constitutional amendment bill in relation to social and economic rights are attached as an Annex at the end of this paper.

against discrimination based on gender or disability, and stipulates in greater detail the state's obligations to protect the socially vulnerable such as women, children, adolescents, seniors, and the disabled. We may need to reify social rights in the Constitution in further detail, but it appears that we also need to secure social consensus before doing so. Still, it can be said that the stipulation of more detailed social rights in the amendment bill has consolidated the guidelines to be used in the legislative and administrative processes and court proceedings aimed at reifying fundamental social rights. Even under the existing Constitution, active constitutional adjudication has a role to play to consolidate liberty as non-domination.

## V. CONCLUSION

For the last thirty years since its inception, constitutional adjudication conducted by the Constitutional Court of Korea has made significant progress despite its relatively short history. It has resolved some of the fundamental problems involving the Constitution through specific cases, and, accordingly, it has developed and furthered meaningful legal principles. However, it cannot be said that such a remarkable advancement of constitutional adjudication has always produced positive effects in constitutional democratic arrangements.[115] Even though trial and error exist in every process, it is still necessary to review whether constitutional adjudication in Korea has exceeded the scope or limit of its democratic legitimacy or has failed to effectively fulfill its roles and functions.

The purpose of this paper is to review the necessity for securing the democratic legitimacy of constitutional adjudication and explore its required conditions, which can provide an important guide for the self-examination and development of constitutional adjudication in Korea. In this paper, I took the position that, from the functional or empirical point of view, the democratic legitimacy of constitutional adjudication is rooted in constitutional democracy. Indeed, the democratic legitimacy of constitutional adjudication can be recognized only if it can ensure

[115] Jongcheol Kim, *Upgrading Constitutionalism: The Ups and Downs of Constitutional Developments in South Korea since 2000*, *in* CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY Ch. 4 (Albert Chen ed., 2014).

that political processes secure democratic representativeness, formulate the conditions where the political demands of citizens can be faithfully responded to, and contribute to the human rights of the socially vulnerable, which the rule of the majority may neglect or ignore. However, it should be understood that these are exceptional and limited cases and can be realized only under special conditions. Unlike political processes, constitutional adjudication, in harmony with constitutional democracy, should be conducted in a self-controlled way while maintaining the rationality required for trials. The organization responsible for constitutional adjudication should be organized in a democratic way so that social diversity can be reflected, thereby complementing the political review processes. Further, the results of constitutional adjudication should be open to public discussion so that the people may challenge these outcomes through political processes.

Such a function of constitutional adjudication can be theoretically supported by the republican reformulation of constitutional democracy. If we, from the perspective of republican political philosophy, restructure constitutional democracy as centered on the sovereign people, the separation of powers, and the principle of checks and balances, constitutional adjudication will have the space to play certain roles in materializing a democratic republic where the public good of civic autonomy and substantive equality can be realized. In particular, constitutional adjudication can be an effective means to guarantee the realization of contestatory democracy, which republicanism presented as an ideal form of democracy to realize liberty as non-domination.

As discussed, I believe that the structure of the Constitution of Korea is one of the most suitable for this republican interpretation. Also, in this paper, I reviewed the democratic legitimacy of constitutional adjudication against the unique backdrop and context of Korea, focusing on the political party system and social and economic policies. This is a self-imposed attempt to demonstrate that the democratic legitimacy of constitutional adjudication can still be recognized even from the republican perspective, which has remained skeptical of it, and also to review the possibility of constitutional adjudication of the political party system and social and economic policies, which may not be readily harmonized with each other from the republican perspective, against the backdrop of Korea's special

conditions.[116]

This paper attempted to identify the conditions under which active constitutional adjudication is needed in constitutional democracy, albeit in exceptional cases, by reviewing the political system and social and economic policies of Korea. It is up to the reader to evaluate how convincing these arguments are. Further, it is not certain whether these conditions can apply to countries other than Korea. As noted earlier, the Public Official Election Act and the Political Parties Act of Korea have been unable to effectively guarantee political freedom, which is essential in a democratic republic, and provide for an election system for representative organization that has failed to fully secure democratic representativeness. Suppose the institutional and cultural environments of a country are such that representative organizations have not secured sufficient legitimacy and the political freedom of the socially vulnerable is suppressed. In that case, it can be said that there exists a minimum condition for active constitutional adjudication, which may serve as a means to control the discretion of the legislature and the administration through the standards of constitutional values.

[116] As this paper focuses on constitutional adjudication of the political party system and social and economic policies, it does not explore the universal conditions that may necessitate active constitutional adjudication or other special conditions in Korea. For institutional or cultural elements including the ideology of the political society that spread during democratization, the fragmentation of powers, and the changes in the understanding of the roles and rights following power fragmentation within the judiciary, see Kim & Park, *supra* note 19, at 44-48.

Table 2: Provisions on Social Rights in President Moon's Constitutional Amendment Bill

| Current | Amendment Bill |
|---|---|
| Article 11 ① All **citizens** shall be equal before the law, and there shall be no discrimination across all areas of political, economic, social or cultural life on account of sex, religion, or social status. | Article 11 ① All **people** shall be equal before the law, and there shall be no discrimination across all areas of political, economic, social, or cultural life on account of sex, religion, **disability, age, race, region,** or social status. |
| <Newly added> | **② The state should make efforts to address discrimination based on sex, disability, etc. and to realize** substantive **equality.** |
| ② No privileged class shall be recognized or ever established in any form. | ③ No privileged class shall be recognized or ever established in any form. |
| ③The awarding of distinctions of honor such as decorations shall be effective only for the recipients, and no privileges shall ensue therefrom. | ④ The awarding of distinctions of honor including decorations shall be effective only for the recipients, and no privileges shall ensue therefrom. |
| Article 31 ① All citizens shall have an equal right to receive an education corresponding to their **abilities**. | Article 32 ① All citizens shall have an equal right to receive an education corresponding to their **abilities and aptitude**. |
| ② All citizens who have sons or daughters to support shall be responsible at least for their elementary education and other education as provided by laws. | ② All citizens who have sons, daughters, or **children** to support shall be responsible at least for their elementary education and other education as provided by laws. |
| ③ Compulsory education shall be free of charge. | ③ Compulsory education shall be free of charge. |
| ④ The independence, professionalism, and political impartiality of education and the **autonomy of universities** shall be guaranteed under the conditions prescribed by laws. | ④ The independence, professionalism, and political impartiality of education shall be guaranteed under the conditions prescribed by laws. |
| ⑤ The state shall promote lifelong education. | ⑤ The state shall promote lifelong education. |
| ⑥ Fundamental matters pertaining to the educational system, including in-school and | ⑥ Fundamental matters pertaining to the educational system, including in-school and |

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| lifelong education, administration, finance, and the status of teachers, shall be determined by laws. | lifelong education, administration, finance, and the status of teachers, shall be determined by laws. |
| Article 32 ① All citizens shall have the **right of labor**. The state shall endeavor to promote the employment of workers and guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions prescribed by laws. | Article 33 ① All citizens shall have the **right to work**. The state **shall implement policies** to **stabilize** and promote employment. |
| <Newly Added> | ② The state shall endeavor to guarantee appropriate wages and shall implement the minimum wage system in accordance with laws. |
| <Newly Added> | **③ The state shall endeavor to ensure that the same level of wages shall be paid for labor of the same value.** |
| ② All citizens shall have the duty to work. The state shall prescribe by laws the extent and conditions of the duty to work in conformity with democratic principles. | **<Deleted>** |
| ③ **Standards of working conditions** shall be determined by laws in such a way as to guarantee human dignity. | ④ **Labor conditions shall be determined by the employer and the employee on equal footing and with free will**, provided that the standards of labor conditions shall be prescribed by laws in such a way as to guarantee human dignity. |
| **④ Special protection shall be accorded to working women, and they shall not be subject to unjust discrimination in terms of employment, wages, and working conditions.** | **⑤ All citizens shall not be unfairly discriminated against in employment, wages, and other labor conditions due to pregnancy, childbirth, child nurturing, etc. To this end, the state shall implement policies to protect women's labor.** |
| ⑤ Special protection shall be accorded to working children. | ⑥ Special protection shall be accorded to working children. |
| ⑥ The opportunity to work shall be accorded preferentially, under the conditions prescribed by laws, to those who have given distinguished service to the state, wounded veterans and police officers, and members | ⑦ The opportunity to work shall be accorded preferentially, under the conditions prescribed by laws, to those who have given distinguished service to the state, wounded veterans, and police officers, and members of |

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| of the bereaved families of military service members and police officers killed in action. | the bereaved families of military service members, police officers killed in action, and **people who died in rescuing others.** |
| <Newly added> | **⑧ The state shall implement policies to ensure that all citizens can find a balance between work and life.** |
| Article 33 ① To enhance working conditions, workers shall have the right to independent association, collective bargaining, and collective action. | Article 34 ① Workers shall have the right to independent association and collective bargaining. |
| <Newly added> | ② Workers shall have the right to collective action **for the improvement of labor conditions and the protection of their rights and interests.** |
| ② Only those **public officials** who are designated by laws shall have the right to association, collective bargaining. and collective action. | ③ The right to association, collective bargaining, and collective action of **public officials prescribed by laws, such as incumbent military officers, may be either restricted or denied under the conditions prescribed by laws.** |
| ③ The right to collective action by workers employed in important defense industries as prescribed by laws may be either restricted or denied under the conditions prescribed by laws. | ④ The right to collective action by workers employed in important defense industries as prescribed by laws may be either restricted or denied under the conditions prescribed by laws **only when it is necessary.** |
| Article 34 ① All citizens shall be entitled to a life worthy of human beings. | Article 35 ① All citizens shall be entitled to a life worthy of human beings. |
| ② **The state shall have the duty to endeavor to promote social security and welfare.** | ② **All citizens shall have the right to social security in a way that they can maintain an appropriate quality of life free from various social dangers such as disability, disease, aging, unemployment, and poverty.** |
| ③ **The state shall endeavor to promote the welfare and rights of women.** | ③ **All citizens shall have the right to the state's assistance with respect to pregnancy, childbirth, and child nurturing.** |
| ④ The state shall have the duty to implement policies for enhancing the welfare of senior citizens and the young. | **<Deleted>** |

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| ⑤ Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age, or other reasons shall be protected by the state under the conditions prescribed by laws. | **<Deleted>** |
| ⑥ The state shall endeavor to prevent disasters and to protect citizens from harm therefrom. | **<Deleted>** |
| <Newly added> | **④ All citizens shall have the right to live a pleasant and secure residential life.** |
| <Newly added> | **⑤ All citizens shall have the right to live a healthy life. The state shall endeavor to prevent disease and to improve health and medical institutions. Necessary matters shall be prescribed by laws.** |
| <Newly added> | Article 36 **① Children and adolescents have the right to receive respect and protection as independent individuals.** |
| <Newly added> | **② The elderly shall have the right to live a dignified life and participate in political, economic, social and cultural life.** |
| <Newly added> | **③ The disabled shall have the right to live a dignified and independent life and participate in all areas with equal opportunity.** |
| <Newly added> | Article 37 ① **All Citizens shall have the right to live safely.** |
| <Newly added> | ② The state shall prevent disasters and protect **people** from danger. |
| Article 35 ① All citizens shall have the right to a healthy and pleasant environment, and the state and all citizens **shall endeavor to protect the environment**. | Article 38 ① All citizens shall have the right to a healthy and pleasant environment. Specific details shall be prescribed by laws. |
| ② The **substance and the exercise of the environmental right** shall be determined by the related Act. | ② The state and the citizens **shall protect the environment in a way that sustainable development is possible.** |
| ③ **The state shall endeavor to ensure** | |

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| **comfortable housing for all citizens through housing development policies, etc.** | |
| <Newly added> | ③ The state shall implement policies to protect animals. |
| Article 36 ① Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the state shall do everything in its power to achieve that goal. | Article 39 Marriage and family life shall be entered into and sustained based on individual dignity and equality of the sexes, and the state shall do everything in its power to achieve that goal. |
| **② The state shall endeavor to protect motherhood.** | |
| **③ The health of all citizens shall be protected by the state.** | |

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