ISSN 2093-3754

YONSEI LAW JOURNAL

Vol. 10, 1 & 2, February 2020

ARTICLES

INSTITUTE FOR LEGAL STUDIES, YONSEI UNIVERSITY

YONSEI LAW JOURNAL

VOL. 10, 1 & 2, FEBRUARY 2020

BOARD OF EDITORS

YONSEI LAW JOURNAL

VOL. 10, 1 & 2, FEBRUARY 2020

BOARD OF EDITORS

YONSEI LAW JOURNAL

VOL. 10, 1 & 2, FEBRUARY 2020

EDITORIAL POLICY

YONSEI LAW JOURNAL

The Institute for Legal Studies of Yonsei University publishes the Yonsei Law Journal (YLJ) to provide a significant and emerging forum for the discussion of pressing legal issues by bringing together a diverse group of professors, judges, legal professionals, and law students. All articles published in the YLJ are accessible on Westlaw and HeinOnline.

SUBMISSIONS

The manuscript should be submitted electronically in Microsoft Word format. The YLJ strongly prefers manuscripts that do not exceed 12,000 words in length, including the main text and footnotes. The YLJ will not publish articles exceeding this length except in extraordinary circumstances. The manuscript must be double-spaced and written in Times New Roman, 11 point font. All submissions should include keywords and an abstract that provides the reader with a summary of the content of the manuscript. A three- to four-sentence biography of the author is also required.

Citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20th ed.). The author is expected to provide a complete citation to every fact, opinion, statement, and quotation that is not of his/her original idea. While there is no specific timeframe for submitting manuscripts, the YLJ strives to meet its publication deadlines. Manuscripts should be submitted via email to: yslj@yonsei.ac.kr

YONSEI LAW JOURNAL

VOL. 10, 1 & 2, FEBRUARY 2020

EDITORIAL POLICY

REVIEW PROCESS

The YLJ carefully reviews all manuscripts that it receives. The Editorial Board conducts a formal evaluation and determines whether an anonymous outside review is necessary. Outcomes of the review are divided into four categories: acceptance without revision, acceptance with minor revisions, resubmit after revisions, and rejection. Once a manuscript is accepted for publication, the author shall submit a final draft that incorporates required revisions and complies with the editing rules of the YLJ.

YONSEI LAW JOURNAL

VOL. 10, 1 & 2, FEBRUARY 2020

CONTENTS

ARTICLES

YONSEI LAW JOURNAL

VOL. 10, 1 & 2, FEBRUARY 2020

ARTICLES

CONFIRMATION OF PARTIES CONCERNED WITH A PATIENT'S MEDICAL CARE AGREEMENT: THIRD PARTIES' REQUESTS FOR MEDICAL CARE

Dongjin Park[*]

ABSTRACT

Whether the request for treatment by a third party constitutes a contract or merely a management of affairs depends on the general principle of interpreting intent. Even if a third party requests treatment for another person, this does not necessarily mean that this is a contractual obligation for remuneration based on the treatment. The request for treatment of a third party does not constitute an application, nor does it result in a legal transaction between the treatment provider and the treated person. If the request for treatment by the third party does not constitute a legal transaction, it is a treatment without legal obligation. As a result, management of affairs is opened for the treated person. If the request for treatment is interpreted as a declaration, this is a declaration in favor of third parties. Or, the treatment provider may have signed a treatment contract as the representative of the patient. If the contractual partner knows or should have known that he or she is a representative, the act of representation is effective.

[*] Professor of Law, School of Law, Yonsei University.
E-mail: djpark@yonsei.ac.kr.

I. INTRODUCTION

From a civil law point of view, the controversial issues in medical care are the medical care provider's responsibility for the damages inflicted on the patient due to medical care and the burden of proof. However, it is also important to determine the party bearing the cost incurred from medical care and the legal principles. According to Article 15 of Korea's Medical Service Act,[1] the medical person may not refuse to render his/her service without any justifiable reason. Namely, the medical person should render his/her medical service without considering whether the medical cost is high or low and whether he/she could recoup the medical expenses. Hence, in order to ensure that medical professionalism is not affected by financial considerations, it is essential to establish clear legal theories about the warranty of medical costs incurred by proper medical service.

Usually, when the patient entrusts medical care[2] to a doctor,[3] and, thereby, the doctor agrees to the medical care, a medical service agreement[4] would be made; and, thereupon, the cost incurred in the process of the medical care and payment for it would be borne by the patient. Here, the medical services would

---

[1] Ui-Lyo-Beob [Medical Service Act], Act No. 221, Dec. 25, 1951, *amended by* Act No. 14438, Dec. 20, 2016, art. 15, § 1 (S. Kor.) [Medical Service Act]: Medical personnel or a founder of a medical institution may not, upon receiving a request for medical treatment or assistance in childbirth, refuse to render his/her service without any justifiable ground.

[2] The concept of medical care is not defined in the Medical Service Act but confirmed through judicial precedents. Medical care may well be categorized into (1) prevention and treatment of diseases and (2) the behaviors that may cause harm if not done by medical personnel. The former may well include diagnosis, examination, prescription, medication, or surgery. Supreme Court [S.Ct.], 2005Do4102, Aug. 19, 2005 (S. Kor.).

[3] If the doctor works for a hospital or other medical institution, the operator of the hospital or institution would be a party to the medical agreement.

[4] The agreement between the parties concerned with a medical service is "a medical service agreement" or "a medical care agreement." For example, the draft amendment of the Civil Act in 2013 used the terminology "medical service agreement." *See* Soogon Park, *Ui-Lyo-Gye-Yag-ui Min-Beob-Pyeon-Ib-gwa Gwa-Je* [*Incorporation of the Medical Service Agreement into Civil Act and the Challenges thereof*], 60 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 194 (2012). In contrast, the Medical Service Agreement incorporated into typical agreements under the German Civil Act, as of February 20, 2013, is specified throughout eight paragraphs from § 630a to § 630h. (BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 630a - § 630h, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.) [hereinafter BGB]). Here, the agreement is called "Behandlungsvertrag." This terminology may be translated into "medical care agreement" rather than "medical service agreement."

be equated with fulfilling the obligation according to the medical care agreement. For such medical care, the patient should cooperate with the doctor while paying him or her for services. However, the medical care agreement is not always made by the patient. For example, if a third party asks the doctor to treat a person devoid of mental capacity, the person asking for medical care is different from the person to be treated, and, so, the patient does not make the agreement.

Here, if the request for medical care is a manifestation of an intention or an offer of agreement, the medical care agreement would be an agreement for a third party. If the person treated or the patient is not considered a party to the medical care agreement, the patient would not bear the cost and payment for treatment. However, if a third party has asked for medical care, the person treated might be a party to the medical care agreement. In such a case, the person asking for medical care is regarded as an agent; and, thus, the person treated would be a part of the medical care agreement.

In addition, there might be cases where a third party's request for medical care could not be interpreted as an expression of an intention or offer of agreement. For example, a passerby finds an unconscious person on the street and, therefore, asks for medical care for the person. In such a case, we may not equate the third party's request with the expression of an intention or an offer of agreement. Namely, it could not well be interpreted that the third party or the passerby intended to be a party to the medical care agreement and bear medical costs on behalf of a complete stranger. Then, the doctor's medical care or other services would be provided without any medical care agreement or other contractual obligations. In such a case, the doctor may well ask for payment for the medical service according to the principle of management of affairs or unjust enrichment.

In relation to determining the person who should bear the medical costs, it is also necessary to examine whether a medical care agreement has been made through a request for medical care. If a medical care agreement has been deemed made, it would be a natural corollary to examine who should bear the cost. Such examinations would be significant when the person asking for medical care is different from the person treated. If no medical care agreement is deemed made, the doctor may seek payment according to the management affairs and unjust enrichment doctrines. Here, it is necessary to examine who would bear the

cost of managing the affairs and pay for the medical costs. We can well determine in various ways whether a medical care agreement has been made and who would bear the medical costs; but, here, we discuss the behaviors associated with asking for medical care.

II. THE PARTY CONCERNED WITH THE PATIENT'S MEDICAL CARE AGREEMENT WHEN THE PATIENT REQUESTS MEDICAL CARE

It is well agreed that a patient with the capacity to act can ask the doctor to provide him or her with medical care; and, in this case, the patient would be a party to the medical care agreement. However, the patient would not bear the obligation in the medical care agreement if the patient is not able to understand his/her intentions. Since the offer of a medical care agreement is still a juristic act, the person offering the agreement should have the capacity to understand his/her intentions. If the patient's capacity to act is limited, the following issues remain.

A. In Case the Patient is a Minor

When the patient is a minor, there are various views. First, there is a view that, when the minor has the capacity to understand his/her intentions, he or she cannot cancel a medical care agreement made independently except for cosmetic surgery, abortion, artificial fertilization, sterilization, and similar types of surgery.[5] The ground is that such agreements made by the minor would benefit his or her life—they are very personal—and, therefore, others' intervention should be excluded. However, some scholars oppose such logic because the medical care agreement should not be treated exceptionally, and, therefore, such an agreement can also be canceled.[6] They argue that, even if the agreement were canceled after the medical care has been provided,

[5] Heetae Suk, *Ui-Lyo-Gwa-O* [*Medical Malpractice*]*, in* Ju-Seog-Min-Beob: Chae-Gwon-Gag-Chig (5) [Annotated Civil Act: Details of Obligations (5)] 257 (Joonsu Park ed., 1999).

[6] Chunsoo Kim, *Ui-Lyo-Gye-Yag* [*Medical Care Agreement*], 15 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 155 (1997); Minjoong Kim, *Jin-Lyo-Gye-Yag: Pan-Lye-lo Hyeong-Seong-doen Won-Chig-e-seo Jeon-Hyeong-Gye-Yag-eu-lo* [*Medical Care Agreement: From the Principles Established through the Judicial Precedents to the Typical Agreement*], 28 Sa-Beob [JURIS] 41, 59 (2014).

the doctor would not suffer an extreme loss. Even if the medical care agreement should be canceled, the doctor still may demand that the minor pay according to unjust enrichment or management of affairs.

When a minor, who is capable of understanding his or her intentions, is accompanied by a parent or legal guardian and asks for medical care, the views are divided. First, it is argued that a medical care agreement has been made directly between the doctor and the minor patient.[7] Second, there is a view that the minor patient has made an agreement with the doctor through the parent or guardian.[8] Third, this legal agent would be a stipulator, the doctor a promissor, and the minor a third party. Thus, the medical care agreement would be an agreement for the benefit of a third person.[9] Another view is that the minor patient makes an agreement with the doctor by getting the legal agent's consent.

In case the minor, who has no capacity to understand his or her intention, is accompanied by a legal agent, views split regarding who should be a party to the medical care agreement.[10] There is a view that the medical care agreement would be directly between the minor patient and doctor.[11] The theory of the representative act argues that the legal representative makes the agreement with the doctor on behalf of the minor; and, therefore, the legal effects become vested in the minor.[12] Another view is that the legal agent has made a medical care agreement with the doctor for the third-party minor.[13] In particular, the view that the minor patient has made a medical care agreement directly with the doctor argues that the legal agent accompanying the minor patient should bear joint or joint and surety obligations for the medical

---

[7] Suk, *supra* note 5, at 257.

[8] MINORU OTANI, I RYŌ KŌ I TO HŌ (醫療行爲と法) [MEDICAL ACTS AND LAW] 67 (1980); KIMINORU KADOWA, I RYŌ KAGO MINJI SEKI NIN RON (醫療過誤民事責任論) [CIVIL RESPONSIBILITY FOR THE MEDICAL MISTAKE] 179 (1979).

[9] HIGASHI TAKANAKA, IJI HŌ GAISETSU (醫事法概說) [INTRODUCTION TO THE MEDICAL CARE ACT] 54 (1981).

[10] Regarding the theories and their criticism, see Sigeto Yonemura, *Iji Hō Kōgi: Ippan I ryō Kō I Hō(1): I ryō Kei yaku* (醫事法講義: 一般醫療行爲法(1): 醫療契約) [*Lecture on the Medical Care Act: General Medical Care Act (1): Medical Care Agreement*], 694 HŌ GAKU SEMINA (法學セミナ-) [LAW SEMINAR 99] (2012).

[11] AKIRA AJAMI & YOSHIO NAKAI, I RYŌ KAGO HŌ NYŪMON (醫療過誤法入門) [INTRODUCTION TO MEDICAL MISTAKE ACT] 52 (1979).

[12] OTANI, *supra* note 8, at 67.

[13] Suk, *supra* note 5, at 257; Yonemura, *supra* note 10, at 100.

expenses, in case the minor is financially insolvent.[14]

To be more specific, even if a minor is capable of understanding his or her intentions, the minor's capacity to act is limited, which means that the minor alone cannot make an effective agreement with others and may cancel the agreement after the medical care. If so, the law's intent to protect minors would be well maintained. Furthermore, even if the doctor's intervention should follow a medical care agreement involving the minor's life, physical, or other health, the minor would be appropriately protected, although he or she can cancel the agreement. If the minor is allowed to cancel the agreement, it might be feared that the doctor could not be compensated for the medical service. However, since the doctor's medical service can be compensated according to unjust enrichment or management of affairs, the minor's right to cancel would not be prohibited.

If a minor capable of understanding his or her intention is accompanied by a legal agent, it may be interpreted that the minor has made the medical care agreement by getting consent from the agent. Otherwise, the agent has made the agreement with the doctor on behalf of the minor. In principle, such a case should be interpreted so that the legal agent has made the agreement with the doctor on behalf of the third-party minor. Actually, in most cases, minors are less capable of understanding their intentions and not very financially able, so they may not intend to be directly responsible for the medical care cost. If the agent should visit the doctor with a minor not capable of understanding his or her intention to ask for the medical care, the minor would not intend to be a party to the agreement because a minor not capable of understanding his/her intention cannot be a party to a juristic act.

B. The Adult Ward or Limited Ward Patient

Even after the commencement of an adult guardianship, the adult ward can decide on personal matters when capable of understanding his or her intentions.[15] Usually, medical treatment

---

[14] Suk, *supra* note 5, at 257.

[15] Min-Beob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 14965, Oct. 31, 2017, art 947-2, s. 1-5 (S. Kor.) [Civil Act]. Decisions on Personal Matters of Adult Wards: (1) An adult ward shall make a decision independently on his/her personal matters insofar as the ward's conditions permit. (2) Where an adult guardian intends to isolate the adult ward in a psychiatric hospital or any other place to undergo medical or other treatment, the guardian shall obtain permission from the Family Court. (3) Where an adult ward is unable to give

or other care is included in personal matters. So, as long as the adult ward can agree to any juristic act affecting himself or herself, the adult guardian should get the ward's consent. However, while the adult ward's ability to independently decide on a medical treatment does mean that he or she can decide on the selection of a doctor, it does not mean the ward can independently make a medical care agreement obligating him or her to payment for the medical costs.[16] Moreover, the adult ward's consent is distinguished from the execution of the medical care agreement. Namely, from the perspective of the Civil Act, the agreement is a kind of juristic act creating rights and obligations between the patient and doctor, but the consent to medical care is an authorization for medical intervention as the fulfillment of the agreement's obligations.[17] Hence, in terms of executing the agreement, the adult award's opinions should be respected according to Article 947[18] of the Civil Act, while the agreement should be executed by the adult guardian. In short, the ward cannot effectively execute the agreement.

If the agreement were executed by the adult guardian, the

---

consent to the medical treatment that harms his/her body, the adult guardian may give consent on behalf of the ward. (4) In cases falling under paragraph (3), if any danger, such as the possibility of death from the direct results of the medical treatment or the risk of causing a substantial disability, exists, the guardian shall obtain permission from the family court, provided that the guardian may make an *ex post facto* request for permission if the delay in medical treatment is likely to endanger the ward's life or cause severe mental and physical disability.

[16] *See* MINISTRY OF JUSTICE, 2013NYEON GAE-JEONG-MIN-BEOB-HAE-SEOL [INTERPRETATION OF THE AMENDED CIVIL ACT IN 2013] 112 (2013). The adult award can decide on the selection of a rental house as a freedom of residence. However, whether a rental contract should be made shall be decided by the asset manager and legal representative. *See also* Cheolung Je, *Yo-Bo-Ho-Seong-In-ui In-Gwon-Jon-Jung-ui Gwan-Jeom-e-seo Bon Sae-Lo-un Seong-Nyeon-Hu-Gyeon-Je-Do [The Main Features, Drawbacks of the New Korean Guardianship and Some Proposals for its Improvement: From the Perspective of the Human Rights of the Mentally Incapacitated Adult*], 56 MIN-SA-BEOB-HAG [THE KOREAN JOURNAL OF CIVIL LAW] 277, 287 (2011).

[17] Cheonsoo Kim, *Seong-Nyeon-Hu-Gyeon-gwa Ui-Lyo-Haeng-Wi-ui Gyeol-Jeong [Adult Guardianship and Decision on Medical Care*], 21 HAN-GUG-GA-JOG-BEOB-HAG-HOE [THE KOREAN SOCIETY OF FAMILY LAW] 1, 9 (2007).

[18] Civil Act, *supra* note 15, at art. 947 (Welfare of Adult Wards and Respect of Opinions). In managing the property and protecting the personal matters of an adult ward, the adult guardian shall manage such affairs in a manner conforming to the ward's welfare considering diverse circumstances. In such cases, the adult guardian shall respect the opinion of the adult ward unless it conflicts with the ward's welfare.

effects of the agreement—whether the adult award or guardian would be a party to the agreement—would differ depending on the interpretation of the guardian's request for medical care.[19] If the agreement is interpreted as "the adult guardian has requested the medical care as a party," the agreement would be a contract for a third party. But, if the agreement is interpreted as "the adult guardian has executed the agreement as an agent," the adult ward would be a party to the agreement. There may well be a case where the patient is a limited ward. Then, since the limited ward can practice a juristic act independently and effectively unless the act is reserved for consent, he or she may well make a medical care agreement with the doctor. If the juristic acts reserved for consent include the execution of a medical care agreement, the limited ward can make the agreement by getting consent from the guardian or the guardian may execute the agreement as a legal agent. In these cases, the limited ward would be a party to the agreement. Where the medical care agreement is made via representation, it would correspond to a juristic act about personal matters; and, therefore, the limited ward's opinions should be respected as with an adult ward.[20]

III. THE PARTIES CONCERNED WITH THE PATIENT'S MEDICAL CARE AGREEMENT WHEN A THIRD PARTY REQUESTS MEDICAL CARE ON THE PATIENT'S BEHALF

When the patient through a third party asks for medical care, it is necessary to examine the case more carefully in terms of the medical care agreement. First, if the third party's request for medical care is not a declaration of intention for a juristic effect, the doctor's medical care is not a fulfillment of a contractual obligation. Namely, the doctor treated the patient not out of a legal obligation; and, thus, the legal theory of management of affairs would apply. For example, if a passer-by has found an insensible person on the street and takes him or her to the hospital for medical care, the passer-by's request for medical care would not be interpreted as an offer of medical agreement. Here, the request for medical care is just asking for a medical care favor, where the

[19] For details of interpretations, see, *infra*, Section III.

[20] Civil Act, *supra* note 15, at art. 959-6 (Limited Guardianship Affairs) and art. 947 ("shall apply *mutatis mutandis* to limited guardianship affairs").

passer-by does not want to be legally burdened with the medical costs.

However, if the request for medical care should be interpreted as a declaration of an offer of agreement, the doctor and the third party would be obligated in a medical care contract. The doctor would provide the medical care to the patient as an obligation, while the third party would be obligated to pay for the care. In case the third party's request for medical care is interpreted as an offer of agreement, there exist two types: 1) The third-party declares his intention of offering a medical care agreement as an agent of the patient (or a dependent), or 2) The third-party declares his or her intention as a party to the agreement. However, if a wife asks for medical care on behalf of her insensible husband, she would be responsible for the medical cost jointly with her husband.[21]

In order to judge where the third party's request for medical care belongs, it is necessary to judge the factual relations or interpret the declared intention. The cases would be divided into the case where the third party's request for medical care can be interpreted as an offer of agreement and the case where it cannot be so interpreted.

A. Third Party's Request Interpreted as an Offer of Agreement

1. Request for Medical Care Interpreted as Agency

As in the case of an agency, the juristic actor and actor to whom the effects of the juristic act revert may be different. In case of a medical care agreement, if a third party other than the patient has declared an intention to offer an agreement, the declaration's effects would differ depending on whether the declarant wanted the legal effects of his or her act to revert to himself or herself or to the patient. In the former case, the effect would be an agreement for a third party, while, in the latter case, the effect would be an agency. The typical examples of the agreement for a third party are an employer making an agreement for a medical check-up on behalf of potential employees or a life insurance company asking potential subscribers to check their health at a designated

[21] Civil Act, *supra* note 15, at art. 827 (Right of Representation between Husband and Wife for Home Affairs).

hospital.[22] If a person has asked for medical care as an agent, the effects of his or her juristic act will revert to the principal.

It can be imagined that a person would make an agreement for medical care as an agent of a patient or a dependent. For example, if the person is a patient's spouse, it is deemed that an agreement for medical care has been made between the doctor and the spouse as a representative of the household affairs.[23] Similarly, if a sibling or a lineal relation asks for medical care on behalf of the patient, he or she is deemed to have made an agreement for medical care as an agent. In case a nursing home has asked a doctor to care for its elderly ward, it is deemed that the facility has made an agreement for medical care as an agent of the ward if the ward has the capacity to understand his or her intention and the nursing home has been authorized to act an agent. Likewise, if a hotel guest asked the hotel owner to call a doctor and a doctor comes to the hotel, the hotel owner may have made an agreement for medical care as an agent of the guest.[24]

To be an effective agency, a declaration of a juristic act for a third party is made when the juristic actor has a right of representation. If the person who has asked for medical care with the intention of representing the patient has not been authorized, the juristic act would be an unauthorized agency. Here, the doctor may ask the unauthorized person to fulfill the obligation or compensate for the damage caused.[25] However, in such a case, an agency could be affirmed. For example, when the hotel owner called a doctor to take care of an insensible guest without declaring an agency, he would be an unauthorized agent. However, if the patient should recover consciousness and, thereby, confirm the medical care agreement, the effects of the agreement would revert to the patient. Conversely, if the patient should not confirm the medical care agreement, the hotel owner would be obligated to pay for the medical cost. The owner could ask the patient for reimbursement according to the principle of management of

---

[22] Suk, *supra* note 5, at 256.

[23] Minjoong Kim, *Ui-Lyo-Gye-Yag-ui Dang-Sa-Ja-lo-seo-ui Hwan-Ja-wa Gwan-Lyeon-Han Mun-Je-e dae-han Geom-To* [*A Review of the Problems Related to the Patient as a Party to the Medical Care Agreement*], 10 THE KOREAN SOCIETY OF LAW AND MEDICINE 253, 265 (2009).

[24] ADOLF LAUFS & BERND-RÜDIGER KERN, HANDBUCH DES ARZTRECHTS [HANDBOOK OF MEDICAL LAW] § 39, para. 12 (4th ed. 2010).

[25] Civil Act, *supra* note 15, at art. 135, s. 1 (S. Kor.).

affairs.[26]

a. Third-Party Requesting Medical Care in His or Her Name

If an agency should have a juristic effect, the declaration of agency for the principal should come first. If a person declares himself or herself a party to the agreement, the effects should revert to the person even when he or she had an intention to represent a third party.[27] As discussed above, if a hotel owner were asked to call a doctor but did not declare agency, the owner would be a party to the medical care agreement.[28] Then, an agreement for the third party would be established.

Whether there was an intention of representation or not shall be judged depending on whether there was a declaration of agency. The declaration is a clear expression of the intention to revert the effects of the juristic act to a third person. However, without the declaration, the juristic act would be regarded as an agency if the other party was aware or should have been aware that the agreement was made on behalf of the principal.[29] Since the declaration means that an intention of representation was expressed,[30] the same juristic effects would exist if the other party was or should have been aware of such intention of representation. For example, when a third party asking for medical care on behalf of the patient does not declare agency, the effects of the juristic act revert to the patient regardless of authorization. If the third party did not want to revert the juristic effect to himself or herself, he or she had the intention of agency, and the other party was aware or should have been aware of such facts.

All-in-all, in case the person asking for medical care is the patient's friend, relative, nursing home, or hotel owner, the normative interpretation of his or her juristic act would not lead to the conclusion that he or she would be willing to assume the legal obligation for the medical cost. Rather, his or her intention should

---

[26] WILHELM WEIMAR, ARZT·KRANKENHAUS·PATIENT [DOCTOR·HOSPITAL·PATIENT] 34 (2nd ed. 1976).

[27] Civil Act, *supra* note 15, at art. 115 (first sentence) (S. Kor.). *See* ChanjuPark, *Hyeon-Myeong-Ju-Ui* [*Doctrine of Principal Disclosure*], 31 OE-BEOB-NON-JIB [HUFS LAW REVIEW] 551, 551 (2008).

[28] LAUFS & KERN, *supra* note 24, § 39, para. 13; WEIMAR, *supra* note 26, at 33.

[29] Civil Act, *supra* note 15, at art. 115 (second sentence) (S. Kor.).

[30] YUNJIG GWAG & JAEHYUNG KIM, MIN-BEOB-CHONG-CHIG [GENERAL PROVISIONS OF CIVIL ACT] 353 (2013).

be interpreted as an agency.[31] Such a theory would well be applied through Article 114 of the Korea's Civil Act.

By the way, if an agency should be admitted, the right of representation should exist so that the legal effects revert to the principal. Admitting an agency only means an establishment of the agency; it does not mean the agency is effective. Namely, in order for an agency to be effective for the principal, there should exist the right of representation in addition to the declaration.[32] When an agency has been established within the scope of a right of representation, the effects of the agency will revert to the principal. A declaration would be a criterion for judgment of agency. In other cases, the declaration is not an absolute condition for the effects of an agency to revert to the principal. The right of representation should be given by the principal or by law. If an agency is not authorized, it would be unauthorized. Regardless, even if there were neither a right of representation nor declaration, the effects of agency would be admitted if the other party was or should have been aware of the agency.[33]

b. The Agent's Authority is not a Requisite for Agency

If an agency has been established, an agent's authority should exist for its effects to revert to the principal. Thus, for the effects of the medical care agreement executed through the agent to revert to the principal, an agent's authority should exist through the principal's authorization or a legal prescription. Then, in case the patient is not capable of understanding his or her intentions, it would be impossible for the patient to grant an agent the right to act, and the effect of a third party's agency would not revert to the principal even if the other party or the doctor should think the

---

[31] Such an interpretation would be a result of the normative interpretation confirming the meaning of the agreement from the other party's perspective. However, any objective interpretation and distinction between the two would be difficult, having no practical advantages. Jinsu Yune, *Gye-Yag-Hae-Seog-ui Bang-Beob-e gwan-han Gug-Je-Jeog Dong-Hyang-Gwa Han-Gug-Beob* [*International Trend and Korean Law about Methods of Interpreting the Contracts*], 12 BI-GYO-SA-BEOB [THE JOURNAL OF COMPARATIVE PRIVATE LAW] 27, 53 (2005).

[32] If the other party was or should have been aware of the agency, the juristic act would be treated as declared. Civil Act, *supra* note 15, at art. 115.

[33] Here, it should not be interpreted in such a way that an implicit declaration existed. Even if the other party was or should have been aware that the juristic act as an agency, it could not be declared implicitly. *See* YOUNGJOON LEE, MIN-BEOB-CHONG-CHIG [GENERAL PROVISIONS OF CIVIL ACT] 500 (2003).

patient is the party to the medical care agreement.[34] Instead, the person who asked for medical care would take responsibility for the doctor as an unauthorized agent.[35]

Even when the person has an agent's authority according to law, not all of his or her acts are for the principal. If the agent does not declare the agency because he or she does not want to represent the principal, the agency would not be established. For example, the parent of an infant not capable of understanding can make an agreement for medical care with the hospital as a legal agent, and the parent has executed the agreement not as an agent of the baby but independently. In such a case, the parent would have to pay for the medical cost as a party to the medical care agreement. If a person under obligation to support an aged parent with dementia has asked for medical care on the parent's behalf, the child has made an agreement for medical care not as the parent's agent but independently.

2. Agreements Interpreted as for a Third Party

If a person has asked for medical care for another, and thus is willing to be a party to the medical care agreement, it would be an agreement for the benefit of the third person. Namely, the doctor and the person are the parties to the agreement, while the patient is the beneficiary.[36]

a. Whether a Request for Medical Care Creates a Third-Party Beneficiary Contract

If the person asking for medical care has not declared an intention for representation, it is not easy to discern whether the person has offered to be a party to the agreement or is acting on behalf of a third party. Usually, if a person has executed an

---

[34] When the deceased was admitted to a nursing home, an act of delegation of authority would have existed for a medical care agreement. Here, however, the person who executed the agreement cannot be regarded as an agent of the deceased because the deceased was not an adult ward and his adult child was not deemed to have an agent's authority. Rather, the person was authorized by the party to the agreement with the nursing home for the sake of the deceased. Regardless, such a fact can hardly be confirmed now.

[35] Civil Act, *supra* note 15, at art. 135, § 1. In addition, the patient is not responsible as an apparent agent.

[36] SHOJI KAWAKAMI, *Shin ryō Kei yaku to I ryō Ji ko*（診療契約と醫療事故）[*Medical Care Agreement and Medical Accidents*], 167 HŌ GAKU KYŌSHITSU（法學教室）[JURISPRUDENCE CLASSROOM] 65 (1994).

agreement in a third party's name, he/she has represented the third party. However, if the person has done a juristic act without such a declaration, the effects shall revert to that person. Because the other party may have perceived him or her as the party to the agreement, this perception should be protected. Here, if the other party's service is rendered to the third party, his/her status as a party to the agreement is not affected.[37] However, even if a person has made an agreement in his/her name without a declaration of agency, an agency may well be admitted on condition that the person had an intention to act as an agent and that the other party was and should have been aware of the agency.[38] If an agency has been admitted, the person has been authorized by the principal or law. Namely, an agent's authority would exist so that the effects of the agency revert to the principal.

The agent's intention to act on behalf of the principal is a prerequisite for an agency. Such intention must be assumed according to whether there was a declaration of agency; but, even without such a declaration, the agency sometimes may not be denied. If it is assumed that the person has done a juristic act without a declaration but with an intention of agency; and, if the other party were and should have been aware of such intention, the agency would well be established. But, if such intention is denied, the agreement would be assumed to be for a third party. In such a case, the legal theory about the agency should be discussed first.[39] When a hotel owner asked for medical care on behalf of a guest, it should not be interpreted that the owner has become a party to the medical care agreement because the owner did not declare the agency. This is a problem of interpreting the request for medical care or the offer of agreement. The agency should be determined in consideration of the situation. Usually, the hotel owner's act should be deemed an agency.

When a person executes an agreement with the nursing home

---

[37] Tucksoo Song, discussing Article 539, explains that whether the agency existed is determined by the fact that the person has declared his/her intention to act as an agent. (Tucksoo Song, *Je-3-Ja-leul wi-han Gye-Yag* [*Contract in Favour of Third Person*], *in* MIN-BEOB-JU-HAE: CHAE-GWON(6) [ANNOTATED CIVIL ACT: OBLIGATIONS (6)] 134 (Yunjig Gwag ed., 1992)) However, when such intention has not been declared, the other party may be aware or possibly should have been aware of the agency. In such a case, the agency should be admitted.

[38] Civil Act, *supra* note 15, at art. 115 (S.Kor.). As discussed above, the agency should be confirmed before judging whether it is authorized.

[39] ADOLF LAUFS, ET. AL., ARZTRECHT [MEDICAL LAW] para. 11 (6th ed. 2009).

for an insensible parent,[40] it is usual that the agreement specifies that the nursing home is authorized to offer a medical care agreement to a doctor if necessary. Here, the nursing home would act for the adult child or as the parent's guardian.[41] Hence, the agreement would be effective between the adult child and doctor for the benefit of the third-party patient. In other words, the nursing home asking for medical care is offering an agreement for the benefit of the third-party patient. Namely, the adult child has made an agreement with the nursing home for the benefit of the insensible parent, authorizing the nursing home to ask for the patient's medical care.

If the patient is not capable of understanding his/her intention and has no legal agent, the patient cannot request support. Here, the public prosecutor, the local administration, etc., would intervene in the case to ask the court to create a limited guardianship for the insensible patient;[42] and, then, the guardian would ask the court to decide on the methods and contents of the support.[43] If the patient is insensible—not able to live a self-reliant life with a job—the person with the obligation to support the patient would be obliged to have the patient treated.[44]

---

[40] The parties to the agreement for admission to the nursing home are the person under obligation to support the patient and the nursing home for the benefit of the patient or a third party.

[41] At the same time, the adult child is a party to the agreement for admission to the nursing home.

[42] Civil Act, *supra* note 15, at art 947-2, s. 1-5.

[43] *See Inhwan Park, Sae-Lo-Un Seong-Nyeon-Hu-Gyeon-Je-Do-e iss-eo-seo Sin-Sang-Bo-Ho* [*Substitution for Making a Decision Regarding Personal Affairs and Limits in the New Adult Guardianship System of Korea*], 25(2) GA-JOG-BEOB-YEON-GU [KOREAN JOURNAL OF FAMILY LAW] 147, 156, n. 15 (2012). Park insists that it is necessary to protect the insensible people and those not declared an 'adult ward' by the court, but such a problem may well be resolved by an adult guardianship. However, Hyun So-hye argues that the Civil Act should be rearranged to specify the agency regarding the medical care to protect adult wards. *See* Sohea Hyun, *Ui-Lyo-Haeng-Wi Dong-Ui-Gwon-Ja-ui Gyeol-Jeong: Seong-Nyeon-Hu-Gyeon-Je Si-Haeng-e Dae-Bi-ha-yeo* [*Who Can Consent to the Medical Treatment?: In Preparation for Enforcement of the New Adult Guardianship System in Korean Revised Civil Law*], 13(2) HONG-IG-BEOB-HAG [JOURNAL OF HONGIK LAW REVIEW] 177, 202 (2012).

[44] The extent and method of support shall be agreed between the adult child and an insensible parent. If no agreement has been reached between the concerned parties with respect to the extent and method of support, the court may, upon the application of the parties, determine such matters (Civil Act, *supra* note 15, at art. 977 (S. Kor.)). Hence, as long as the extent and method have yet to be confirmed, it would be controversial to allow the nursing home to ask for medical care on behalf of the adult child. However, it is conceived that the agreement for medical care should be covered by the obligated support; and,

Since lineal relations are obliged to support each other,[45] it is quite natural not only that the parents are obliged to support their minor children but also that the adult children are obliged to support their insensible parents. A person under a duty to furnish support shall perform the duty only where the person entitled to receive support cannot self-support.[46] Usually, the adult child is obliged to pay for their insensible parents' living costs, and such obligation also covers the medical care costs under a medical care agreement. Hence, the adult child can authorize a third party to make a medical care agreement with the hospital on the adult child's behalf.[47]

b. Request for Medical Care for a Rescued Party

Usually, when a person has rescued and asked a doctor to treat a third party, an agreement is deemed executed between the doctor and the third party. If the person who rescued the third party is not known, a relation of management affairs would be established between the doctor and the third party. However, such an approach is not deemed reasonable. The rescuer asked the doctor to treat the third party, whom he did not know, to do an act of kindness for the third party. To make that person responsible for medical costs is not deemed just. Furthermore, the doctor or the third party would not perceive that the rescuer should be responsible for the medical costs. If the rescuer declared explicitly that he or she would be a party to the medical care agreement or is especially related to the patient, the agreement is assumed to have been made between the rescuer and doctor for the benefit of the patient. For example, if the rescuer is a relative, an acquaintance, or friend of the patient, the medical care agreement between him or her and the doctor would imply that he or she would intend to be legally responsible for the medical cost. Furthermore, the rescuer or the doctor should have been aware of such an intention. Then, the rescuer's request for medical care would be regarded as an offer of agreement to pay for the medical care.[48]

---

therefore, it would be deemed not impossible for the nursing home to ask for medical care on behalf of the adult child.

[45] Civil Act, *supra* note 15, at art. 974, sub-para 1 (S. Kor.).

[46] Civil Act, *supra* note 15, at art. 975 (S. Kor.).

[47] Since the insensible parent (patient) cannot afford to authorize a third party to do a juristic act on his or her behalf, any effect of the agency on behalf of the parent (patient) cannot be reverted to him or her.

[48] AJAMI & NAKAI, *supra* note 11, at 58. *See also* Suk, *supra* note 5, at 259.

On the other hand, if the offender in an incident or accident has asked the doctor for medical care for the victim, the offender is deemed to have offered an agreement with the doctor. What should be noted here is that even if the offender promised clearly to pay for the medical cost on behalf of the victim, such a declaration would not always be interpreted as the offender offering to be a party to a medical care agreement. Rather, according to a theory, it should be interpreted that the offender has declared an intention to be responsible jointly for the medical costs.[49] Summing up, if the offender is deemed a party to the medical care agreement, the doctor cannot ask the patient directly for the medical costs. The doctor should ask only the offender. The patient or his/her guardian should have asked for medical care; and, therefore, the party to the agreement is the patient or guardian. Then, it is assumed that the offender has expressed a joint, surety obligation for the medical cost, which is deemed to reflect the offender's intention.

c. 'Untrue Agreements' for a Third Party'

Since medical care is not rendered for the person asking for the care but for the patient, the medical care agreement is deemed an agreement for the benefit of the third-party patient. However, if we examine it more closely, there are cases where the third-party patient could not well declare his or her intention. For example, when the patient is not capable of understanding his/her intention and, thus, cannot express an intention when the medical care agreement was made. Nevertheless, the medical care would proceed. Even if there is no expression of intention to benefit, both parties to the medical care agreement may make an effective agreement. Such an agreement is called 'an untrue agreement for a third party.' If a party has expressed his/her intention for the benefit of the patient, the doctor would directly ask that party to pay the cost. Usually, it is held that the third-party beneficiary theory would not apply to an untrue agreement for a third party.[50]

Regarding the obligation to pay for the medical cost, it is not important whether the patient should receive the medical service or whether the medical care agreement made between the doctor

---

[49] Suk, *supra* note 5, at 262; KOOHKI KANNO, I RYŌ KEI YAKU HŌ NO RIRON (醫療契約法の理論) [MEDICAL CARE AGREEMENT ACT AND THEORY] 102 (1997).

[50] TUCKSOO SONG, CHAE-GWON-GAG-LON [DETAILS OF LAW OF OBLIGATION] 92 (2014).

and stipulator is for the benefit of a third-party patient or an untrue third party because the obligations in the medical care agreement are all attributable to the person who has asked for the medical care. Furthermore, in case the doctor's medical care is not in fulfillment of the contractual obligations but in the management of affairs, the agreement would be regarded as one for an untrue third party if the patient or benefactor has died in an insensible state. If the patient should recover his consciousness and confirm the agreement, the confirmation is interpreted as that of a management of affairs.[51]

Judicial precedent from the Supreme Court[52] exists regarding this issue. A person poured paint thinner over his whole body in a police substation and self-immolated. A policeman asked a medical institution for emergency aid, and the medical institution took care of the person. The lower courts judged that the nation or the subject who asked for emergency medical care entrusted the treatment of the burnt person to the medical institution for treatment, and, thereby, the medical institution agreed to the treatment. The Supreme Court remanded the case after reversal. The trial court judged that the nation would be able to take legally appropriate measures for protecting people's freedom and rights; and, therefore, the nation or the police substation made an emergency medical care agreement with the medical institution. However, the Supreme Court opined that a medical care delegation agreement had not been made "because there was no law specifying that treatment of a person needing emergency aid is the nation's affairs or that the nation is obligated to take an emergency measure for people requiring an emergency treatment."[53] As such, the Supreme Court's judgment suggests that the nation is not a party to the medical care agreement and, therefore, is not obliged to pay for the medical cost. Then, the patient or guardian should bear the medical costs, and, here, the principle of the management of affairs shall be applied.

---

[51] Kim, *supra* note 24, at 267.

[52] Supreme Court [S.Ct.], 93Da4472, Feb. 22, 1994. (S. Kor).

[53] In judicial precedent from Germany, a fire-fighting station suppressed a fire ignited by an engine locomotive; and, thus, the fire-fighting station asked for the fire-fighting costs. The court allowed such a claim. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] June 20, 1963, 40 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 28, 1964 (Ger.); 63 BGHZ 167 (Ger.).

3. Determining the Benefactor

If the agreement for the benefit of a third party exists, the issue remains who is the benefactor. Usually, the patient is the benefactor. Thus, if the patient is not capable of understanding his/her intention or is unconscious, the medical care agreement would be interpreted as one for the third party who is authorized by the agreement to receive the services. Then, it is an agreement for an untrue third party. If the patient is a minor or financially insolvent elder with an adult child, the person responsible for payment is not the patient but the guardian or legal representative. In such cases, it may well be interpreted that the person asking for medical care for a third party would do so as his/her guardian, who is obligated to have the patient treated.[54] Namely, it can also be interpreted that the person has made a medical care agreement with the doctor as a guardian. Since the person asking for medical care would be responsible for the medical cost, the patient would be enriched unjustly. Thus, the person asking for medical care would make a medical care agreement with the doctor for the benefit of the patient as a guardian. In this case, it is necessary to confirm the medical care being rendered to the patient and have the doctor approve it, which is equated with the expression of an intention to receive the benefits.

Summing up, the effects of a medical care agreement could not revert to both parties. When a medical care agreement is made for a third party, the benefactor should be the patient or the guardian. In other words, it is impossible to establish a medical care agreement for the benefit of both patient and guardian. Who will be the benefactor of the medical service would be determined through interpretation of the doctor's and requestor's intentions.[55] Usually, if a person asks the doctor for medical care without determining the benefactor, the patient would be the benefactor. Then, the guardian would get a reflective interest.

---

[54] Byoungjo Choe, *Sa-Mu-Gwan-Li-ui Nae-Yong* [*Management of Administrative Affairs*], *in* MIN-BEOB-JU-HAE: CHAE-GWON (10) [ANNOTATED CIVIL ACT: OBLIGATIONS (10)] 12 (Yunjig Gwag ed., 2005).

[55] JEUNGHAN KIM & HAKDONG KIM, CHAE-GWON-GAG-LON [DETAILS OF THE OBLIGATIONS] 97 (2006); SONG, *supra* note 50, at 96.

B. Third Party's Request not Interpreted as Offer of Agreement

1. *De facto* Contractual Relation

Some scholars argue that, regardless of whether a patient devoid of mental capacity can offer an agreement, a *de facto* contractual relation would be established between the patient and the doctor.[56] The management of affairs would exist only when a person handles an affair, though not obliged to do so.[57] However, a management of affairs would not exist for the doctors because they are obliged not to refuse rendering medical service according to law.[58] Such a view is criticized due to the following reasons.

According to the Civil Act, the person who spent his/her money without any obligation may well be compensated for the expenditure. When we judge whether an obligation exists, we need to consider whether such expenditure should be compensated. Although the doctor is obliged by law to render medical services upon a request, the redemption of the medical cost is needed. In such a case, the management of affairs should not be excluded.[59] In addition, if we admit the theory of *de facto* agreement, we should assume that an agreement without expression of intention may be made. It would be more negative than positive to rearrange such a conventional theory. In short, treating an insensible or unconscious patient is not required by law (Civil Act); and, therefore, the theory of management of affairs should be applied to such a case. In other words, the fact that a doctor simply has decided to care for a patient does not mean that a medical care agreement to which the patient is a party has been made.[60] Even if a third party requested medical care, he or she might not want to

---

[56] Suk, *supra* note 5, at 262; ERWIN DEUTSCH & ANDREAS SPICKHOFF, MEDIZINRECHT: ARZTRECHT, ARZNEIMITTELRECHT, MEDIZINPRODUKTERECHT UND TRANSFUSIONSRECHT [MEDICAL LAW: MEDICAL LAW, PHARMACEUTICAL LAW, MEDICAL DEVICE LAW AND TRANSFUSION LAW] 62 (6th ed. 2007).

[57] Civil Act, *supra* note 15, at art. 734, § 1 (S.Kor.).

[58] Medical Service Act, *supra* note 1, at art. 15, §§ 1-2 (Prohibition of Refusal to Give Medical Examination or Treatment): (1) A medical person may not, upon receiving a request for medical treatment or assistance in childbirth, refuse to render his/her service without any justifiable reason. (2) Each medical person shall give the best treatment to any emergency patient in compliance with the Emergency Medical Service Act.

[59] Choe, *supra* note 54, at 44.

[60] LAUFS & KERN, *supra* note 24, at § 39, para. 11; MICHAEL QUAAS, ET. AL., MEDIZINRECHT [MEDICAL LAW] § 14, para. 20 (3rd ed. 2014).

be a party to the medical care agreement.

After all, if the request for medical care cannot be interpreted as an offer of agreement, the doctor's medical service should be deemed to start with no obligation on the part of the doctor according to the theory of management of affairs. Even if a third party has requested medical care, the doctor's medical service would be a *de facto* medical care without any obligation. Then, the doctor's medical service would be a management of affairs. Thus, the doctor can ask the patient or his/her guardian to pay the medical cost according to the theory of management of affairs.[61]

2. Determining the Beneficiary in a Management of Affairs

In case the management of affairs exists, it is necessary to examine whose affairs have been handled because the doctor should confirm the party whom he or she should charge for medical care. First of all, the patient would be the principal whose affairs have been managed with no obligation on the part of the doctor. However, if the patient has a legal representative, it is deemed that the patient or the adult ward or minor, who should be taken care of by the legal representative, has been treated by the doctor upon request from the legal representative or guardian. If the patient is insensible and has an adult child, it could be interpreted that the doctor has handled his or her affairs. In case the management of affairs can come into being, the doctor can be deemed to handle the adult child's affairs on behalf of him or her.

As discussed above, an adult child may well be under obligation to support his/her incompetent parent (the secondary obligation).[62] In particular, if the parents have lost financial

---

[61] Civil Act, *supra* note 15, at art. 734 (S.Kor.) *et seq*.; QUAAS, *supra* note 60, § 14, para. 21; DIRK LOOSCHELDERS, SCHULDRECHT: BESONDERER TEIL [LIABILITY: SPECIAL PART] para. 614 (5th ed. 2010); OTHMAR JAUERNIG ET AL., KOMMENTAR ZUM BGB [COMMENTARY ON THE BGB] § 630a, para. 1 (15th ed. 2014); ERICH STEFFEN & BURKHARD PAUGE, ARZTHAFTUNGSRECHT [MEDICAL LIABILITY] para. 63 (10th ed. 2006); ADOLF LAUFS, ET. AL., ARZTRECHT [MEDICAL LAW] para. 124 (5th ed. 1993); E.M.SCHMID, DIE PASSIVLEGITIMATION IM ARZTHAFTPFLICHTPROZESS [PASSIVE LEGITIMATION IN THE MEDICAL DUTY PROCESS] 65 (1988); Tatzaki Maeda, *I ryō Kei yaku Ni tsuite*（醫療契約について）[*Medical Care Agreement*], 3 KYŌTO DAIGAKU HŌGAKUBU SŌRITSU HYAKUJŪNEN KINEN RONBUNSHŪ（京都大學法學部創立百周年記念論文集) [COLLECTION OF ARTICLES IN COMMEMORATION OF THE 100TH ANNIVERSARY OF KYOTO UNIVERSITY FACULTY OF LAW 83] (1999).

[62] Supreme Court [S.Ct.], 2011Da96932, Dec. 27, 2012 (S. Kor); SANGYONG KIM, CHIN-JOG-SANG-SOG-BEOB [LAW OF RELATIVES AND SUCCESSION] 528 (2013).

self-reliance, the adult child is obligated to support the parents. According to German Federal Supreme Court precedent[63] and Article 1618a of the German Civil Act,[64] an adult child is obligated to bear the cost for parents' nursing home. Namely, the obligation to have dependents treated appropriately by the hospital would be covered by the obligation to support them. Of course, an adult child is obliged to support an insensible parent.

3. Reimbursement Claim in a Management of Affairs

When the patient has a legal representative or guardian, the doctor may want to charge him/her for the medical cost incurred by the management of affairs. If the doctor can do so, his management of affairs should be admitted for two or more people. When the doctor manages the affairs for the patient, he/she need not confirm his/her intention to benefit the patient. If the doctor is deemed to have managed other's affairs, the management of affairs would be admitted.[65] If a nursing home has paid the charge for medical care on behalf of its patient, the facility could well claim the management of affairs for the patient's adult child. The adult child usually pays his/her parent's living costs, and medical care is not excluded from such payments. Since the adult child is obliged to keep his/her parents safe from any physical problems such as diseases and accidents, he/she should also be obliged to have the parent treated by the hospital.[66]

Besides, there are disputes about the claim for repayment for unjust enrichment with regard to the management of affairs (for the adult child of the patient).[67] For example, when Party 'A' entrusts Party 'B' with some affair, and 'Party C' handles it, for

---

[63] Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 12, 2014, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1177, 2008 (Ger.) (BGH Feb. 12, 2014, XII ZB 607/12).

[64] BGB, *supra* note 4, at § 1618a (Pflicht zu Beistand und Rücksicht [Duty of Assistance and Respect]) and (Eltern und Kinder sind einander Beistand und Rücksicht schuldig [parents and children owe each other assistance and respect]).

[65] Choe, *supra* note 54, at 13 and 54.

[66] *Id.* at 13

[67] *See Id.* at 5 ("If the management of affairs is allowed, the debate about the repayment for unjust enrichment must be excluded."); Hyunjoong Kang, *Sa-Mu-Gwan-Li-Chong-Seol* [*Management of Administrative Affairs*], *in* JU-SEOG-MIN-BEOB: CHAE-GWON-GAG-CHIG (5) [ANNOTATED CIVIL ACT: DETAILS OF OBLIGATIONS (5)] 257 (Joonsu Park ed., 1999). Since the management of affairs is more favorable to the doctor, it is no advantage to allow repayment for the unjust enrichment.

whom did 'Party C' handle the affair? To be more specific, the adult child is obliged to ask for medical care on behalf of the parent as part of the obligation to support the parent, but a third party has asked for such medical care. Here, it is necessary to examine for whom the requestor managed the affairs. Here, the effects would differ depending on the person. If he/she managed the affairs simply for a third party, it is important to determine to whom the effects of the management of affairs would be reverted.

We need to consider the following points. First, the management of affairs does not always need to be associated with the responsibility for the reimbursement of medical costs. Second, the management of affairs covers both right and obligation. Third, if the patient is an insensible adult, he or she may not have a guardian. Then, it is deemed a natural corollary to interpret that the doctor has managed the patient's affairs. In contrast, if an unconscious minor is taken to the hospital, it would well be interpreted that the parent's affairs have been managed by the hospital.[68] If a third party or the requestor has paid the doctor for the medical care cost, he/she can afford to claim reimbursement for the management of the patient's affairs. Since the management of affairs can well be admitted regardless of whether the principal is insensible, it can exist even if the patient is insensible.[69] In case the subject to whom the effects of the management of affairs should be reverted cannot be confirmed through interpretation of the intention expressed, the management of affairs would be attributed primarily to the patient and secondarily to the guardian.[70] In such a case, both parties would be under an untrue joint and several obligations.

[68] A judgment resolved the issue as the management of affairs in Germany. An eighteen-year-old man boarded an airplane in Munhen destined for Hamburg with a ticket for the trip. But he did not get off at Hamburg, instead remaining on the airplane. The airplane then flew to New York. When he was denied entrance to the United States, the airline (Lufthansa) took him to Germany. The German court judged that the cost for carrying him back to Germany had been a management of affairs. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 7, 1971, 55 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 128, 1971 (Ger.) (Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 7, 1971, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 609, 1971 (Ger.)).

[69] Kang, *supra* note 67, at 336. When a doctor treats an insensible patient or victim of an accident, he/she is deemed to have managed the person's affairs. Choe, *supra* note 54, at 13.

[70] Choe, *supra* note 54, at 4.

4. Relationship between Obligation to Pay Expenses and Establishment of a Management of Affairs

On the other hand, when the requestor for medical care has no intention of managing the patient's affairs, the theory of management of affairs would not apply. Hence, it is argued that the requestor is not obliged to pay the medical cost.[71] However, even if a management of affairs should be confirmed between the requestor and patient, the former does not need to pay the doctor for the medical cost. Regardless, the management of affairs should not be denied between the requestor and patient to negate the obligation to pay the medical cost.

5. Bearing the Obligation due to a Management of Affairs or Hospitalization Contract

When a third party requests medical care for the patient, we should examine whether it is a management of affairs. In general, when a third party requests medical care out of goodwill, it is interpreted as not intending to manage the affairs for the patient; and, therefore, the management of affairs should be denied.[72] Such an argument should be discussed based on interpreting the juristic act. If there is a normative intention of management or intention to be engaged in the medical care agreement for the patient, an intention for management of affairs may exist. For example, if the requestor did not act out of goodwill but under some obligation, such as by a nursing home, to be engaged in the medical care agreement, the intention to manage affairs may exist. Then, the nursing home manages the affairs of its occupants. If the hospitalization agreement specifies such an obligation, the nursing home will fulfill its obligation.

6. Medical Practice as a Management of Affairs

According to the principle of management of affairs, the patient should reimburse the third party for his/her medical costs. However, the doctor cannot claim a fee regarding other services. Hence, the patient need not compensate for other medical

---

[71] *Id.*
[72] *Id.*

expenses. But, according to judicial precedent[73] and majority opinions[74] in Germany, the doctor's usual fee should be reimbursed if the management of affairs belongs to his/her duty or business. The logical ground for such exceptions, Article 1385, Paragraph 4 of the German Civil Act specifying that the patient should bear the cost incurred for the guardian's professional labor, may be applied,[75] or parties' assumed intentions should be respected. If they had made a delegation agreement as assignor and assignee, the assignor would have promised to pay.[76]

Our judicial precedent opines that, in case such professionals as a doctor rendered a labor service, the service would be a part of their assets, and, thus, medical care can be equated with the consumption of the assets.[77] The theories support such a

---

[73] 55 BGHZ 128 (Ger.) (NJW 1971, 609, 612); 65 BGHZ 384 (Ger.), 390 (NJW 1976, 748); 69 BGHZ 34 (Ger.) (NJW 1977, 1446); 143 BGHZ 9, 16 (Ger.) (NJW 2000, 422); Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 20, 1973, LINDENMAIER-MÖHRING [LM] § 675 Nr. 47 (Ger.) (NJW 1973, 2101, 2102); Bundesgerichtshof [BGH] [Federal Court of Justice] March 7, 1989, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGSREPORT (NJW-RR 1989, 970) (Ger.); NJW-RR 1992, 1435 (Ger.); NJW-RR 2005, 639, 641 (Ger.); NJW-RR 2005, 1426, 1428 (Ger.); NJW 1993, 3196 (Ger.); WM 1972, 616, 618; WM 2000, 973.

[74] For example, see Hans Herrmann Seiler, *Kommentierung zu § 683 BGB* [*Commentary on § 683 BGB*], *in* MÜNCHENER KOMMENTAR ZUM BGB [MUNICH COMMENTARY ON THE BGB] 24 (6th ed. 2012).

[75] ANDREAS BERGMANN, ET. AL., J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH [STAUDINGER'S COMMENTARY ON THE CIVIL CODE] § 683, para. 58 (2006); HEINZ GEORG BAMBERGER, ET. AL., BÜRGERLICHES GESETZBUCH: KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH [COMMENTARY ON THE CIVIL CODE] § 683, para. 4 (2011); JAUERNIG ET AL., *supra* note 61, § 683, para. 6; LAUFS & KERN, *supra* note 24, § 39, Rn. 14.

[76] Hellmuth Köhler, *Arbeitsleistungen als, Aufwendungen?*, JURISTENZEITUNG (JZ) 359, 362 (1985).

[77] Supreme Court [S.Ct.], 2007Da55477, Jan. 14, 2010 (S. Kor). A person who was working for others worked for a third party in anticipation of being employed by him in the future, but the employment agreement had not been executed between them. In such a case, Article 61 of the Commercial Act specifies that, if a merchant has worked for a third party within the scope of his/her business sphere, he or she could claim compensation for his/her cost. Namely, the services provided as a series of business or work would be a juristic act for consideration, requiring payment. Hence, the person was deemed to manage the third party's affairs in anticipation of payment. If the person has employed a worker for the management of affairs and, thus paid him/her, the payment shall be deemed a cost of management of affairs as if the person's service were provided to the third party. Namely, the payment was an autonomous sacrifice of assets or the cost, which may well be compensated by the third party. In such a case, the level of the usual payment may well be determined according to the business practices and common sense in consideration of the person's efforts, contents of the affairs managed, and the principal's or the third party's benefits due to the management of affairs.

position.[78]

IV. CONCLUSION

The judgment of whether a third party's request for medical care should lead to a medical care agreement or whether it should lead only to the management of affairs should be made according to the general principle of interpreting the expression of intentions. The judicial precedent declares that

> in case the parties' intentions are not clear, it is necessary to interpret them reasonably in overall consideration of the contents of the intentions expressed, the motive and details of the expressions, the purpose of the implicit agreement, and the parties' genuine intention, according to logic and empiricism.[79]

On the other hand, specific criteria for interpreting intentions have been suggested: details of the expressions of the intentions, established practices between parties, parties' behaviors after execution of the agreement, nature and purpose of the agreement, customs, etc.[80] Usually, even if a third party requests medical care on behalf of a person, the request cannot be well interpreted in such a way that he/she would be willing to pay for the medical cost according to an agreement. A third party's request for medical care cannot be interpreted as an offer of an agreement, and it cannot be regarded as the establishment of a juristic relation between the requestor and the doctor.[81] In order to ask the requestor to pay the medical service fee, his/her intention to accept the obligation for payment should be admitted. Hence, the doctor should confirm whether he/she intends to pay for the medical care in advance.[82]

---

[78] Kim, *supra* note 24, at 271.
[79] Supreme Court [S.Ct], 2002Da6753, June 11, 2002 (S. Kor).
[80] Yune, *supra* note 31, at 54.
[81] The legal theories of tort, management of affairs, and unjust enrichment cannot be well applied to the request for medical care. However, if the request may be interpreted as an offer of a medical care agreement as a party or as an agent, the request may be interpreted as an expression of intention for the offer of an agreement.
[82] LAUFS & KERN, *supra* note 24, § 39, para. 9; DEUTSCH & SPICKHOFF, *supra* note 56, at 60.

If the intention to pay the medical cost should be admitted, the intention of burdening the party with an agreement may be admitted. However, such intention may well be interpreted as the intention to be burdened with a joint and surety obligation. For example, in case the requestor is an offender and he/she has signed a joint and surety guardian (surety) agreement, his act cannot be interpreted as an intention to be obliged to pay for the medical cost as a party to the agreement. Hence, if the party to the medical care agreement has not been explicitly indicated and the requestor has not signed the medical care agreement and, thus agreed to a joint and surety obligation, it cannot be interpreted that he/she would be willing to be a part to the medical care agreement. Any document should be interpreted according to its expressions unless sufficient and clear counter-evidence exists to deny the expressions.[83]

If a third party's request for medical care (hospitalization) is not a juristic act, the doctor is deemed to have treated the patient with no legal obligations. Namely, the doctor managed the patient's or guardian's affairs. Here, the third party's expression of intention should be regarded as an intention for a joint and surety obligation.

The request for medical care discussed in Section III may well be interpreted as that made as an agent of the patient or guardian. For example, in case a wife requests medical care for the insensible husband, the wife's representative right to manage family affairs could well be admitted. Even where the legal theory of agency can apply to the medical care agreement, the requestor may not always be responsible for the medical cost. The requestor acted as an agent without intending to be a party to the medical care agreement. Here, if the requestor has no right to the representation, his/her act is an unauthorized agency. Especially if there is no manifestation of agency and only the signed medical care agreement, an agency may exist if the doctor was or should have been aware that the requestor acted as an agent. But such an agreement shall not be effective for the principal or the patient.

---

[83] Supreme Court [S.Ct], 2012Da96403, Jun. 13, 2013 (S .Kor). "If the juristic document is not questioned for its authenticity, the court should admit the contents of the document intact, unless a clear and reasonable counter-proof denying the contents of the documents exists. In case the interpretations of the document are different between the parties, it is necessary to interpret it reasonably according to logic and the empirical rule in overall consideration of its motives, means, ends, purpose, and the parties' genuine intention." Supreme Court [S.Ct], 2002da6753, Jun. 11, 2002. (S. Kor.)

Keywords
Medical Care Agreement, Request for Medical Care, Agreement for Benefit of a Third Party, Management of Affairs, Confirmation of Parties to the Agreement

Received: 2019; *review completed and accepted*: 2020

JURY TRIALS IN SOUTH KOREA: THE SITUATION, ACHIEVEMENTS, AND SUGGESTIONS FOR IMPROVEMENTS

Sanghoon Han[*]

ABSTRACT

In South Korea, 2,267 cases have been tried with a jury since the Act on the Civil Participation in Criminal Trials took effect on January 1, 2008. While the new system was intended to enhance the democratic legitimacy of criminal trials and to further strengthen the public's faith in judicial decisions, the number of cases tried by jury (1.96% of eligible cases) remains unsatisfactory, and a large number of eligible crimes are adjudicated via traditional bench trials. While there initially was a strong skepticism of the jury trial system amongst scholars and professionals in the legal field, skepticism of jury trials has eased as time has gone on, and the jury trials turned out to be successful.

The jury trial proceeding, itself,—the way it is conducted—started to receive a great amount of satisfying reviews. Therefore, in 2012, the Citizen Participation Act was amended to make all criminal cases tried by a three-judge panel at the first instance eligible for jury trials. As aforementioned, however, the number of cases being tried by the jury still remains low even after the change in the system. One of the reasons is that the jury trial is dependent on the motion of the defendant, which is possible only when the defendant requests a jury trial, and the court has discretion to deny the motion for a jury trial.

The article explores the current status of the jury trial system in South Korea, and, by doing so, several possible measures are suggested to further and facilitate jury trials both qualitatively and quantitatively. It is true that the language of South Korea's Constitution restrains improvements of the jury

[*] Professor, Yonsei University School of Law. Email: han2004@yonsei.ac.kr. This paper was presented at a symposium organized by the Supreme Court in September 2018 in commemoration of the 70th anniversary of the Korean judiciary and was published in 2019 in Korean. The author would like to express gratitude to the panelists who did not spare their useful comments on the presentation. The author also thanks to Professor Joe Phillips and Ms. Jina Lee, doctoral candidate, for their work for this publication

trial system. However, there is a necessity to find leeway within the system and to explore possible institutional and practical solutions. In doing so, the performance of civil participation trials for the past eleven years will be first examined through empirical data based on surveys conducted on judges, jurors, and the public. Focusing on the bills proposing amendments to the Citizen Participation Act currently pending in the National Assembly, we evaluate key suggestions and recommend jury improvement measures in Korea as follows.

First, a bill providing mandatory jury trials in serious criminal cases with possible exceptions by court decisions shall be supported. Moreover, a proposed bill to allow the court to carry out jury trials on application of the prosecution or de officio should be advocated as well. Second, while the article supports the extension of jury trials to cases decided by a single judge, there needs to be a certain minimum penalty, for instance, the defendant is punishable by less than three- or five-year imprisonment.

Third, to strengthen the authority of jury verdicts at this stage, it is crucial to grant the jury verdict at least a "weak binding force," which means that the judge shall respect the jury's verdicts unless there is an exceptional reason not to do so. It is indeed necessary to thoroughly review current practices of jury trials to come up with more sophisticated statutes, jury instructions, and practices to ensure that the agreement rate between the jury verdict and judge's opinion should amount to over 95% from around 93% at present.

Fourth, to reduce the burden of duty on the trial courts and to promote the efficiency of the jury selection process, certain administrative work needs to be done by either the chief of the district courts or the head of the district court branches. Moreover, various jury pooling methods should be utilized to reduce the costs of the jury trial. Lastly, it may be appropriate to restrict the prosecution's appeal in cases where the court accepts the unanimous verdict of acquittal while allowing the prosecution to appeal in certain limited serious felony cases.

I. INTRODUCTION

A total of 2,267 cases have been tried with citizen participation or juries as of December 2017, ten years since South Korea's Act on Citizen Participation in Criminal Trials (Citizen Participation Act) took effect in January 2008.[1] During this period, 5,701 defendants motioned for a jury trial. Among them, 2,277 cases (40.50%) were withdrawn by the defendants, while 1,075 (19.10%) were denied by the court. Thus, 40.30% of the cases were tried with citizen participation. Since 143,807 cases were eligible for the jury trial system, the ratio of defendants' motions was only 3.96% and that of the actual jury trials was just 1.96%.

In consideration of the aims of citizen participation in criminal trials and enhancement of citizens' trust in the judiciary system and its democratic legitimacy, such ratios are deemed very low. However, in terms of quality, civil participation or the jury trial system has been more satisfactory than expected. Skepticism about the jury trial system amongst professionals and scholars in the legal field dwindled as time went on. As a result, by 2012, the Citizen Participation Act was amended to cover all the cases tried by a three-judge panel. Nevertheless, the number of cases tried by the jury system did not much increase. One of the reasons is that a jury trial is dependent on the defendant's motion, but there have been many cases where the court denied the motions, in part, because of the heavy work burden incurred by jury trials. In such circumstances, this paper aims to explore the ways to encourage civil participation in criminal cases in quality and quantity. It is true that the language of Article 27 (1) of the Korean Constitution[2] restrains far-reaching and fundamental reforms of the jury trial system. However, it is deemed possible as well as desirable to delve into and find moderate solutions, including institutional or practical ones, within the boundary of the current constitutional system. In doing so, this article examines the performance of the

---

[1] Gug-Min-ui Hyeong-Sa-Jae-Pan-Cham-Yeo-e gwan-han Beob-Lyul [Act on Citizen Participation in Criminal Trials], Act No. 8495, June 1, 2007, *amended by* Act No. 14839, July 26, 2017 (S. Kor.) [Citizen Participation Act]. For statistics, see NATIONAL COURT ADMINISTRATION (S. KOR.), 2008-2017 NYEON GUG-MIN-CHAM-YEO-JAE-PAN SEONG-GWA BUN-SEOG [ANALYSIS OF THE PERFORMANCES OF THE CITIZEN PARTICIPATION IN THE CRIMINAL TRIALS FOR THE PERIOD 2008-2017] (2018).

[2] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 27(1) (S. Kor.): "All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act."

jury or the civil participation trials for the past eleven years through empirical data based on surveys conducted with judges, jurors, and the public and, thereupon, evaluate ways to improve the jury trial system, focusing on the proposed amendment to the Citizen Participation Act, currently pending in the National Assembly of Korea, as of February 2, 2020.

II. PERFORMANCES OF THE JURY TRIALS IN SOUTH KOREA

A. Judicial Performances of the Jury Trials

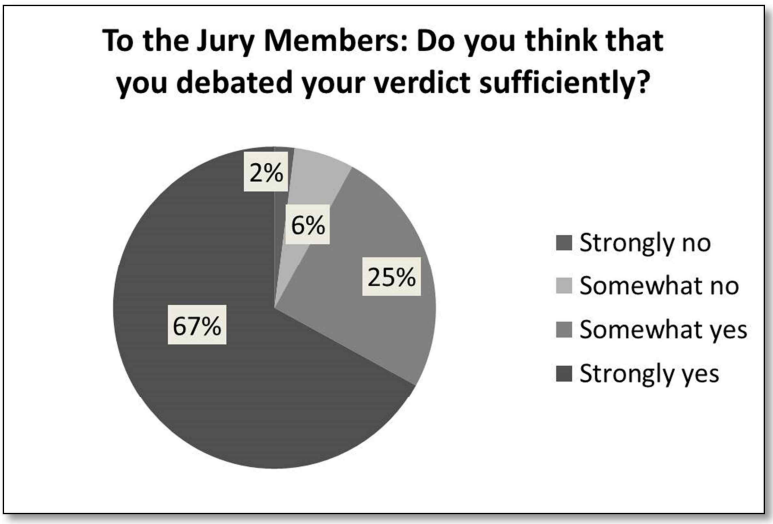
Indeed, jury trials in South Korea have not been so frequently conducted as expected. Concerning quality, however, the performances are more positive. The purpose of jury trials is to raise the public faith in judicial decisions and the democratic legitimacy of the judicial process. (Article 1 of the Citizen Participation Act). Although it is not easy to separate the discussions on these two challenges, this study separates them for the convenience of analysis.

1. Enhancement of the Democratic Legitimacy of the Judicial Process

Ordinary citizens participated as jury members in criminal trials to help enhance the democratic legitimacy of the judicial process. In other words, citizens' opinions would be reflected in the criminal trials, while their transparency would be enhanced. According to the results of a survey of 478 jury members from March to June 2012,[3] 69% answered 'Yes' to the question: "Did

[3] The age of the jurors ranged between twenty-one and seventy-seven. Their average age was 42.65; 47% were males, while 53% were females. Regarding academic background, 51.1% graduated from college, while 35.3% graduated from high school; 7.1% graduated from middle school; and, 6.6% studied at graduate schools. As to employment, 40.4% were regular employees; 12.7% were self-employed; 7.6% were irregular employees; and, 5.1% were freelancers. Their monthly earnings ranged across five million won or higher (27.3%); two to three million won (21%); three to four million won (17%); and one to two million Won (11.8%). Sanghoon Han & Wooyoung Chun, *Jeol-Cha-Gwan-Yeo-Ja Si-Gag-e-seo Bon Gug-Min-Cham-Yeo-Jae-Pan Yeon-Gu Bo-Go-Seo* [*Research into the Jury Trial System from the Perspective of the Partakers in the Judicial Process*], RESEARCH REPORT OF CITIZEN PARTICIPATION IN THE JUDICIAL PROCESS 22 (2012).

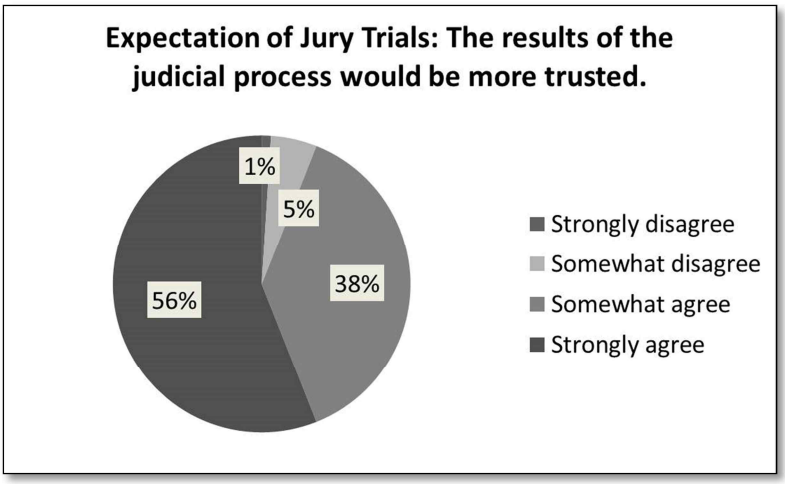
you express your opinion sufficiently in the verdict process of the jury," while 23.9% answered "A little." Significantly, 93% answered that they had expressed their opinions more or less, and 91% (n=397) of the subjects answered that they had debated sufficiently on their verdict.



On the other hand, to the question: "Do you expect that jury trials would be more transparent?" 56.7% of the subjects said, "Yes, they would be," while 39.9% answered, "Yes, a little." Summing up, 96% of the subjects thought that jury trials would be more transparent. Hence, jury trials are deemed to conduce democracy and transparency of the judicial process by allowing ordinary citizens to participate in criminal trials, rather than keeping them an exclusive turf for experts and judges.

2. Enhancement of the Public Faith in Judicial Decisions

Jury members who participated in jury trials showed more faith in judicial decisions, with 95% (411 subjects) answering that they would trust the results of the judicial process more due to jury trials.



On the other hand, 92.9% of the jury members said that their perception of the judicial process had changed positively after their participation in the criminal trials (50.4% said, "so much," while 42.6% said, "a little"). Judges also had a positive perception: 25.4% of the judges answered "very much" to the question: "Do you think the jury trials are desirable for a just judicial process?," while 52.6% said "a little." Thus, 78% of the judges felt jury trials were desirable for a just judicial process. Although the ratio was a little lower in the case of the judges than that in the case of the jury members, the absolute majority of the judges were found to support jury trials.

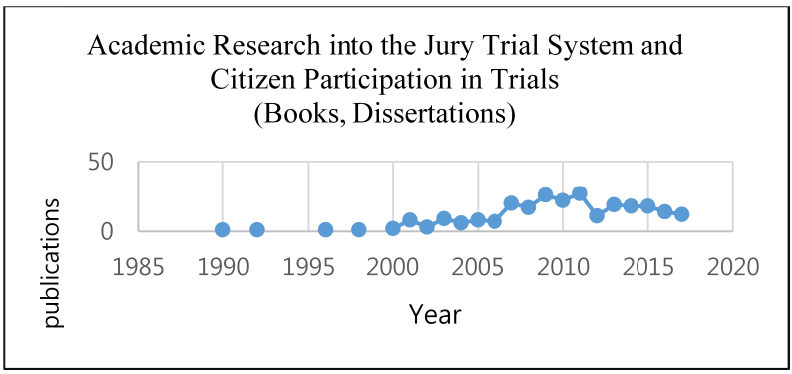
Summing up, jury trials have achieved their original goals: enhancement of the legitimacy of the judicial process and citizens' faith in just judicial decisions. It is deemed that judges' and law experts' perception of jury trials have changed much from the earlier skeptical one to a positive one.[4]

[4] Jaehyeok Choi, who was a presiding judge for the early jury trials, said that he was very skeptical about jury trials at first, but he praised them later. Jaehyeok Choi, *Beob-Won-ui Gwan-Jeom-e-seo Bon Gug-Min-Cham-Yeo-Jae-Pan-ui Un-Yeong-Hyeon-Hwang-gwa Gae-Seon-Bang-Hyang* [*Current Situation of the Jury Trials and Their Reform Measures from the Perspective of the Court*], 28 HAN-IL-BEOB-HAG [KOREA-JAPAN LAW REVIEW] 139 (2009).

3. Other Performances of the Jury Trials outside of the Judiciary

a. Contribution of Jury Trials to the Development of the Field of Law and Psychology

The introduction of the jury trial system has brought about various positive effects in other areas than the judicial process. Above all, the academic research into the jury trial system and civil participation in the trials have been increased. As shown in the graph below, research into them had been rare before 2000 but has been very active since 2000 and particularly has been increasing rapidly since 2007.[5]



What is as important as the quantitative increase of the research into jury trials is the qualitative expansion. Meanwhile, because there had been no history of jury trials in Korea, the soil for the development of related law and supportive psychology had been sterile; but, as the jury trials system was introduced, an institutional ground for the development of law and psychology based on empirical research has grown. Furthermore, this theoretical and empirical research into Korea's unique jury trial system has been introduced to the United States and other foreign countries, attracting foreign scholars' attention.[6]

---

[5] Such results were ascertained by searching university libraries on-line for dissertations and books with keywords such as "jury trial system," "people participation," "citizen participation," and "mass participation," and then summing them up.

[6] Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW 525 (2010); Valerie P.

b. Contribution to the Expansion of Democracy

Since the jury trial system is understood as a bastion of citizens' freedom and human rights against the government's arbitrary exercise of its power to punish, it is essential from the perspective of democracy and human rights.[7] In particular, while the United States was experiencing British colonial rule, its juries found innocent the independent activists who had been prosecuted by the British government; and, thus, the jury trial system would be more significant for Americans.[8] We also need to note the historical fact that the jury trial system expanded in the aftermath of the French Revolution.

Hence, the jury trial system or the Civil Participation in Criminal Trials may well be a starting point for the perfection of Korean democracy. The National Consensus Committees that are engaged in making policies about such important issues as nuclear power plants and educational policies may well be an extension of the jury trial system because they champion a direct and deliberative democracy.

Summing up, the jury trial system may well have conduced its legislative purposes of enhancing the democratic legitimacy of the judicial process and the public's faith in judicial trials. In the same context, ordinary people expect that the jury trial system would serve to enhance the justice of and faith in the judicial process; 77% of the subjects sampled opined, more or less, that the jury trial system should be expanded.[9]

Hans, *Trial by Jury: Story of a Legal Transplant*, 51(3) LAW & SOCIETY REVIEW 471 (2017).

[7] Lawyer Dongeon Cha says that a US deputy public prosecutor once asked, "Is Korea a real democratic nation despite that it does not operate a jury trial system?" Such a question well proves Americans' view of democracy and the jury trial system. Dongeon Cha, *The Effects of the Jury Trial System on the Development of Democracy*, 5 LAW JOURNAL 167 (Feb. 2015). *See also* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1995).

[8] The Bushell and Zenger cases are good examples. In contrast, after US independence, many whites prosecuted for crimes against African Americans were acquitted by a jury, which was a problem of the jury trial system. *See* KYOUNGHWAN AHN & INSUB HAN, BAE-SIM-JE-WA SI-MIN-UI SA-BEOB-CHAM-YEO [JURY TRIAL AND CITIZEN PARTICIPATION IN THE JUDICIAL PROCESS] (2005); INSUB HAN & SANGHOON HAN, GUG-MIN-UI SA-BEOB-CHAM-YEO [CITIZENS' PARTICIPATION IN THE JUDICIAL PROCESS] (2010).

[9] This was a result of a survey conducted by a domestic on-line company for 1,020 adults aged 19 or older in February 2017. The average age of the participants was 43.18 (range: 19-69); 20.2% of them were in their 20's, 21.1% in their 30's, 24.2% in their 40's, 22.7% in their 50's, and 11.8% in their 60's.

III. INSTITUTIONAL CHANGES

In December 2011, the National Assembly of Korea passed an amendment to the Citizen Participation Act, which was proclaimed in January 2012 to take effect in July of the same year. This amendment (Article 4 of the new Citizen Participation Act) expanded the cases eligible for jury trials to the three-judge panels specified in Article 32, Paragraph 1 of the Court Organization Act. The new Act provides that the court may decide not to proceed with a jury trial and transfer the matter to ordinary proceedings in such cases as sexual crimes, considering the secondary damage to the victims (Articles 9 and 11, Citizen Participation Act). Such clauses are designed to respect victims' opinions of not wanting a jury trial.[10]

Originally, it was agreed by political parties in 2008 that a Committee for Citizen Participation in Criminal Trials would be established five years later to assess the performances of jury trials and to decide whether to improve them and, if so, how. It would be noteworthy to point out that the National Assembly took a very vigorous stance in expanding and enhancing jury trials in 2011, even though at first, four years earlier, it had been hesitant.

The Supreme Court decided in favor of the jury trial system in many cases. For instance, the Court stated that the defendant who had not submitted his or her confirmation for the jury trial within seven days after receipt of the indictment could apply for the jury trial before the first hearing of the trial and that the court could decide to proceed with the jury trial by confirming the defendant's intention.[11] Later in 2010, the Supreme Court handed down a judgment that the verdict of the jury should be respected.

Male and female participants each numbered 510. SANGHOON HAN, ET AL., PI-GO-IN SIN-CHEONG-YUL JE-GO DEUNG-EUL TONG-HAN GUG-MIN-CHAM-YEO-JAE-PAN HWAL-SEONG-HWA BANG-AN [SUGGESTIONS FOR IMPROVEMENT OF THE CITIZEN PARTICIPATION IN THE CRIMINAL TRIALS] 233 (2017).

[10] Citizen Participation Act, *supra* note 1 (Act No. 11155, *amended on* Jan. 17, 2012, *enforced on* July 1, 2012). The reasons for proposing the amendment of the Act were the heavy work burden of the court. It was judged appropriate that 100-200 cases would proceed with citizen participation. In 2008, 65 cases proceeded with jury trials, and, in 2009, only 94 cases were tried with the jury, which accounted only for 1.4% of all the eligible cases (a total of 11,498 cases). If all the eligible cases should be tried with a jury, they would amount to about 20,000 cases; and, thus, if the ratio of 1.4% should be maintained, about 280 cases could be expected to be tried with a jury every year.

[11] Supreme Court [Sup. Ct.], 2009mo1032, Oct. 23, 2009 (S. Kor.) (re-appeal on the decision on proceeding to a jury trial).

Namely, in the first trial that proceeded with the jury trial system, the jury delivered 'a not-guilty' verdict based on their evaluation of witnesses and the court proceeding, and the court agreed to the verdict of the jury and acquitted the defendant. However, the appeal courts, which hears and decides cases without a jury, interrogated the witnesses only for the victims and found the defendant guilty. On appeal, the Supreme Court overturned the decision and remanded the case, noting that the appeals court had violated the principles of a trial-centered judicial process, direct trial, and evidential justice.[12]

In 2011, a defendant motioned for a jury trial, but both the district and appeals court continued to proceed to trial without a jury, while they did not decide whether the defendant had a right to trial with a jury. On appeal, the Supreme Court reversed and remanded the case to the appeals court, stating that such a practice would violate citizens' important right to a jury trial and other procedural rights. The Supreme Court opined that the judicial process without a jury trial would be invalid in consideration of the purpose of civil participation in the judicial process.[13] In 2014, the Supreme Court had a chance to examine the contents of the jury instruction;[14] and, in 2016, it heard a case regarding the requirements and scope of the judges' discretion to turn down a defendant's motion for a jury trial.[15]

The Constitutional Court has made approximately twenty decisions on jury trials since 2009. Most of the constitutional appeals were about the right to a fair trial, right to equality, presumption of innocence, etc. concerning the jury system. Namely, the citizens who appealed to the Constitutional Court had wished to be tried with a jury, but their motion for a jury trial had been refused due to non-eligibility for a jury trial. In 2009, the Constitutional Court decided that the refusal of the motion did not infringe the rights to equality, etc. [16] In 2004, the Court decided that sub-paragraph of Paragraph 1 of Article 9 of the Citizen Participation Act, which specifies the exclusion of the motion for a

---

[12] Supreme Court [Sup. Ct.], 2009do14065, Mar. 25, 2010 (S. Kor.).
[13] Supreme Court [Sup. Ct.], 2011do7106, Sept. 8, 2011 (S. Kor.).
[14] Supreme Court [Sup. Ct.], 2014do8377, Nov. 13, 2014. (S. Kor.).
[15] Supreme Court [Sup. Ct.], 2015mo2898, Mar. 16, 2016 (S. Kor.) (re-appeal on the exclusion of the jury trial).
[16] Constitutional Court [Const. Ct.], 2008Hun-Ba12, Nov. 26, 2009, (21-2 KCCR 493) (S. Kor.) (appeal for unconstitutionality of Section 1 of Article 5 of the Citizen Participation Act); Constitutional Court [Const. Ct.], 2014Hun-Ba447, July 30, 2015, (27-2 KCCR 270) (S. Kor.).

judicial trial, was constitutional.[17]

The academic circle published its evaluation and suggestions for civil participation in criminal cases.[18] Most of the evaluations

[17] Constitutional Court [Const. Ct.], 2012Hun-Ba298, Jan. 28, 2018, (26-1 KCCR 99) (S. Kor.).

[18] There is other various literature: *Taeyoung Ha, Gug-Min-ui Sa-Beob-Cham-Yeo: Cham-Sim-Je-ui Jaeng-Jeom-eul Jung-Sim-eu-lo* [*Citizen Participation in the Judicial Process: Focusing on the Main of Issues about Jury Trial*], 19 GYEONG-NAM-BEOB-HAG [GYEONGNAM LAW REVIEW] 227, 227-242 (2004); Eunro Lee & Kwangbai Park, *Bae-Sim-Pyeong-Gyeol-Gyu-Chig-ui Beob-Sim-Li-Hag-Jeog Je-Mun-Je(sang): Man-Jang-Il-Chi-Gyu-Chig-Gwa Da-Su-Gyeol-Gyu-Chig* [*Psychological and Legal Issues in Jury Decision Rule(1): Unanimity Rule Versus Majority Rule*], 18(2) HYEONG-SA-JEONG- CHAEG [KOREAN JOURNAL OF CRIMINOLOGY (KJC)] 459, 459-500 (2006); NEIL VIDMAR, THE JURY TRIAL SYSTEMS IN THE WORLD (2000); *Sanghoon Han, Gug-Min-Cham-Yeo-Jae-Pan-Je-Do-ui Jeong-Chag-Bang-An* [*Recent Developments and Suggestions for the New Civil Participation in Criminal Trials System in Korea*], 106 THE JUSTICE 483, 483-534 (2008); Taehoon Ha, *Gug-Min-Cham-Yeo-Jae-Pan-Je-Do Jeong-Chag Bang-An* [*The Ways to Establish the Jury Trial System*], 106 THE JUSTICE 564, 564-566 (2008); Taemyeong Kim, *Gug-Min-Cham-Yeo-Jae-Pan-Je-Do-ui Gae-Seon-Gwa-Je* [*The Improvement of Participatory Trial System*], 379 IN-GWON-GWA JEONG-UI [HUMAN RIGHT AND JUSTICE] 27, 27-43 (2008); Misuk Park, *Gug-Min-Cham-Yeo-Jae-Pan-ui Si-Haeng-Seong-Gwa-wa Hyang-Hu-Gwa-Je* [*The Results of Judicial Citizens' Participation System and Tasks in the Future*], 21(2) HYEONG-SA-JEONG-CHAEG-YEON-GU [KOREAN CRIMINOLOGICAL REVIEW] 135, 135-174 (2010); Donghee Lee, *Gug-Min-Cham-Yeo-Jae-Pan-ui Si-Haeng-Pyeong-Ga-wa Gae-Seon-Bang-An* [*The Reality of Korean Jury System and Its Remedy*], 30 BEOB-HAG-YEON-GU [CHONBUK LAW REVIEW] 219, 219-250 (2010); Hojoong Lee, *Gug-Min-Cham-Yeo-Jae-Pan-ui Seong-Gwa-wa Gwa-Je* [ACHIEVEMENTS AND PROBLEMS OF THE JURY SYSTEM IN KOREA], 1(3) BEOB-GWA GI-EOB-YEON-GU [RESEARCH INTO LAW AND ENTERPRISES] 191, 191-239 (2011); Bongsu Kim, *Gug-Min-Cham-Yeo-Jae-Pan-ui Gae-Si-Yo-Geon-e ae-han Go-Chal* [*A Critical Study for Opening Requirements of The Judicial Citizens' Participation Trial*], 23(1) HYEONG-SA-JEONG-CHAEG [KOREAN JOURNAL OF CRIMINOLOGY (KJC)] 9, 9-34 (2011); Hyejeong Kim, *Gug-Min-Cham-Yeo-Jae-Pan-Je-Do-ui Si-Haeng-Pyeong-Ga-wa Myeoch Ga-Ji Jaeng-Jeom-e dae-han Gae-Seon-Bang-An* [THE REVIEW OF JUDICIAL CITIZENS' PARTICIPATION SYSTEM THROUGH IMPLEMENTATION RESULTS], 32 YEONG-NAM-BEOB-HAG [YEUNGNAM LAW REVIEW] 83, 83-103 (2011); HEESUSNG TAK & SOOHYEONG CHOI, HYEONG-SA-JEONG-CHAEG-GWA SA-BEOB-JE-DO-E GWAN-HAN YEON-GU 5: GUG-MIN-CHAM-YEO-JAE-PAN- JE-DO-UI PYEONG-GA-WA JEONG-CHAEG-HWA BANG-AN [STUDIES ON THE CRIMINAL JUSTICE POLICIES AND JUDICIAL SYSTEM 5: FOCUSED ON EVALUATION RESEARCH ON CIVIL PARTICIPATION IN CRIMINAL TRIALS] 11-27 (2011); Seulki Kim, *Gug-Min-ui Hyeong-Sa-Jae-Pan Cham-Yeo-e gwan-han Beob-Lyul-ui Jeong-Bu Gae-Jeong-An-e dae-han Bi-Pan-Jeog Geom-To* [*A Critical Review on the Revised Bill of the Act on Citizen Participation in Criminal Trials*], 24 YEON-SEI-BEOB-HAG [YONSEI LAW JOURNAL] 1, 1-29 (2014); Taeksu Kim, *Peu-Lang-Seu Cham-Sim-Jae-Pan-ui Gae-Hyeog-Gwa Si-Sa-Jeom* [*Reforms of the Jury Trial System in France and Their Implication*], 31(2) BEOB-HAG-NON- CHONG [HANYANG LAW REVIEW] 73, 73-95 (2014); Yoori Seong & Kwangbai Park, *Yu-Joe-Pan-Dan Yeog-Chi-e dae-han Bae-Sim-Seol-Si Jeol-Cha-ui Hyo-Gwa* [*An Effect of the Jury Instruction Procedure on The Level of the Threshold for*

have been positive, and a considerable number of scholars have opined that a more positive meaning should be attached to the verdict of the jury.

IV. SUGGESTIONS FOR IMPROVEMENT OF JURY TRIALS IN SOUTH KOREA

A. Need for the Final Form of Legislation and Arrangement of the Core Issues

In 2004, the Judicial Process Participation Committee decided to introduce the jury trial system to South Korean courts through two stages; and, in 2006, the Judicial System Reform Committee confirmed the decision. During the first stage, the verdict of the jury would be a recommendation. During the second stage, the Citizens' Judicial Participation Committee would be established under the Supreme Court, according to Article 55 of the Citizen Participation Act. Thus, the Citizens' Judicial Participation Committee was launched under the Supreme Court on July 12, 2012. The final draft of the amendment of the Act was decided by the committee on January 18, 2013, and would be confirmed through a public hearing followed by a series of committee meetings (third, sixth, and eighth meetings).[19]

Meanwhile, the Ministry of Justice partially modified the committee's draft from the perspective of the public prosecutors and announced "a draft of the Citizen Participation Act" on October 11, 2013. Two months later, on December 31st of the same year, the ministry announced the second amendment draft. The draft of the Act was partially modified because the Ministry of Justice sought to exclude Public Election Act violators from jury

the Decision to Convict], 21(3) HAN-GUG-SIM-LI-HAG-HOE-JI : MUN-HWA MICH SA-HOE-MUN-JE [KOREAN PSYCHOLOGICAL JOURNAL OF CULTURE AND SOCIAL ISSUES] 497, 497-510 (2015); HYEONGGUK KIM, ET AL., GUG-MIN-CHAM-YEO-JAE-PAN-LON [A THEORY ON THE JURY TRAILS] (2016); Sunghoon Han, *Gug-Min-Cham-Yeo-Jae-Pan-ui Hwal-Seong-Hwa Bang-An-e gwan-han Yeon-Gu* [*A Study on Activation of the Jury Trial System*], 27(2) HAN-YANG-BEOB-HAG [HANYANG LAW REVIEW] 67, 67-83 (2016).

[19] For data about the fourth meeting of the Judicial Development Committee, see *Gug-Min-ui Sa-Beob-Cham-Yeo Hwag-Dae mich Gang-Hwa: Gug-Min-Cham-Yeo-Jae-Pan Hwal-Seong-hwa Bang-An (Chu-Ga Bo-Go)* [*Expansion and Reinforcement of Citizens' Judicial Participation: Activation of Citizen Participation in the Criminal Trials (an additional report)*], July 5, 2018, 22.

trials. This was thought to result from the acquittal of an anti-government poet, Dohyun Ahn, who had been accused of violating the Public Election Act.[20] The second amendment bill was to expire in 2016.

Along the way, the fourth meeting (June 5, 2018) of the Judicial Development Committee decided on some reform measures for jury trials:

(a) Regarding the motion system (including the introduction of the essential cases eligible for the jury trials), intentional murder cases shall be essentially eligible for the jury trials (majority opinions).
(b) The cases filed with the branch courts of the district courts shall be eligible for a jury trial (unanimous decision).
(c) In case of a unanimous 'not guilty' jury verdict, the public prosecutor's appeal right would be limited (majority opinions).

Such decisions of the Judicial Development Committee differed much from those of the Citizen's Judicial Participation Committee, particularly about the eligible cases and the prosecutor's limited appeal right.

At the twentieth National Assembly, Sungho Jeong and other lawmakers proposed an amendment to the Act on Citizen Participation in Criminal Trials on June 12, 2017, which reflects the decisions of Citizen's Judicial Participation Committee, more or less. Recently, Representative Jongmin Kim submitted a more drastic amendment to the Act, reflecting the decisions of the Judicial Development Committee. Since the cases eligible for jury trials were expanded to all the criminal cases subject to the three-judge panels in 2012, there would be few reforms of the jury trial system during the second stage of judicial reforms, covering almost over five years, but the recent movements at the National Assembly would be much welcomed. The situations and contents of the proposed amendments to the Act, pending at the National Assembly as of April 30, 2019, are as follows:

[20] Donghee Lee, *Gug-Min-Cham-Yeo-Jae-Pan-ui Seong-Gwa-wa Gwa-Je: Choe-Jong-Hyeong-Tae-An-e dae-han Pyeong-Ga-wa Je-Eon-eul Po-Ham-ha-yeo* [*Performances and Challenges of the Citizen Participation in the Criminal Trials: Including the Evaluation of and Suggestions for the Final Draft*], 146(3) JUSTICE 69, 71 (2015).

Partial Amendment Bills Pending at the 20th National Assembly

Date Submitted: 2017-03-31
Proposer: Thirteen representatives, including Jaejeong Lee
Major Contents:

In principle, the number of jury members shall be nine, and, in special cases, it maybe seven (Amendment bill, Article 13).

Date Submitted: 2017-06-12
Proposer: Ten lawmakers, including Seongho Jeong
Major Contents:

a) Although the defendant has not motioned for a jury trial, the court may, by authority or upon the prosecutor's application, proceed to a jury trial for enhancement of democracy and transparency of the judicial process (Amendment bill, Article 5).

b) The reason for exclusion of the jury trial shall be amended from "the cases not proper for the jury trial" to "the cases where the jury trial would be disadvantageous to defendant or victim or where a fair trial would be clearly impeded" (Amendment bill, Article 9, Paragraph 1, Sub-paragraph 4).

c) For a more careful jury verdict, the confession-based case shall not be tried by the five-member jury but by a seven- or nine-member jury (Amendment bill, Article 13, Paragraph 1 and Article 30, Paragraph 1).

d) In consideration that the Civil Code specifies a nineteen-year-old person as an adult, the age of the prospective jurors shall be nineteen or older (Amendment bill, Article 16 and Article 22, Paragraph 1).

e) Supplement of the Jury Verdict Conditions and Effects (Amendment bill, Article 46 and Article 49, Paragraph 1).

1) In case all of the jury members cannot agree to a verdict, the verdict shall be reached not by the simple majority but by a three-fourths majority.

2) The judges should respect the verdict of the jury except for the case where it is against the Constitution, statutes, enforcement ordinance, enforcement regulation, or Supreme Court precedents.

3) Although a verdict was not reached by the jury, the judges may refer to the opinions of the jury; and, in such a case, the judges should not fail to quote the opinions in the sentencing.

f) As for the case where the jury's 'not guilty' verdict is unanimous, and, thereby, the court has sentenced 'not guilty,' the prosecutor cannot appeal to the appellate court for the reason that "the fact has been mistaken" (a new Article 46-2).

Date Submitted: 2018-08-28
Proposer: Ten representatives, including Kwangdeok Joo
Major Contents:

Lately, more people distrust the judiciary, while some judges are criticized for their political judgment. The cases infringing on the neutrality and independence of the judiciary have come in succession. Thus, it is deemed urgent to enhance the democratic legitimacy and transparency of the judicial process.

Thus, it is necessary to extend the jury trial system to all the district court cases and their branch courts regardless of the size of the judging panel (Amendment bill, Article 5, Paragraph 1).

Date Submitted: 2018-10-31
Proposer: Ten representatives, including Gwangwon Park
Major Contents:

The phrase "the case proper" shall be changed into "the case itself."

Date Submitted: 2019-03-22
Proposer: Ten representatives, including Hyeryeon Paik
Major Contents:

The current Act specifies that the jury corps would be formed through arbitrary sampling. Since gender and age distributions are not taken into consideration, the jury may well be biased in terms of gender or age, which may impede the reliability and neutrality of the jury verdict.

Hence, it would be necessary to introduce an arbitrary sampling per gender and age group to enhance the neutrality and reliability of the jury verdict (deletion of Article 9, Paragraph 1, Sub-paragraph 4, Amendment bill, Articles 22, 23, and 31).

Date Submitted: 2019-04-09
Proposer: Eleven representatives, including Jongmin Kim
Major Contents:

a) The cases eligible for a jury trial would be expanded to include the cases of intentional murder (including its attempted version and its instigation). Such cases would compulsorily proceed to jury trial. Defendants and their lawyers may motion for the exclusion of the jury trial; and, if their motion should be refused by the court, they may appeal to the higher court immediately (Amendment bill, Article 5, Paragraph 3 and Article 9, Paragraphs 1 and 3).

b) The jurisdiction of the jury trials would be expanded to all the district courts and their branch courts except for the small ones (Amendment bill, Article 10).

c) The age of the jury members and the prospective jurors would be adjusted down to nineteen or older (Amendment bill, Article 16 and Article 22, Paragraph 1).

d) The presiding judge should explain to the jury members the summary of the defendant's and his/her lawyer's arguments as well as that of the public prosecutor's (Amendment bill, Art. 46, Paragraph 1).

e) The judges should respect the jury verdict except when it violates the Constitution, statutes, enforcement ordinances, and regulations (Amendment bill, Article 46, Paragraph 5).

f) If the jury has not reached a verdict, the judge should hand down a sentence. In such a case, the judge shall refer to the opinions of the jury members (Amendment bill, Article 46, Paragraph 6).

Mostly, the draft amendments to the Act suggest that jury trials should be activated, while the effects of the jury verdict should be reinforced, but they differ in terms of their focus. Judging such core issues would not be easy because they reflect individuals' preferences or value systems. Nevertheless, it is deemed urgent to review the suggestions from the Citizen's Judicial Participation Committee, Judicial Development Committee, and the six amendments proposed by the representatives at the twentieth National Assembly.

If the effects of the jury verdict should be reinforced, the problem of unconstitutionality still remains. The Jaein Moon government's proposed amendment to the Constitution suggests in its Article 28, Paragraph 1 that "Every citizen has the right of access to the court according to the Constitution" and that "the judicial power lies in the courts consisting of the judges. Citizens may participate in the judicial process as a jury member or in other ways." Namely, since citizens' right to participate in the judicial process would be specified in the Constitution, the problem of unconstitutionality would be resolved if the Constitution should be amended in such directions. However, since the Constitution has yet to be amended, we need to review the reform measures for the jury trial system under the current Constitution.

As long as the Constitution is yet to be amended, it would be desirable to reform the jury trial system in consideration of the current Constitution. When the Constitution has been amended, it would be very feasible to reform the jury trial system drastically. Then, the current issues may be summed up as follows.

First, it would be desirable to maintain the current scope of the eligible cases and the principle of the defendant making a motion for a jury trial. If the principle of the defendant's motion should be

maintained, the problem still remains whether only the defendant would be allowed to move for a jury trial or certain types of crimes should proceed to jury trials. Second, how would the effects of the jury verdict be reinforced? If the court should not be bound by the jury verdict, the specific cases where the court is not bound by the verdict need to be specified. Third, procedures for and methods of the jury debate and verdict should be specified. Would the current simple majority system be maintained? Otherwise, should a qualified majority or the unanimous decision be introduced? Should the jury continue to be obliged to listen to judges' opinions? How would the sentencing procedure proceed? Several important issues are discussed below for increasing jury trials.[21]

B. Expansion of Cases Eligible for Jury Trials

Currently, only about 1.5% (about three hundred cases annually) of the criminal cases eligible for jury trials end up with jury trials.[22] Such a rate is too low to enhance the public trust in the judicial process in both terms of quantity and quality. In major criminal cases (such as the crime of influence, bribery, etc.,) that attract citizens' attention and, therefore, that should be tried fairly, most of the defendants do not move for a jury trial, which undermines the jury trial system. Moreover, defendants tend to move for a jury trial when it is deemed advantageous to themselves. Such a practice of "forum shopping" is not appropriate.

In the case of the US federal criminal court process, where the defendants can waive jury trials, the conditions for waiving jury trials should be met. First, the defendant does not want to be tried by the jury. Second, the prosecutor should agree to the trial with no jury. Third, the court should approve the non-jury trial. Then, the trial can proceed without the jury, or the court can allow for a free bargaining (opt-out system).[23] We need to note that in Japan the court can exclude a jury trial for a case even if it is compulsory according to law, but the reasons for exclusion of the jury trial have lately become less strict. After all, the differences

---

[21] Although the methods of debate and verdict of the jury are important issues, this article focuses on issues for increasing jury trials.

[22] *The Citizen Participation in Criminal Cases Has a Long Way to Go… Its Rate of Uses Have Still to Rise*, HERALD ECONOMY, Aug. 20, 2018.

[23] *See* FED. R. CIV. P. 23(a).

among an opt-in system, opt-out system, and mandatory system are those of procedures and degrees.

When expanding the scope of the cases eligible for jury trials, we need to examine the annual number of criminal cases that Korean courts can bear in consideration of the current human and material resources of the judiciary. If more national resources should be invested in the judiciary, we would need to consider an optimal distribution of the nation's entire resources available as well as the jury members' burden. Namely, we should be conscious of the limits of the cases that may be tried with the jury.[24]

The Citizen's Judicial Participation Committee has proposed the expansion of motions, while the Judicial Development Committee has decided on mandatory jury trials. However, the two positions do not oppose each other. Such movements seem to be a natural development, considering that citizens' support of jury trials has increased, that it is urgent to help recover the public trust in the judicial process, and that the argument for unconstitutionality is less effective.

As of now, Representative Seongho Jeong's proposed amendment specifies in Article 5 that, without the motion from the defendant, the court may, *ex officio* or upon prosecutor's application, proceed to a jury trial where it is needed for democratic legitimacy and transparency of the judicial process. On the other hand, Representative Jongmin Kim's proposed amendment states in Article 4, Paragraph 3 (newly written) that crimes, such as murder and murder by a robber or rapist, should be tried with the jury but that the court may exclude a jury trial upon the defendant's request or by authority (Article 9, Paragraph 1)

If the Citizen Participation Act should be amended to allow jury trials without the defendant's consent, his or her right of access to the court would be infringed, which may be unconstitutional. According to the decision of the Constitutional Court, the guarantee of a citizen's right of access to the court means that the citizen has a right to be tried by a judge who will confirm the facts and interpret and apply the law to his/her case. In other words, any limit or barrier should not be built up to make it difficult for the defendant to have an opportunity to be tried by a judge. Depriving the defendant of his/her right of access to trial by

[24] It is conceived that, if a little more human and material resources should be mobilized, the courts may well bear 700-1,000 cases yearly.

a judge, which is guaranteed by the Constitution, infringes upon the essential contents of a citizen's Constitutional rights.[25]

However, it is notable that, in 2012, the Constitutional Court decided that Article 27 of the former Discipline of Judge Act,[26] specifying that the judges concerned should appeal only and once to the Supreme Court, is not unconstitutional because it would not infringe upon the right of access to the court and trial by a judge (Article 27, Paragraph 1 of the Constitution). In this case, the Constitutional Court opined as follows:

> Article 27 of the former Discipline of Judge Act specifies that the lawsuit against the Chief Justice for cancellation of the disciplinary measures should be tried once and for all. Such an article can be justified because it considers the special status of the judge and the special nature of his or her discipline, and, therefore, the lawsuit should be tried promptly. Moreover, unlike other trial cases where the Supreme Court is not engaged in finding the facts, in the present case, the Supreme Court, as the first and last instance, finds and determines the truth for the lawsuit. Thus, the opportunity of finding the facts and applying the law by the judge has not been deprived. Hence, the relevant article of the former Discipline of Judge Act does not infringe on the right of access to the court guaranteed by Article 27 of the Constitution.[27]

The above judicial decisions can be summarized as follows. Citizens' right of access to the court and the principle of separation

---

[25] Constitutional Court [Const. Ct.] 92Hun-Ka11, Sept. 28, 1995, (7-2 KCCR 264) (S. Kor.) (unconstitutionality of Article 186, Section 1 of the Patent Law). The Constitutional Court decided that "Section 1 of Article 186 of the Patent Law specifies that only when a party protests against the final decisions made by the Patent Administration can it appeal to the Supreme Court, which would be unconstitutional because it infringes on the citizens' right of access to the court presided by a judge whose status is guaranteed by the Constitution."

[26] Article 27 (Procedure of Appeal): (1) In case the claimee wants to appeal the disciplinary measure, he or she should appeal to the Supreme Court within fourteen days from when he or she has known about the disciplinary measures. In this case, the claimee should appeal directly to the Supreme Court, not via the lower courts. (2) The Supreme Court judges the case of the above Paragraph 1 only with a single trial. The Article was amended, but only some words were adjusted.

[27] The Constitutional Court [Const. Ct.], 2009Hun-Ba34, Feb. 23, 2012, (24-1 KCCR 80) (S. Kor.) (constitutional appeal for the unconstitutionality of Article 2, Paragraph 2 of the Discipline of Judge Act).

of the powers should be determined by the judge in specific cases through confirmation of the facts and application of law. Although the judge's authority may be limited for public interests and rational reasons, he or she should not be deprived of his or her opportunity to confirm the facts and apply the law. If the judge should be given an opportunity to confirm the facts and apply the law, the lawmakers can well limit the judge's authority when it does not violate the principles of access to the court and separation of powers.

In consideration of such judicial precedents, even if the defendant does not move for a jury trial, the court can proceed to it by authority or upon the prosecutor's application, when it does not infringe the defendant's right of access to the court. The reasons are two-fold. First, the first trial court can make a judgment different from the jury verdict, although they are obligated by law to respect it. Second, the appeal court can also make a judgment different from that of the first trial court. Namely, even according to the draft amendments of the Citizen Participation Act, the defendant would not be deprived of his/her right of access to the court where the judge should confirm the facts and apply the law.[28]

If the problem of unconstitutionality can be resolved, the jury trial would be well operated without the defendant's motion but by judge's authority or upon the prosecutor's application. Otherwise, as Representative Jongmin Kim's draft amendment suggests, certain types of crimes shall be subject in principle to a jury trial, but the jury trial could well be excluded upon the defendant's motion to waive a jury trial (opt-out system). The less serious cases may well be subject to a jury trial if they need to reflect the ordinary citizens' sound common sense. Of course, in such a case, the judge should proceed to the jury trial by legal authority or upon the prosecutor's application.

C. Expansion of Eligible Cases for the One-Judge Panels

Representative Gwangdeok Joo's proposed amendment to the Citizen Participation Act specifies that jury trials shall be

[28] Sanghoon Han, *Gug-Min-Cham-Yeo-Jae-Pan-Je-Do Si-Haeng-Gwa In-Gwon-Ong-Ho* [*Civil Participation in Criminal Trials and Human Rights*], 102 JUSTICE 7, 7-29 (2008); Sanghoon Han, *Gug-Min-Cham-Yeo-Jae-Pan-e-seo Bae-Sim-Won-Pyeong-Gyeol-ui Gi-Sog-Jeog Hyo-Lyeog-e gwan-han Geom-To* [*An Analysis and Suggestion of the Binding Force of the Jury Verdict in Korea*] , 24(3) HYEONG-SA-JEONG-CHAEG [KOREAN JOURNAL OF CRIMINOLOGY (KJC)] 9, 9-38 (2012).

expanded not only to the three-judge-panels of the district courts and their branch courts but also to single-judge panels (Amendment bill, Article 5, Paragraph 1). It would be desirable, of course, to expand the eligible cases not only to the criminal cases subject to the three-judge-panels but also to those subject to the single-judge panels.[29] For example, any defendant who might be imprisoned for six months or longer would have the right of access to a jury trial.[30] In Korea, the criminal cases subject to the single-judge-panel should be referred to the three-judge-panel for a jury trial, but such a procedure would not be necessary if the single-judge-panel should allow the jury trial.

However, if all the misdemeanors including the monetary penalties should be subject to jury trials, the courts could not bear the burden in terms of time and human resources. Namely, the eligibility for jury trials needs to be limited. The scope of the cases eligible for jury trials should be determined politically in consideration of the number of the cases, the seriousness of the cases, citizens' concerns and conveniences, the workload of the courts, budget for the courts, etc. For example, if the criminal penalty for a case exceeds a three-year or five-year imprisonment, it may be eligible for a jury trial despite being tried by a single-judge panel. Otherwise, jury trials for felonies that might receive a sentence of death or life imprisonment shall be mandatory or excluded, while other crimes shall be subject to the jury trial upon application from the defendant or prosecutor.[31] As it would be inevitable for the court to exclude even a felony from the jury trial if there are certain reasons, it would be deemed desirable to operate a separate panel taking charge of the decisions on the exclusion of jury trials. (Those will be discussed later in this article.)

---

[29] MISOOK PARK ET AL., HYEONG-SA-JEONG-CHAEG-GWA SA-BEOB-GAE-HYEOG-E GWAN-HAN JO-SA, YEON-GU MICH PYEONG-GA(II): GUG-MIN-CHAM-YEO-JAE-PAN-E DAE-HAN CHAM-GWAN MICH JO-SA-YEON-GU [RESEARCH INTO CRIMINAL POLICY AND JUDICIAL REFORM, RESEARCH, AND EVALUATION (II): OBSERVANCE AND REVIEW OF THE JURY TRIAL] 195 (2008) (in consideration of the basic reason for the jury trial system, it would be desirable to open it to all the criminal cases, while the court can selectively exclude cases).

[30] Baldwin v. New York, 399 U.S. 66 (1970); Blanton v. City of North Las Vegas, 489 U.S. 538 (1989).

[31] Britain and Canada divide the crimes into three categories: indictable offenses, summary offenses, and offenses triable either way. The indictable offenses shall be subject to jury trials in principle, while the summary offenses shall be tried by the judge, alone, and the offenses triable either way may be subject either to a jury trial and the judge, alone. PARK ET AL., *supra* note 29, at 189.

D. Enhancement of the Effects of the Jury Verdict

According to the current law, the jury verdict does not bind the judge at the first stage of the jury trial system (Article 46, Paragraph 2 of the Citizen Participation Act). However, since the judges should write their reason in the sentence if they hand down a sentence different from the jury verdict (Article 49, Paragraph 2 of the Citizen Participation Act), it may well be understood that the jury verdict has the "strong effect of recommendation."[32] The statistic that jury verdicts have corresponded to 93.2% of judges' sentencing for the last decade proves that the jury verdict has a strong advisory effect.[33] However, the fact that the jury verdict has only an advisory effect impedes the use of jury trials. For example, a defendant moved for a jury trial; but, after he heard that the jury verdict would have only an advisory effect, he called off the motion. Even jury members would not like to participate in a jury trial because the jury verdict would have only an advisory effect. In other words, the advisory effect of the jury verdict may well have some negative impact on jury members' presence at the trial.

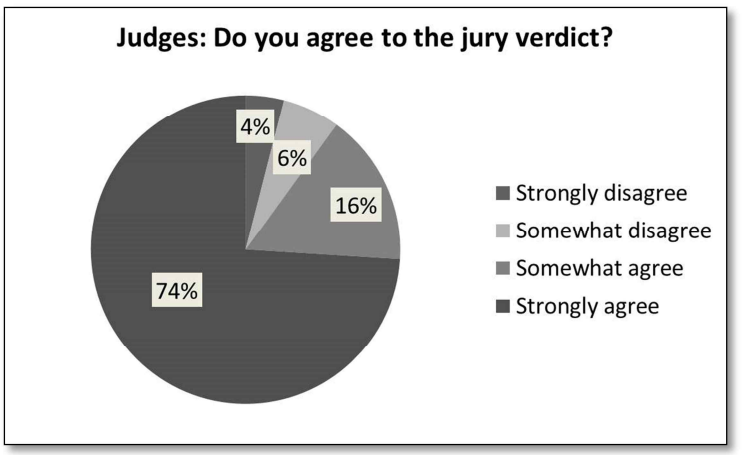
On the other hand, if the effects of the jury verdict should be enhanced, we may well doubt whether jury verdicts are precise and appropriate. The appropriateness of jury verdicts can well be estimated in reference to their rate of concordance with judges' verdicts. Thus, the researcher asked the judges whether they had agreed with the jury verdicts; 89.5% (n=639) of them answered, 'Yes.'[34] The survey below was conducted in 2012, while the concordance rate of 93.2% between jury verdicts and judges' decisions was the average rate for a decade. It is deemed reasonable to estimate that the judges' opinions would coincide almost completely with those of the jury. We cannot merely exclude the possibility that the judges should agree to the jury verdict, although they do not actually agree with it. Such an unwilling yield on the parts of the judges may well be justified in terms of the democratic legitimacy of the judicial process.

---

[32] The effects of a judicial decision or jury verdict may well be categorized into four categories: (1) strong binding effects, (2) weak binding effects, (3) strong advisory effects, and (4) weak advisory effects. The effects of the current jury verdict may have strong advisory effects. Han, *supra* note 28, at 27 (2012).

[33] NATIONAL COURT ADMINISTRATION (S. KOR.), *supra* note 1, at 41. Most of the 155 cases where the jury verdicts did not correspond to the judge's sentencing were 'not guilty' by the jury but 'guilty' by the court.

[34] Han & Chun, *supra* note 3, at 22.



Such a rate of concordance is similar to that found in Los Angeles (California) and Maricopa (Arizona) in the United States.[35]

In the case of South Korea, most of the 155 cases where the jury verdict disagreed with the judges' sentences were 'not guilty' from the perspective of the jury but were sentenced 'guilty' by the court. Hence, the high possibility that the jury verdicts of 'not guilty' are not much different in Korea and the United States. In a survey conducted in 2012, 87% of 719 Korean judges answered that jury members are sufficiently qualified to judge between 'guilty' and 'not guilty.'[36]

---

[35] Theodore Eisenberg, et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, Cornell LAW FACULTY PUBLICATIONS, Paper 343 (2005), http://scholarship.law.cornell.edu/facpub/343.

[36] The majority (62.5%) of judges who responded had worked as a judge for 5 years or less, followed by 16-20 years (19%), 11-15 years (12.4%), 6-10 years (4.4%), and 21-25 years (1.7%). Han & Chun, *supra* note 3, at 51; Kidu Oh, *Bae-Sim-Won-ui Pan-Dan-Neung-Lyeog* [*The Ability of Jury to Find Fact*], 96 JUSTICE 124, 124-138 (2007); Ilho Hwang, *Gug-Min-Cham-Yeo-Jae-Pan-ui Bae-Sim-Won-e dae-han Sil-Jeung-Jeog Yeon-Gu* [*Empirical Study on Juries of Civil Participation in Criminal Trial*], 29 HAN-YANG-BEOB-HAG [HAN YANG LAW REVIEW] 513, 513-540 (2010); Kiman Hong, *Gug-Min-Cham-Yeo-Jae-Pan-ui Bae-Sim-Won Pan-Dan-Neung-Lyeog-e gwan-han So-Go* [*A Review of Jury Members' Ability of Judgment*], *in* SA-BEOB-GAE-HYEOG-GWA SE-GYE-UI SA-BEOB-JE-DO (VII) [JUDICIAL REFORM AND THE JUDICIARY SYSTEMS IN THE WORLD (VII)] (2010); Sangjoon Kim, *Bae-Sim-Pyeong-Gyeol-gwa Pan-Sa-Pan-Gyeol-ui Il-Chi-Do mich Pan-Dan-Cha-I-e Gwan-Han Yeon-Gu* [*A Study on the Agreement between Jury Verdict and Judges' Sentencing*] (2011) (unpublished Master Dissertation, Seoul National University); Yonggu Lee, *Gug-Min-Cham-Yeo-Jae-Pan-ui Bae-Sim-Won Pyeong-Gyeol-gwa Pan-Gyeol Cha-I-e gwan-han Bun-Seog* [*An Analysis of the Differences between Jury Verdicts and Judges' Sentencing*], 3(2) HYEONG-SA-

In addition, 78% of the judges who had been engaged in jury trials said, 'Yes,' to the question, "Is the jury trial desirable for a fair judgment?." In a 2012 survey, 26% (n=606) of the jury members answered that "it would be essential to give a binding effect to the jury verdict;" 54.6% (n=1,238) said, "a little necessary." In overall terms, 80.6% of the jury members agreed to the binding effects of the jury verdict.

At the current stage, it would be desirable to give 'a weak binding effect' to the jury verdict. 'The weak binding effect' means that the courts should respect the jury verdicts and, thus, that they shall accept the jury verdict unless there is an exceptional reason not to.[37] Representative Seongho Jeong's bill suggests that the jury verdict should be respected as much as possible. If the jury verdict should be given 'a weak binding effect,' it would be deemed necessary to arrange the rules, regulations, and jury report system so that the rate of concordance between the jury verdict and judges' sentencing could be 95% or higher.

E. A Limit of the Prosecutor's Appeal?

Representative Seongho Jeong's bill to amend the Citizen Participation Act specifies that, if the unanimous verdict of the jury is 'not guilty' and, thereby, the court has acquitted the defendant, the prosecutor should not appeal to the higher court for the reason that "the facts have been misunderstood and, thus, the court's sentence has been affected by the misunderstanding" (new Article 46-2). The Judicial Development Committee decided to the same effect at its fourth meeting (June 5, 2018). In jury trials for the period from 2008 to 2017, the ratio of appeals was 81.0%, which is higher than that (61.5%) of appeals of ordinary criminal cases. The ratio of prosecutor's appeals (including appeals by both parties) in jury trials is 48.4%, which is higher than that for other criminal trials (28.1%). In particular, in 2016, the ratio increased to 51.5% and, in 2017, increased a little to 51.9%. These ratios are higher than those of defendants' appeals in the same years (48.9% and 50.2%, respectively).[38] The ratio of disaffirmation by the appeals court was 28.4%, which is much lower than that (40.5%)

SO-SONG I-LON-GWA SIL-MU [THEORIES AND PRACTICES OF CRIMINAL PROCEDURE (TPCP)] 109, 109-192 (2011).

[37] Han, *supra* note 28, at 22 (2012).

[38] NATIONAL COURT ADMINISTRATION (S. KOR.), *supra* note 1, at 38.

of the average disaffirmation for other trials for the same period.[39] All-in-all, jury trials have been appealed more, while the ratio of their disaffirmation by the appeals court has been lower. The problem is that the prosecutors abuse their rights to appeal to the higher courts. If the verdict reached jointly by the jury and the court should be opposed by the prosecutors and disaffirmed by the appeals court consisting only of professional judges, only the judicial costs would increase; such a practice would undermine the reasons for jury trials while discouraging the defendants from moving for jury trials.[40]

In these regards, limiting the prosecutor's appeal sounds persuasive. However, we need to consider several points. Above all, limiting the prosecutor's appeal may well be understood as a way to check the prosecutor's right to appeal in order to safeguard the jury trial system. This method seems too similar to the US concept of 'double jeopardy.' Actually, in the United States, the defendant would be set free by the 'not guilty' verdict of the jury; and, then, he or she would not be indicted again for the same charge.[41] Such a principle of double jeopardy is specified in Article 5 of the Amendment of the US Constitution; and, thus, the Article shall apply to the judicial process in each state.[42]

However, though the principle of double jeopardy does not allow for the prosecutor's appeal against the 'not guilty' verdict of the jury, the scope for excluding further litigation is narrow because only particular criminal 'counts' are barred from the retrial. Further, as the United States is a federal system, the effect of excluding further litigation in state courts will not bar charges in federal court and vice versa. Namely, if a verdict should be 'not guilty' in a state court, the accused may well be indicted again by the federal government and vice versa. This is the dual sovereignty doctrine.[43]

---

[39] *Id.* at 45. The ratio of disaffirmation at the Supreme Court is just 1.1%.

[40] Hanjoong Jung, *Gug-Min-Cham-Yeo Hyeong-Sa-Jae-Pan-gwa Geom-Sa-ui Hang-So Je-Han* [*The Participatory Criminal Justice System and the Restriction of Prosecutor's Appeal*], 35(3) OE-BEOB-NON-JIB [HUFS LAW REVIEW] 216 (2011).

[41] The principle of double jeopardy is provided in Article 5 of the Amendment of the Constitution. United States v. Ball, 163 U.S. 662 (1896); Fong Foo v. United States, 369 U.S. 141 (1962); RANDOLPH JONAKAIT, THE AMERICAN JURY SYSTEM 250 (2003).

[42] Benton v. Maryland, 395 U.S. 784 (1969).

[43] United States v. Lanza, 260 U.S. 377 (1922); Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); Koon v. United States, 518 U.S. 81 (1996). See also Heath v. Alabama, 474 U.S. 82 (1985) for a case where a state has punished a crime but another state can punish the same crime.

In contrast, Korean judicial precedents and common views adopt the 'same underlying fact theory;' and, thus, the identity of the charged facts and the scope of the further litigation excluded are relatively wide. Moreover, Korea has a unitary judicial system. Namely, there are no concepts such as state and federal governments. So, once litigation has been resolved, there would be no further prosecution. Since, rather than the principle of double jeopardy, the principle of excluding the same litigation is applied in continental countries, there has been no case where the prosecutor's appeal to the higher court of a jury or court verdict is limited.[44]

Furthermore, the limit of the prosecutor's appeal is related to the retrial system. Since the Korean legal system does not allow for a retrial unfavorable to the defendant, any wrong verdict of 'not guilty' cannot be corrected.[45] In contrast, many foreign countries allow for a retrial unfavorable to the defendant. These include such countries as Germany, Austria, Denmark, Finland, Norway, Sweden, Switzerland, the Netherlands, Russia, Bulgaria, Poland, and others. England and Wales introduced the retrial system in 2003.[46]

In case the court should accept the unanimous jury verdict of 'not guilty' and, thereby, declare innocence for the defendant, the sentence would be confirmed if the prosecutor could not appeal the case to the higher court. Then, even if the judgment of acquittal should be wrong because of the defendant's false statement, witness perjury, or falsified evidence, retrial will be impossible according to the law (Article 420 of the Criminal Procedure Code). Then, the wrong judgment betraying the substantial truth and justice could not but be settled. Particularly,

---

In the Oklahoma federal building explosion and Rodney King cases, the defendants were indicted both by the state and federal authorities.

[44] Yongsik Lee, *Hyeong-Sa-Jae-Sim-Je-Do-ui Han-Gye-wa Gu-Jo-e gwan-han Jae-Jo-Myeong* [*A Study on the Limitation and Structure in the Criminal Retrial System*], 19(3) HYEONG-SA-BEOB-YEON-GU [JOURNAL OF CRIMINAL LAW] 755, 755-776 (2007).

[45] Even in cases where the 'not guilty' decision has been confirmed for a serious offender, some scholars opine that the retrial for such offenders would not betray the principle of double jeopardy. Chanun Park, *I-Jung-Cheo-Beol-Geum-Ji-Won-Chig-gwa Bul-I-Ig-Jae-Sim-ui Ga-Neung-Seong* [*Principle of the Prohibition of Double Jeopardy and Possibility of the Retrial Unfavorable to the Defendant*], 64(2) BEOPJO [KOREAN LAWYERS ASSOCIATION JOURNAL (KLAJ)] 176, 176-218 (2015).

[46] Ohgeol Kwon, *Bul-I-Ig-Jae-Sim-ui Heo-Yong-Yeo-Bu-e dae-han Bi-Gyo-Beob-Jeog Geom-To* [*A Study on the Comparative Law of the Disadvantage Retrial*], 17(2) BEOB-HAG-YEON-GU [LAW REVIEW] 193, 198 (2017).

since the jury trial tends to be engaged with the felonies, such a wrong judgment would boil down to the pain and anger of victims and/or their bereaved and, further, lead the entire society to distrust of the judicial process and the jury trials.[47]

In the Korean legal system that does not allow for retrials unfavorable to the defendants, we should acknowledge that a wrongful judgment would make victims or their bereaved families and citizens irrecoverably distressed. The basic principles of criminal trials are the identification of the substantial truth and guarantee of due process of law, and such principles should develop together with the democratic legitimacy of the judicial process and public trust in it. Jury trials not conforming to the principal of the substantial truth might well lose public support. If a wrong judgment should be rendered for a felony, the positive public perception would turn into a negative one, while the jury trial system would be distrusted or opposed by the people. Hence, we need to review such problems seriously.

Summing up, it is deemed necessary to check prosecutors' reckless appeals against the judgment of 'not guilty' by the jury and the court—namely, prosecutors' appeals against a unanimous jury verdict of 'not guilty' and judgment of acquittal by the court. However, for violent crimes causing death or grievous bodily harm to the victims, public prosecutors' appeals may well be permitted. Specifically, for crimes punishable by a death sentence, life imprisonment, or seven-year-long or longer imprisonment, the prosecutor's appeal to the higher court for the reason of a mistake of facts should be allowed, while, in the other cases, prosecutor's appeals may well be limited.[48]

F. Improvement of the Decision Procedure for Exclusion of the Jury Trial

Under the current jury trial system, the court may refuse the

---

[47] The United Kingdom amended the Criminal Justice Act in 2003 to allow for retrials unfavorable to the defendants. The amended Act began to be effective in 2005. Daesoon Kim, *I-Jung-Wi-Heom-Geum-Ji Gyu-Chig-eun Bul-Byeon-ui Jin-Li-in-ga?: Yeong-Gug-ui Stephen Lawrence Pi-Sal Sa-Geon-eul Jung-Sim-eu-lo* [*Is the Rule against Double Jeopardy an Immutable Truth?: With Particular Reference to the Murder of Stephen Lawrence, an England Case*], 11(2) YEONG-SAN-BEOB-LYUL-NON-CHONG [YOUNGSAN LAW REVIEW] 3, 3-21 (2014); Park, *supra* note 45, at 205.

[48] Of course, the extent of the felonies, which the prosecutor may appeal to a higher court, should be discussed in more detail.

defendant's motion for a jury trial in consideration of the nature of the case. The problem is, however, that the criteria or reasons for the refusal of the judicial trials are not clear, being different depending on the courts or jurisdictions. Hence, it may well be necessary to re-examine the current jury trial system under which the trial court decides on the exclusion of the jury trial. Namely, the trial court may tend to refuse the jury trial due to its heavy burden, while the criteria for this decision will be different depending on the trial court. Arbitrary or inconsistent decisions on the jury trial may well be criticized by the defendant, victim, and citizens from the perspectives of justice and equality. The wider the deviations among jurisdictions, the more severe such criticism.

Hence, it is essential to reform the current jury trial system so that the court decisions on jury trials can be made according to fair and objective criteria. One of the alternatives is that a special panel would be established to decide on the exclusion of jury trials. To be more specific, if a defendant moves for a jury trial, the motion would be referred to the special panel who will decide on the motion in consideration of the prosecutor's opinion. If there is no reason for the exclusion of the jury trial, the special panel would refer the case to the appropriate panel. Then, jury trial cases would be evenly distributed among panels, while the fairness, objectivity, and transparency of the decisions on the jury trial or its exclusion would be ensured.

The special panel who will decide on the appropriateness of the jury trial would be established by the district court or its branch court. The special panel may well be supervised by a head panel or by a special judge. Then, the special panels throughout the nation would get together for a workshop where the criteria for exclusion of the jury trial could be discussed or unified. Then, the jury trial would proceed as follows:

> Defendant's motion for a jury trial → A special panel (within the trial court) would review the motion[49] → Referral to the appropriate panel if the result of the review is positive → Jury trial would start.

If the defendant's motion should be refused by the special panel, the relevant case would be referred to the appropriate panel.

[49] Although such procedures may seem unfamiliar, they may well be understood as an evidence preservation procedure.

Namely, since jury trials and the ordinary ones are distributed among the panels, the work burden among the panels would be even.

G. Reform of the Procedures Summoning the Prospective Jurors

For a jury trial, the defendant should move for it, but what is more important is citizens' positive participation in the jury trials. Currently, in case of 9 jury members, 140 prospective jurors would be called, while in case of 7 jury members, 110 ones would be called, and, in case of 5 jury members, 90 ones would be called. For the last decade, a total of 251,067 prospective jurors have been called, and, among them, 68,162 ones have responded to the call. Thus, the response ratio was 27.1%. But, excluding those who did not receive the calls or those who excused their absence in advance, the actual response ratio was 51.6%, which is deemed not so poor.[50] Among those 68,162 prospective jurors, 18,018 (26.4%) were appointed to the jury or as a reserved juror.[51] An average of 39.6 persons attended trials in the case of 9 jury members, while 30.5 persons attended in case of 7 jury members and 24.9 persons in case of 5 jury members. Thus, more than half of the potential jurors would return home without participation in the trials.[52]

Accordingly, in order to activate jury trials, the material facilities (jury trial courtrooms, etc.,) should be increased, while the waiting rooms for jury members should be installed separately. Then, more than two jury trials would be opened simultaneously. It would be desirable if a prospective juror could participate in two or more trials at the same court.[53]

If many jury trials could be opened on the same day, more than one court panel could call the prospective jurors on the same day. Then, those who are present at the court would be more likely

---

[50] NATIONAL COURT ADMINISTRATION (S. KOR.), *supra* note 1, at 51.

[51] *Id.* at 54.

[52] *Id.* at 23. Hence, there were a variety of complaints: "Why didn't you explain about it in advance?;" "Why am I not eligible for jury service?;" "I left home early in the morning, but I should return home soon." Moreover, many prospective jurors felt uncomfortable in the waiting room. TAK & CHOI, *supra* note 18, at 297.

[53] Such a procedure or technique is called "jury pooling." *See* FEDERAL JUDICIAL CENTER, HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 46-48 (1989).

to be selected for jury service. Thus, the cost for jury trials would be much reduced, while the citizens could minimize their response burden by not jeopardizing their ordinary living.

Thus, it is deemed necessary to modify the current Citizen Participation Act a little, in addition to the expansion of the material and human resources. The current act specifies that the trial court should call the prospective jurors (Article 23, Paragraph 1 of the Act), but, in order to introduce a pooling system, the chief of the court or similar officer should be authorized to call the prospective jurors. Furthermore, the branch courts under the district court should be authorized to decide on the jury trial (Art. 10 of the Act needs to be amended to accomplish this). Besides, if the single-judge panel could decide on the jury trial, not only the chief of the district court but also the directors of its branch courts could call the prospective jurors.

In addition, the eligibility for jury members are specified in the Citizen Participation Act: Article 17 (Reasons for Disqualification), Article 18 (Reasons for Exclusion due to Jobs), Article 19 (Reasons for Exclusion), and Article 20 (Causes for Exception). Namely, Article 17 (Reasons for Disqualification) and Article 18 (Reasons for Exclusion due to Jobs) specify the general reasons for exclusion, while Article 19 (Reason for Exclusion) specifies the reasons for excluding the person for a certain trial, and Article 20 (Reason for Exception) implies that the person would be exempted from the jury, but he or she could be a jury member. Since the reasons for disqualification or exclusion as specified by Article 17 and 18 are objective, the chief of the district courts or his/her deputy could decide on the prospective jurors, which would help to save the cost for the jury trial system and enhance its efficiency. Merely, regarding Articles 19 and 20 of the Citizen Participation Act, the reasons would change depending on the specific cases, and the trial court may well decide on the jury members' qualifications as it currently does.

V. CONCLUSION

Although it is just eleven years since its introduction, the jury trial system has shown more achievements than expected. The jury trial system would help to recover citizens' trust in the justice system. Through the jury trial system, such social assets as citizens' trust in the judicial process and smooth resolution of

disputes would be secured with legalism and democracy enhanced.

Hence, activation and expansion of the jury trial system are essential. On the other hand, judges, prosecutors, and lawyers engaged in jury trials seem to feel very burdened by their heavy workload. Therefore, it is deemed necessary to divide the workload optimally among them, while making efforts to find the solutions satisfying all the participants in a jury trial through an objective, transparent, and efficient approach. Against this background, this paper sums up and suggests reform measures for bills to amend the Citizen Participation Act as follows.

First, certain cases should be subject to jury trials. If the defendant moves for the exclusion of the jury trial, the court would judge whether the motion is appropriate or not (opt-out system). If citizens' sound common sense needs to be reflected in a misdemeanor or minor offense case, the prosecutor or judge should be able to have the case proceed to a jury trial.

Second, it may well be necessary to expand jury trials to the one-judge-panel trial, but there should be a bottom line. For example, the statutory punishment should be longer than a five-year or three-year imprisonment.

Third, it is desirable to reinforce the effects of the jury verdict. At the current stage, "a weak binding effect" should be given to the jury verdict, so the court should respect it. Except for some reasons, the judge should be obligated to follow the jury verdict. In order to increase the concordance rate to more than 95%, it is necessary to review statutes, actual cases, and jury reports meticulously to find some effective solutions.

Fourth, in order to relieve the court of the heavy workload and help the court select the jurors more smoothly, not the trial court but the chief or director of the court should be authorized to select the prospective jurors. Moreover, the system should be reformed to save the cost of the jury trial system drastically.

Fifth, the prosecutor's appeal needs to be partially restricted for the case where the court has accepted the 'not guilty' verdict of the jury. Exceptions may well be prescribed for cases such as felonies like death and fatal injury.

Keywords
Civil Participation, Jury Trial in South Korea, Trust in Judiciary, Jury Verdict, Recommendations for Jury System in South Korea

Received: 2019; *review completed and accepted*: 2020

THE FOURTH INDUSTRIAL REVOLUTION AND COMPETITION LAW IN KOREA

Nansulhun Choi[*]

ABSTRACT

The previous three industrial revolutions are perceived as replacing human labor with machines, namely automation and line work or connectivity. By contrast, the incoming Fourth Industrial Revolution is perceived as a new era of replacing human brains with artificial intelligence. The Fourth Industrial Revolution is expected to be a turning point that brings about significant socio-economic changes, resulting in a variety of optimistic anticipations and pessimistic concerns. Regarding the various changes brought by the Fourth Industrial Revolution, Korea, at the government level, is in a hurry to prepare numerous measures, policies, and plans. In the competition law area, the Korea Fair Trade Commission (KFTC) is striving to formulate policies for the Fourth Industrial Revolution by emphasizing "the establishment of an industrial ecosystem that promotes innovative competition." This is one of the KFTC's five major corporate policy priorities for 2019. In the era of the Fourth Industrial Revolution, competition law stands at the crossroads of whether to keep the principles and frameworks of traditional competition law analysis in place or to adopt additional elements from other legal areas. Recently, around the world, discussions, and research have been actively underway on what new threats the digital economy could pose to the existing economic regime and what legislative solutions could be suggested.

[*] Associate Professor of Law, School of Law, Yonsei University. Email: nanchoi@yonsei.ac.kr. The original Korean version of this paper was published in the Journal of Korean Economic Law, Vol. 18(2) (Korea Economic Law Association, Aug. 2019). The paper was translated into English to be republished in Vol. 10 of the Yonsei Law Journal. Its summary was presented at a symposium organized jointly by the Korean Bar Association and the 4th Industrial Convergence Law Association in June, 2019. The research on this paper was financed by the National Research Fund under the Korean government (Ministry of Education) (NRF-2016S1A3A2923769).

Against this backdrop, the KFTC introduced a revised bill—the Monopoly Regulation and Fair Trade Act[1]*—in November 2018, seeking to modernize competition law for the Fourth Industrial Revolution. The revised bill establishes an innovative ecosystem and enhances the ability to promote new industries. In addition, a number of bills proposed by lawmakers have been submitted. The revised standards for the review of business combinations, including applications for review, are meaningful because they are the first movements prepared through a pre-review and preparatory process. In the wake of the Fourth Industrial Revolution, new types and means of restricting competition emerged. Analyzing this phenomenon and coming up with a plan to improve the Fair Trade Act are preparations needed to implement adequate follow-up regulations based on the understanding of new industries emerging in the Fourth Industrial Revolution. Such legislative efforts, as well as preemptive innovative market analysis and efforts to promote competition, should continue. As a result, the ultimate goal of competition law, namely encouraging subsequent innovation through free and fair competition, can be achieved and a virtuous cycle of smooth operation of new markets accomplished.*

I. THE FOURTH INDUSTRIAL REVOLUTION AND MODERNIZING COMPETITION LAW

The advent of the Fourth Industrial Revolution ushers in an age when automation and connectivity are maximized by artificial intelligence (AI). Moreover, such IT digital technologies as the 'Internet of Things' (IoT), 5G communication networks, and 'Big Data' are combined with advanced manufacturing technologies such as additive manufacturing and robot engineering to expand, increase, and disseminate new utilities. In short, the industrial spreading effects would be maximized.[2] As the Fourth Industrial

[1] Dog-Jeom-Gyu-Je mich Gong-Jeong-Geo-Lae-e gwan-han Beob-Lyul [*Monopoly Regulation and Fair Trade Act*], Act No. 5235, Dec. 30, 1996, *amended by* Act No. 15014, Oct. 31, 2017 (S. Kor.) [Fair Trade Act].

[2] Specifically, things are connected via 5G communication networks, while the sensors attached to connected things collect and generate real-time information. Thus, extensive information could be analyzed real-time using AI. Seunghan Oh, *Big-Data-Yeon-Gwan San-Eob-ui Gyeong-Jaeng-Je-Han-jeog Gwan-Haeng Gae-Seon-eul wi-han Gyeong-Jaeng-Beob Jeog-Yong-ui Ta-Dang-Seong Yeon-Gu* [*A Study on the Application of the Competition Law for Improvement of the Competition-Limiting Practices among the Big Data*

Revolution proceeds, the digital markets are growing rapidly and unprecedentedly. These markets provide the consumers with real-time customized services given their patterns and tendencies of using services interlocked with Big Data, such as data collection and analysis technologies, IoT, and machine learning. Moreover, digital markets help to facilitate the interactions among these.[3] Thus, the Fourth Industrial Revolution is expected to be a turning point that brings about serious changes in economic and social terms, resulting in a variety of optimistic anticipations and pessimistic concerns.[4]

Korea, at a government level, is hurrying to arrange various proactive measures for the changes brought about by the Fourth Industrial Revolution. In terms of fair competition, the Korean government has so far reformed the following policies: improvement of regulations for the new industrial sectors (information and communication technologies [ICT], healthcare, etc.) (2018); reinforcement of monitoring abusive monopolistic activities by innovative technology companies (2017-); identification (2017) and improvement (2018) of the competition-limiting regulations impeding new entries or innovative business activities in ICT, healthcare, new renewable energy industries, etc.; and increasing the penalty to reinforce the effectiveness of the law (amendment to the Fair Trade Act, 2018).[5] Furthermore, the KFTC put forward "Supporting the Establishment

---

Industries], 2018 RESEARCH REPORT BY LAW AND ECONOMICS ANALYSIS GROUP (LEG) OF KOREA FAIR TRADE MEDIATION AGENCY 127 (Dec. 2018); *ICT Standardization Priorities for the Digital Single Market, Communication from the Commission to the European Parliament, the Council*, *The European Economic and Social Committee and the Committee of the Regions* 5-6 (Apr. 19, 2016).

[3] Dongpyo Hong, et al., *Digital Si-Jang-ui Teug-Seong-gwa Gyeong-Jaeng-Beob Jeog-Yong: I-Lon-gwa Sa-lye-Bun-Seog* [*Characteristics of the Digital Markets and Application of the Competition Law: Theories and Case Analysis*], 2018 RESEARCH REPORT BY LAW AND ECONOMICS ANALYSIS GROUP (LEG) OF KOREA FAIR TRADE MEDIATION AGENCY 3 (Dec. 2018).

[4] Pilseong Jang, *2016 DAVOS Forum: Da-Ga-O-neun 4cha San-Eob-Hyeog-Myeong-e dae-han U-Li-ui Jeon-Lyag-eun?* [*2016 DAVOS Forum: What about Our Strategies for the Upcoming 4th Industrial Revolution?*], 26(2) GWA-HAG-GI-SUL-JEONG-CHAEG [THE JOURNAL OF SCIENCE AND TECHNOLOGY POLICY] 15 (Feb. 2016).

[5] Press Release, Presidential Committee on the 4th Industrial Revolution, Hyeog-Sin-Seong-Jang-eul wi-han Sa-Lam Jung-Sim-ui 4cha San-Eob-Hyeog-Myeong Dae-Eung-Gye-Hoeg:I-Korea 4.0 [A Counter-Measure of the 4th Industrial Revolution Centered Human Beings for the Innovative Growth: I-Korea 4.0], Ministry of Science and ICT Press Release (Nov. 30, 2017).

of an Industrial Ecological System Facilitating Innovative Competition" as one of the five business support policies in its 2019 Work Plan.[6]

On the other hand, competition law stands on the crossroads of whether it should maintain its conventional principles and framework even in the Fourth Industrial Revolution or introduce some additional elements from other sectors of the law.[7] Lately, the major countries have dealt with cases related to digital markets, such as mergers and acquisitions among major platform businesses, abuses by market-controlling businesses, etc., while publishing reports about the roles of competition law in the new competitive environment.[8] The relevant agencies in Germany and France have expressed positions that the principles of conventional competition law can well cope with market failure and, therefore, that it would not be necessary to introduce any additional elements from other laws.[9] The House of Lords of the United Kingdom advanced the opinion that they would oppose any regulation unique to the platform since the current competition law would cope with new types of abuses arising in the on-line

---

[6] Specifically, the KFTC published some innovative policies: strict counter-measures against the unfair market activities impeding innovative small and medium venture businesses, a careful review of M&As in consideration of dynamic efficiency and potential competition-limiting effects, rapid review of the M&A of small and medium venture businesses by large companies not limiting competition, strict control of monopolistic abuses impeding emergent or innovative economic activities in platform and pharmaceutical markets, etc. Press Release, Korea Fair Trade Commission (KFTC), Publication of 2019 Administration Plan, KFTC Press Release (Mar. 7, 2019).

[7] Daesik Hong, *4cha San-Eob-Hyeog-Myeong Si-Dae-e-seo-ui Gyeong- Jaeng-Beob-ui Yeog-Hal* [*Roles of the Competition Law in the 4th Industrial Revolution*], 192 GYEONG-JAENG JOURNAL [JOURNAL OF COMPETITION] 64 (Aug. 2017).

[8] Domestic and foreign competition law academic circles and businesses are increasingly concerned with the impact of the Fourth Industrial Revolution. Since several years ago, relevant administrative agencies have actively discussed and researched relevant problems and issues arising with platform industries, Big Data, and the use of algorithms and AI. Nansulhun Choi, *Platform Gyeong-Je-leul dul-leo-ssan Gyeong-Jaeng-Beob Jeog-Yong-ui Dilemma: Geo-Lae-sang Ji-Wi Nam-Yong Mun-Je-leul Jung-Sim-eu-lo* [*Dilemmas in Application of the Competition Law Surrounding the Platform Economy: Focused on the Abuses of the Transactional Position*], 12 COMPETITION AND LAW 28 (2019).

[9] *Competition Law and Data*, JOINT PAPER OF THE AUTORITÉ DE LA CONCURRENCE AND THE BUNDESKARTELLAMT (May 10, 2016).

platform area.[10] As such, the relevant agencies of major countries are passive towards platform regulations. Nevertheless, they continue to discuss and examine what elements of the digital economy pose a new threat to the existing economic order and what problems could be solved through legislative measures.

In such contexts, the KFTC arranged a sweeping amendment of the Fair Trade Act to explore ways to modernize competition law in the wake of the Fourth Industrial Revolution; they attempted to reflect the construction of an innovative business ecological system and enhance the new industries.[11] Additionally, National Assemblymen Byeongdu Min, Hakyoung Lee, and Byeongwan Jang, respectively, proposed amendments to the Fair Trade Act draft: Bill No. 16674, on November 19, 2018, Bill No. 17999, on January 2, 2019, and Bill No. 18067, on January 7, 2019. Their common purpose was to establish a fair and innovative market economy conforming to the changed economic environment in the twenty-first century.

This paper discusses the newly emerging competition-limiting behaviors and means due to the Fourth Industrial Revolution, centering around the amendment of the Fair Trade Act suggested by the government (Bill No. 16942) and, thereupon, reviews the details of the competition law in relation to the new industries.

II. CHANGING COMPETITION LAW TO CONSTRUCT AN INNOVATIVE BUSINESS ECOLOGICAL SYSTEM

A. Deregulation of the Venture Holding Companies

A venture holding company is well defined by Paragraph 2

[10] House of Lords, *Online Platforms and the Digital Single Market*, *Select Committee on European Union - 10th Report of Session 2015-16* (Apr. 20, 2016); Hong, *supra* note 7.

[11] The sweeping draft amendment of the Fair Trade Act was approved at a November 27, 2018 cabinet meeting and, then, submitted to the National Assembly (Bill No. 16942). It is pending in the National Assembly as of July 2019. The KFTC is considering putting forth an additional draft amendment regarding Big Data and patent rights. Seonil Yu, *The KFTC, Pursues the Modernization of the Fair Trade Act in Preparation for the 4th Industrial Revolution...Separate from the Sweeping Amendment Draft*, ELECTRONIC NEWSPAPER, July 1, 2019.

(Definition) of the Act on Special Measures for the Promotion of Venture Businesses[12] and Paragraphs 1 and 2 of Article 8-2 of the same act "as the company that holds 50% or more of the entire subsidiary companies' stock prices." It is an ordinary holding company, which is distinguished from a financial holding company. It can also exist as an intermediate holding company within the ordinary holding company structure.

This system was introduced into the Fair Trade Act in 2001 to help promote venture businesses,[13] but a venture holding company's acquisition of non-affiliated companies' stocks is limited as with ordinary holding companies. Moreover, like ordinary holding companies, a venture holding company is subject to limits in establishing its subsidiary company. Thus, the venture holding system is criticized for being over-regulated so that few business people have used it.[14] Hence, the amendment of the Fair Trade Act specifies ways to induce investments in, and M&As of, venture businesses. While the venture holding company may hold a 20% stake of its subsidiary companies, special cases[15] for holding shares of the subsidiary company should be allowed when a holding company establishes its subsidiary as a venture business. Thus, the limits on acquiring a non-affiliated company's shares would be abolished (Article 18, Paragraphs 2-4, of Fair Trade Act amendment).

However, the problem is that large companies are passive about acquiring venture businesses, while it is almost impossible for a holding company to acquire corporate venture capital (CVC[16])

---

[12] Ben-Cheo-Gi-Eob-Yug-Seong-e gwan-han Teug-Byeol-Jo-Chi-Beob [Act on Special Measures for the Promotion of Venture Businesses], Act No. 5381, Aug. 28, 1997, *amended by* Act No. 16172, Dec. 31, 2018 (S. Kor.) [Venture Businesses Act].

[13] OHSEUNG KWON & SEO JEONG, DOG-JEOM-GYU-JE-BEOB: I-LON-GWA SIL-MU [MONOPOLY REGULATION ACT: THEORIES AND PRACTICE] 522 (3rd ed. 2018).

[14] According to the KFTC, only one company met the conditions for a venture holding company; but, later, its asset scale would be reduced below the criteria, excluding it as a venture holding company.

[15] According to the special cases, the condition for the minimum share would be mitigated to 20%.

[16] A CVC has the advantage that large companies, except the financial companies, can invest partly in venture businesses and, thereby, support them in general: a long-term partnership, capital and management guidance, engineering service, etc. The examples are investors in small and medium start-ups, according to the Support for Small and Medium Enterprise Establishment Act, and new technology financing companies, according to Specialized Credit Finance Business Act.

for a start-up investment and an M&A. The current Fair Trade Act specifies that the ordinary holding company cannot own the CVC and start-up investment companies as subsidiaries based on the Separation of Financial Institutions from Industrial Capitals.[17] A CVC is recognized as a financial affiliate.

The KFTC had decided not to allow the CVC, which venture businesses have continued to request.[18] Thus, the separation between finance and industry is prioritized over protecting small and medium businesses or promoting venture businesses. Consequently, the current level of deregulation is not effective in activating venture and start-up businesses.[19] On the other hand, other experts opine that to activate venture investment CVC may well acquire the shares of venture businesses, but the principle of separation between finance and industry should not be abandoned. In the same context, the argument for allowing large companies to invest in venture businesses through their CVC should be reviewed for the possibility that even venture investments would be monopolized by large companies.[20]

---

[17] The Fair Trade Act adopts the principle of separation of finance and industry with regard to the holding company (Art. 8-2, Para. 2, No.s 4 and 5). The financial holding company cannot own shares of domestic companies except for financial or insurance businesses. The ordinary holding companies should not own the shares of domestic companies that are engaged in financial or insurance businesses.

[18] The bill suggested by National Assemblyman Byeonggwan Kim on June 21, 2018 (Bill No. 13979) emphasizes that the holding companies should be allowed to own the CVC as a subsidiary. However, the KFTC argues that the bill would allow financial institutions to own a CVC, which betrays the principle of separation between finance and industry. The KFTC opined that such drastic reform should be subject to a social consensus. Changseok Oh, *Dog-Jeom-Gyu-Je mich Gong-Jeong-Geo-Lae-e gwan-han Beob-Lyul Il-Bu-Gae-Jeong-Beob-Lyul-An Geom-To-Bo-Go-Seo* [*A Review of the Fair Trade Act – Suggested by the National Assemblyman Jang Byeong Wan* (Bill No. 18067)], 367th National Assembly Meeting (temporary meeting), 3rd State Affairs Committee, 16 (Mar. 2019).

[19] Kiman Kim & Jinsoo Kim, *The Large Companies Bound by the Regulations, Being Pushed Out Even for Their Investment in Venture Businesses*, HANKUK ECONOMY, July 27, 2018. In contrast, in Japan, Germany, etc., large companies are allowed to expand their investments in start-ups through the establishment of a CVC to increase their profits and innovate, conducing the activation of start-ups in the innovative ecology system. Hayeon Kang, et al., *Chang-Jo-Gyeong-Je Global Hyeog-Sin-Hyeob-Lyeog-Model Gae-Bal Yeon-Gu* [*A Study on the Development of a Creative Economy Global Innovation Cooperation Model (A Basic Model)*], POLICY STUDIES 16-20-01 (Korea Information Society Development Institute, Dec. 2016).

[20] Hwang Lee, *A Joint Seminar of Korea Bar Association & 4th Industrial*

B. Competition Issue Related to Big Data and Revising Competition Law

1. Competition Issue Related to Big Data

The Fourth Industrial Revolution is an intellectual revolution based on the hyper-connectivity ignited by AI, Big Data, and other digital technologies, causing innovative changes not only in industries but also in government systems, society, and all human life. In order to respond to the tremendous changes caused by digital technology progressing silently, on-line businesses endeavor to collect and commercialize as much data as possible. In particular, they struggle to collect data about users.[21] Business people previously collected and processed data; but, recently, as advanced IT technology began to be used in diverse industries, digitization and automation have become ubiquitous across industries. In particular, owing to the development of Big Data technology, data can be mass-stored. Thus, consumers can enjoy a convenient life, being offered customized services at lower prices (or almost free) while almost every aspect of our life is being innovated.[22] On the other hand, the effects of Big Data on consumers and markets are positive and negative. In terms of negative effects, it is feared that the entry barrier to using Big Data has increased. All-in-all, concern is increasing every day.[23]

Several large companies that have dominated the on-line markets use Big Data[24] to respond appropriately to consumers'

Revolution Convergence Law Association, JOINT SEMINAR MATERIALS 46 (June 2019).

[21] Gyueyoung Choi, *In-Gong-Ji-Neung: Pa-Goe-Jeog Hyeog-Sin-gwa Internet Platform-ui Jin-Hwa* [*AI: A Destructive Innovation and Evolution of the Internet Platform*], KISDI Premium Report 15-05 (Korea Information Society Development Institute, June 15, 2015).

[22] The Siemens in Amberg, Germany introduced a smart factory using intelligent robots, AI, and Big Data. As a result, they could enhance their automation level by 75% or more, while enhancing productivity 7.5 times in 2017. Press Release, Presidential Committee on the 4th Industrial Revolution, *supra* note 5, at 20.

[23] Some people opine that, in the age of Big Data, competition law should be enforced more positively, while other people oppose reckless intervention by regulations because competition law may not be appropriate means for regulating the abuse of Big Data. D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23(5) GEO. MASON L. REV. 1129 (2016).

[24] In general, 'Big Data' means an information asset or massive stereotyped or unstereotyped data collected by businesses for diverse purposes. A theory has yet to be established about the precise concept of Big Data, but McKinsey, a

requests and save costs, consolidating their dominance of the markets. The exclusive use of Big Data by a small group of companies could result in driving out their competitors from the market, which may well violate the competition law. Lately, many on-line businesses have fueled their efforts to be dominant in the market by adopting the so-called 'data-driven strategy,' which suggests that an increasing number of companies are attempting strategic M&As to secure Big Data.[25] Since Big Data is characterized by high-volume, high-velocity, and high-variety, the companies are likely to gain a relative upper hand easily through a strategic M&A.[26] In fact, according to an OECD report, the number of 'Big Data-related mergers' doubled or more between 2008 and 2012.[27] Hence, the important issue is how to evaluate such Big Data in the area of the competition law. In particular, it is feared that the concentration of the data in several large data-based companies would lead to distorted competition.[28]

On the other hand, there are few cases where such an issue or problem has been handled by competition regulation agencies or courts across the world; but, lately, some business merger regulators have often mentioned the Big Data problem in their

---

multi-national consulting company, defines Big Data as "huge stereotyped or unstereotyped data collection beyond the collection, storage, management, and analysis." IDC (International Data Corporation) or an ICT market surveyor focuses not on the database but on the performances of the business. They conceptualized Big Data as a next-generation technology devised to extract the value from various large-scale data and collect/explore/analyze the data at a supersonic speed. Meanwhile, McKinsey, IDC, and other various research institutes have defined Big Data. It is anticipated that Big Data will be defined subjectively, while the conventional definitions change. Jinhyung Lee, *Data Bigbang, Big Data-ui Dong-hyang* [*Data Bigbang, Trend of Big Data*], 47 BANG-SONG-TONG-SIN-JEON-PA-JOURNAL [JOURNAL OF COMMUNICATIONS & RADIO SPECTRUM] 43, 44 (2012).

[25] Maurice E. Stucke & Allen P. Grunes, *No Mistake About it: The Important Role of Antitrust in the Era of Big Data*, 269 UNIVERSITY OF TENNESSEE LEGAL STUDIES RESEARCH PAPER 1, 3 (2015).

[26] *Id.*

[27] Nansulhun Choi, *Gi-Eob-Gyeol-Hab Sim-Sa-e iss-eo-seo Big-Data-ui Gyeong-Jaeng-Beob-jeog Ui-Mi* [*Competition Law Implication of the Big Data in Examining the Business Merger*], 41(4) Oe-Beob-Non-Jib [HUFS LAW REVIEW] 323, (2017). According to OECD statistics, Business Mergers related to the Big Data increased more than twice from fifty-five cases in 2008 to 134 in 2012. European Data Protection Supervisor, *Report of Workshop on Privacy, Consumers, Competition and Big Data* (June 2, 2014).

[28] D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23(5) GEO. MASON L. REV. 1129 (2016).

examinations of business mergers.[29] In addition, there are great concerns about the possibility that Big Data will cause wide-ranging competition issues in areas other than business mergers,[30] and the European Commission has lately expanded investigations into the violation of competition law by such large, web-based companies as Google and Amazon.[31]

2. Reactions of Major Competition Law Agencies Abroad

The US Federal Trade Commission (FTC) collected the opinions from academic circles and business people, since 2014, and published a research report on January 6, 2016. The report defines Big Data, its benefits, and risks.[32] The European Union (EU) held a forum in June 2014 with the theme, "The Implication of a Data-driven Economy on Competition Policy, Consumer Protection and Privacy," inviting member countries' policymakers, policy executors, and scholars to the European Parliament. Such movement proves that the advanced countries are much concerned with Big Data and its uses in the dimension of competition law. On the other hand, the OECD Competition Commission held a round table in November 2016 with the theme, "Competition, Digital Economy and Innovation," to analyze the effects of Big Data on innovation, review Big Data market structure, and discuss the competition issues caused by Big Data.[33]

---

[29] Choi, *supra* note 27, at 324.

[30] In 2016, the OECD arranged a forum to discuss whether competition law could be an appropriate means of regulating the problems caused by the use of Big Data. OECD, *Directorate for Financial and Enterprise Affairs Competition Committee* (Apr. 26, 2017), https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN2/FINAL/en/pdf.

[31] In June 2017, the European Commission levied approximately 2.42 billion Euros (approximately 3.1 trillion Won) on Google (search share: 90% or more) for manipulation inducing on-line searchers to Google and its subsidiaries. In July 2018, the Commission levied 4.34 billion Euros (approximately 5.7 trillion Won) on Google for abusing its market dominance with its Android Smartphone OS. Later, in March 2019, the Commission levied 1.49 billion Euros (approximately 1.9 trillion Won) on Google for abusing its market-dominating position to use its relay service, AdSense for Search, in the on-line advertisement markets. Moreover, the Commission began to investigate Amazon—one of the largest e-Commerce businesses—for possible violations of EU Competition Law in its e-book distribution.

[32] FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016).

[33] Nansulhun Choi, *supra* note 27, at 327; KFTC (Dept. of International Cooperation), *Overseas Competition Policy Trend No. 124* (Jan. 16, 2017).

3. Acquiring Big Data and Business Merger Report

When the KFTC drafted the Fair Trade Act amendment, it introduced "The Criteria for Business Merger Report based on the Transaction Price" in preparation for large companies' to acquire Big Data and pursue their strategic merger (Article 11, Paragraph 2, of Fair Trade Act amendment). Previously, when a larger company merges and acquires a small venture business with great potential or a start-up by paying a large amount of money, the companies are not obligated to report to the KFTC because the merged business is not big enough in asset value or sales. Hence, if the large company should monopolize the market or build a barrier against new market entries, they would not be scrutinized by regulators. Thus, the amendment to the Fair Trade Act specifies that, even if the merged business falls short of the criteria in terms of the sales amount,[34] the merger should be reported. To be more specific, in case the price (total amount of the value paid or invested for the merger) is higher than certain criteria and the merged business has sold the commodities or services in the domestic market or has operated a research facility or workforce, the merger should be reported to the KFTC.[35] Despite minimal sales, the high price of the merger may well hint that the merged business owns an innovative technology or business idea having great potential in the market. The amendment may have been affected by the ninth amendment of the *Gesetz gegen den Wettbewerbsbeschränkungen* (Law against Restrictions on Competition) (GWB) that began to be enforced from June 9, 2017. The German Act was amended to introduce a series of regulations regarding the platform or representative phenomenon accompanying digitalization in an effort to control merger and market domination.[36]Additionally, the German GWB provides the

[34] According to the current law, an acquiring company with three hundred billion Won or more in asset value or sales (including subsidiaries' asset value or sales) is obliged to report its M&A when acquiring a company with thirty billion or more of sales. (Art. 12, Para. 1, of the Fair Trade Act, and Art. 18, Paras. 1 and 2, of its Enforcement Ordinance).

[35] However, according to the current Fair Trade Act, although the merger has not been reported to the KFTC (or has not satisfied the criteria of the report), the KFTC can investigate and deliberate on the case if it is still obliged to do so and, thereby, remedy the case. In other words, the amendment may not be as effective as expected.

[36] Like Korea's Fair Trade Act, the German GWB specified only the sales amount to determine mergers that should be examined by the government,

following three measures to react to rapidly progressing digitalization:

> (1) Expanded regulations to include the case of merger where the takeover price exceeds 400 million Euros and the acquired company is active in Germany (Article 35, Paragraph 1a, GWB).
>
> (2) New regulations of the free markets (Article 18, Paragraph 2a, GWB).
>
> (3) Introduction of new criteria for judging the market position of the platform company (Article 18, Paragraph 3a, GWB).

Here, the regulations described in item (1) aim to cover the loopholes of the GWB, and those in (2) and (3) specify the considerations when confirming the markets affected by the free-of-charge services and when judging the dominant market power of the company (direct and indirect network effects, users' switching costs, a third-party's accessibility to the platform, etc.).[37]

Like Paragraph 2 of Article 11 of the amendment to Korea's Fair Trade Act, Paragraph 1a of Article 35 of the amendment to the GWB covers cases where it is necessary to protect future innovation and prevent structural degeneration due to the blockade of the market and checking new entries. Such an amendment to the GWB is designed to cover the legal loopholes in the digitalized markets. The representative loophole involves the merger of Facebook/WhatsApp (2014). The case can be described briefly as follows:

---

when they set "the scope of the regulation" (*Anwendungsbereich*) (Art. 35, Para. 1, of former GWB). According to the previous criteria, the regulation applied to a merger when the global sales of the merged business recorded 0.5 billion or more Euros, one of the merger participants recorded 25 million Euros in Germany, or the other party of the merger recorded 5 million Euros. Considering our criteria based on total asset prices or sales of 300 billion Won or 30 billion Won, respectively, the German criteria were deemed relatively low (32.5 billion Won and 6.5 billion Won, respectively).

[37] Bongeui Lee, *Digital-Gyeong-Je-wa Gi-Eob-Gyeol-Hab Sin-Go-Ui-Mu-ui Gae-Seon-Bang-An* [*Adjustment of the Notification Thresholds of Korean Merger Control to the Digital Economy*], 39 JOURNAL OF KOREAN COMPETITION LAW (JKCL) 238, 241 (2019).

The Case of Facebook/WhatsApp Merger (2014)[38]

In February 2014, Facebook[39] published a plan of merging and acquiring Whats App[40] for nineteen billion dollars and, on August 29th, in the same year, reported the M&A to the US FTC and European Commission.[41] The US FTC and European Commission examined the merger between Facebook and the web-based messaging platform business, WhatsApp; and, in October 2014, both authorities judged that the M&A would not serve to limit competition in the markets and, thereby, approved the M&A.

While examining the M&A case, the European Commission analyzed excluding behaviors in the Big Data industry.[42] The Commission recognized that the networking effects would serve to form an entry barrier but evaluated that this M&A would not serve to build an entry barrier. It perceived that consumers could well use several apps simultaneously, while numerous businesses besides Facebook were collecting users' information. The

---

[38] Choi, *supra* note 27, at 334-36.

[39] Facebook is a social networking service business operating its networking platform, Facebook, the communication app, Facebook Messenger, and the photo-video sharing platform, Instagram. Its main source of income has been platform advertisements. To this end, Facebook formerly collected and analyzed their service users' data to provide targeted advertising services.

[40] WhatsApp is a business providing multi-media messaging services on smartphones. The company has neither stored user information in its central server nor itself engaged in on-line advertising.

[41] Despite its huge acquiring price, this M&A was not subject to the jurisdiction of European Commission for the reason that WhatsApp's sales in the EU in 2013 were less than 100 million Euros. Thus, according to Article 1, Paragraph 2, of the Commission's M&A regulations, the case was not subject to the Commission's jurisdiction. Nevertheless, the two companies requested the Commission to examine their M&A, fearing that member nations' examinations would lead to split decisions under Article 4, Paragraph 5, of the regulations, and no member country opposed the M&A. Thus, the Commission began to examine the M&A. Ki Jong Lee, *Digital Platform Sa-Eob-Ja Gan-ui Gi-Eob-Gyeol-Hab Gyu-Je: EUui Facebook/WhatsApp Sa-Geon-eul Jung-Sim-eu-lo* [*Regulations of the M&A between Digital Platform Businesses: Centering around Facebook/WhatsApp Case of EU*], 29(1) SANG-SA-PAN-LYE-YEON-GU [COMMERCIAL CASES REVIEW] 79, 81-82 (2016).

[42] Commission Decision (Facebook/WhatsApp) COMP/M.7217 ¶ 191, Oct. 3, 2014, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

> Commission found no blockade effect.[43] Such judgment of the Commission would be very significant in that they negated the effects of the network as an entry barrier in the on-line market. The M&A between Facebook and WhatsApp was finally approved; but, on May 18, 2017, the European Commission levied a fine of 110 million Euros on Facebook because they had provided wrong information about their M&A.[44] In fact, Facebook could automatically match the users' information of WhatsApp with their users' information, so they were deemed to have submitted false data to the Commission.[45]

In any event, if we should introduce the criterion of the M&A price, it would be necessary to examine the following aspects of the M&A: (1) the M&A price, (2) qualitative or quantitative indices of relevancy to the domestic markets, and (3) harmony with the existing obligations of the report. In particular, since the M&As to be reported to regulators are mostly transnational business mergers, it would be necessary to examine how to harmonize the existing obligations of the report with the new criteria.[46] Once the amendment to the Fair Trade Act has passed the National Assembly, the KFTC should arrange its enforcement ordinance as early as possible in terms of the M&A price and activities in the domestic markets.

4. Revising Criteria for Examining M&As

On February 27, 2019, the KFTC revised "the criteria for examining the M&A" in an effort to process M&As, facilitating innovative competition and checking attempts by large companies to monopolize markets by acquiring and merging with potential

---

[43] Press Release, European Commission, IP-14-1088, Mergers: Commission Approves Acquisition of WhatsApp by Facebook (Oct. 3, 2014).

[44] Press Release, European Commission, Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information about WhatsApp Takeover (May 18, 2017).

[45] On the other hand, Facebook was punished (150,000 Euros) by French authorities on May 16, 2017 for its illegal collection of users' information without their agreement. Italian authorities levied a fine of three million Euros on WhatsApp for sharing personal information with Facebook without users' consent. Later, Belgium, Spanish, Dutch, and German authorities would investigate Facebook tracing users on the Internet.

[46] Lee, *supra* note 37, at 255-56.

rivals. Such a revision seems to have accommodated hitherto criticisms. Although such innovation-based industries obligated to continue R&D activities because semi-conductor and IT businesses occupy an important share of the domestic market, the criteria for examining their dynamic competition-limiting activities had yet to be arranged. Besides, the information assets are both raw materials and commodities in the Fourth Industrial Revolution; and, so, the government would have to pre-emptively check M&As limiting competition.

Also, foreign authorities have paid attention to the Facebook/WhatsApp case (2014) and Microsoft/LinkedIn merger case (2016),[47] focusing on the characteristics of using information assets (formation of entry barriers, networking effects, etc.). The US Department of Justice (DOJ) and the FTC considered anti-innovation activities in their M&A examination guidelines. In short, the relevant authorities of economically advanced countries are taking new approaches in examining M&As related to R&D or information assets. The KFTC reviewed the effects of M&As on innovation in the semi-conductor field in 2015, but the effects of M&As on market competition could not well be assessed due to the lack of specific examination criteria.[48]

Hence, the revised criteria for examination are different from their previous versions in that (1) "the information asset" is defined, (2) the methods to determine the relevant market are specified when innovation-based companies are examined for their M&A, (3) the criteria for determining the concentration in the innovative market are arranged, and (4) some criteria for examining M&As in innovation-based industries and the effects of limiting the competition are suggested.

To be more specific, the revised examination criteria for judging the effects of limiting innovative competition confirm that the area of manufacturing and distributing activities or R&D activities is a separate market or comprehensive market. In addition, when measuring market concentration, such factors as

---

[47] In June 2016, the world's largest software company, Microsoft, published that it would acquire Linkedln, the business-special social networking service (SNS) for approximately twenty-six billion dollars. It was then the largest M&A. In 2011, Microsoft had acquired Skype for 8.5 billion dollars. Choi, s*upra* note 27, at 336-38.

[48] Lee & Go Antitrust Group, *Gong-Jeong-Geo-Lae-Wi-Won-Hoe Gi-Eob-Gyeol-Hab Sim-Sa-Gi-Jun Gae-Jeong* [*Revision of the Criteria for Examining the M&A by the KFTC*], LEE & GO NEWS LETTER, Feb. 2019.

the scale of R&D expenditures, assets, and specialized competence for the innovative activities, along with the number of patents or the frequency of being quoted and the number of companies participating in an innovative competition, will be taken into consideration. Furthermore, in judging the limit on competition, various factors are considered: Are the merged and acquired companies important innovative business entities?; Are they innovative businesses?; Is the number of participants in innovative competition sufficiently large after the M&A? In addition, "the information assets" (a precondition for examining the M&A) are defined as "a set of information collected, managed, analyzed, and used for diverse purposes." Except for existing criteria for judging the limits of competition, aspects, such as blockading access to information assets not easily substituted or limiting non-price competition, are taken into account.[49]

As the criteria for examining M&As have been revised, the potential M&A partners can better predict the future of their M&A attempt, being much relieved of the burden arising from future uncertainty. It is also expected that global enterprises will acquire potential Korean competitors to attempt to monopolize future markets, but it is feared, too, that M&A attempts will be discouraged in innovative markets if the criteria should operate unsatisfactorily.

III. CHANGE IN COMPETITION LAW TO REINFORCE NEW INDUSTRIES' COMPETITIVENESS

A. Addition of Information Exchange to Cartels

Since exchanging sensitive information, such as the future price between competitive businesses, may well lead to the serious limitation of competition, the EU and United States prohibit it as a 'concerted practice' or regulate the information exchange agreement. Nevertheless, Korea's current act does not cover such

[49] Since the criteria for examining M&As, as amended in 2019, do not cover the confirmation of the market and judgment of the competition limitation in the platform industry, some experts argue that it would be desirable to add such aspects to the draft amendment to the Fair Trade Act. Jiwon Kang, *Minutes of the Joint Academic Seminar of Korea Bar Association & 4th Industrial Revolution Inter-disciplinary Law Science Association* 54 (June 2019).

behaviors; and, therefore, such an exchange of information can hardly be regulated as unfair common acts. Hence, the amendment to the Fair Trade Act presumes that where two companies join forces in a market to exchange information, they are deemed to have agreed to the exchange of information. Moreover, an agreement to exchange price and production information between two competing companies will be regarded as competition-limiting behavior to be regulated. (Draft amendment, Article 39, Paragraph 1, Sub-paragraph 9, and Paragraph 5). Specific types of sensitive information, such as price and production quantity, are expected to be specified by the Enforcement Ordinance.

If the Fair Trade Act amendment should be accepted by the National Assembly, even the simple exchange of certain 'information' about the management strategy might be regarded as collusion; and, therefore, it is feared that free communication among competitors would be limited. Hence, a reasonable guideline for interpretation would be required. In addition, while the appropriate article specifies 'agreement' as an element of crime, Article 9 of the same amendment regards 'give-and-take' behaviors as a violation of the Act; and, thus, it is noteworthy that the different situations are stipulated.[50]

On the other hand, the intention of the Fair Trade Act amendment to add information exchange to the list of cartels may well be justified as necessary to regulate common acts such as direct information exchanges on price and quantity. However, some experts opine that such a regulation would suppress positive acts like standardization of commodity specifications and joint ventures for common marketing and production and, therefore, the amendment should be reviewed carefully.[51]

However, predictability from major transaction information would increase in the digital market; and, therefore, companies can well control and manage future competition in the market. Thus, so-called conscious parallelism or tacit collusion may well be easier in the digital market. The new type of cartel, depending on a computer algorithm, is a twenty-first-century 'digital cartel'

[50] The agreements specified in the sub-paragraphs from 1 to 8 are those about price setting, transaction conditions, and establishment of a business, while the agreement about the information exchange specified in Sub-paragraph 9 means the agreement about the exchange itself. Some scholars argue that the normal element has been added to the judgment of the types of agreement. Oh, *supra* note 18, at 21.

[51] *Id.* at 22.

or 'techno-cartel.'[52] The counter-measures against the new type of collusion in the digital economy or the information exchange among companies through algorithms[53] were discussed in the process of drafting the Fair Trade Act amendment. Considering domestic and foreign cases, a price algorithm or certain technology itself would not be a cartel violating competition law. The agreement between companies is a prerequisite for violation of the competition law.

Furthermore, in the information-based market, information is automatically stored through an information processing system such as a computer to be reflected in the transaction immediately. Namely, the information is exchanged with no intention of anti-competition. Hence, the case cannot well be conceived as a cartel; and, thus, this type of case has not been covered by the Fair Trade Act amendment. However, if the functions of the computer algorithm should evolve more to reduce a company's engagement in determining prices, it would be necessary to review whether competition should continue to depend on a company's intention to circumvent competition law and related criteria. In other words, an additional review of the Fair Trade Act policies is required.[54]

B. Improvement of Market Analysis for Monopolistic Markets

In the Fourth Industrial Revolution, dependence on the information media such as computers is increasing; and, thus,

---

[52] Nansulhun Choi, *AI deung-eul Hwal-Yong-han Sa-Eob-Ja-Gan Dam-Hab-gwa Gyeong-Jaeng-Beob-ui Dae-Eung* [*Collusion Based on Artificial Intelligence(AI) and Competition Law's Response*], 38 GYEONG-JAENG-BEOB-YEON-GU [JOURNAL OF KOREAN COMPETITION LAW (JKCL)] 83, 89 (2018).

[53] In 2015, the US Department of Justice (DOJ) investigated posters sold on the Amazon Marketplace for any collusion of prices and accused companies of legal violations. In 2016, the *Eturas* judgment by the European Court of Justice (ECJ) urged the relevant companies to reconsider the concepts of the competition law, especially the "agreement" of a cartel, in other dimensions. Case C-74/14, Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba, 2016 EUR-Lex CELEX 62014CJ0074 (ECLI:EU:C:2016:42) (Jan. 21, 2016).

[54] Nansulhun Choi, *Algorithm-eul tong-han Ga-Gyeog-Jeong-Bo-ui Gyo-Hwan-gwa Gyeong-Jaeng-Beob-jeog Pyeong-Ga* [*Exchange of Price Information through Algorithm and Evaluations from the Competition Law*], 35 GYEONG-JAENG-BEOB-YEON-GU [JOURNAL OF KOREAN COMPETITION LAW (JKCL)] 215, 228 (2017).

relevant authorities are required to develop a search methodology in response to the new trend. So far, discussions have focused on whether conventional search methodology can apply to the digital economy[55] and how competition law can apply to such ICT aspects as e-Commerce, hardware or software markets, search engines, social media, and Big Data.[56] In any event, technological innovation will accelerate, while the changes in the competitive environment will become more severe, increasing the burden on competition regulators.

For example, network effects and economies of scale are structural characteristics of platform markets. Thus, the more data are collected from double/multi-sided markets by taking advantage of network effects, the more on-line service providers would be relieved of costs and labor required to produce new data and enjoy the effects of economies of scale. Owing to such tornado effects, several large companies may well steeply increase their market shares to become so-called 'superstar' enterprises which rapidly occupy world markets. Actually, the market concentration in major countries has increased enormously; and, therefore, the digital economy allows for the 'winner-take-all' effect.[57] Hence, traditional simple markets, so-called innovative markets, require the government to arrange criteria for checking superstar enterprises' anti-competition acts based on sophisticated analyses of the market.

Under these circumstances, the draft amendment to the Fair Trade Act has added measures to Article 4 in an effort to facilitate the KFTC's policymaking and implementation by (1) making clear concepts of market analysis and their grounds, (2) obligating the relevant ministries to review the cases and suggest positions, and (3) adding business associations to the list of entities obligated to submit the data.[58] The current law specifies in Article 3 that "the

---

[55] *The Special Report of the German Monopolies Commission on the Challenge of Digital Markets* (English summary at http://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf) (last visited June 3, 2019).

[56] Gintare Surblyte, *Competition Law at the Crossroads in the Digital Economy: Is It All about Google?*, MAX PLANCK INSTITUTE FOR INNOVATION AND COMPETITION RESEARCH PAPER NO. 15-13 (2015).

[57] In the digital economy, users tend to be attracted to market-controlling enterprises. Hence, a few companies, which have occupied the market, would be strongly influential in price setting and other aspects.

[58] Three national assemblymen's draft amendments contain similar measures: Byeongdu Min (Bill No. 16674), Hak Young Lee (Bill No. 17999), and Byeong Wan Jang (Bill No. 18067).

KFTC should make and implement policy to facilitate competition in monopolistic markets or service markets; and, if necessary, request that ministers suggest improvements in the market structures and urge the relevant companies to submit the data to the Commission." Meanwhile, experts opined that the relevant articles and paragraphs be amended for the following reasons: The legal grounds for market analysis are not clear, and the relevant ministries are not obligated legally to suggest their positions. Moreover, only the relevant companies are obligated to submit data to the Commission; and, therefore, it is not clear whether business associations are obligated to submit their data to the Commission. After all, such opinions from experts have been all reflected in the Fair Trade Act amendment pending in the National Assembly.

In particular, Article 3, Paragraph 2, of the amendment specifies that the KFTC is obligated, according to Paragraph 1 of Article 4 of the amendment, "to analyze the competition conditions in certain industries, examine the conditions of their regulation, and arrange measures to facilitate competition." It is expected that the Fair Trade Act amendment would serve to improve regulations and facilitate competition in innovative markets.[59]

IV. CONCLUSION

According to OECD's Product Market Regulation Indicators in 2014, Korea is ranked fourth among the thirty-three member countries in terms of regulatory strictness.[60] Thus, Korea, at the government level, has published a series of reform measures to reestablish a flexible and effective legal system by rearranging the law and regulations. The measures to reform the system shift from a positive to negative list, with a paradigm shift towards *ex post* regulation and deregulation. Namely, unless irrecoverable damage

[59] Merely, it is deemed necessary to resolve the problem that the obligations overlap between the Office of the Prime Minister (Division of Regulation) and the Ministry of Industry, Trade and Resources. Oh, *supra* note 18, at 8.

[60] Gyupan Kim et al., *Ju-Yo-Gug-ui 4cha San-Eob-Hyeog-Myeong-gwa Han-Gug-ui Seong-Jang-Jeon-Lyag: Mi-Gug, Dog-Il, Il-Bon-eul Jung-Sim-eu-lo* [*The 4th Industrial Revolutions in the Major Countries and Korea's Growth Strategy: Focused on the United States, Germany, and Japan*], 17-07 EXTERNAL ECONOMIC POLICY INSTITUTE REPORT 181 (2017).

is feared, the market-dominating acts would be permitted according to the policy goals and criteria. In order to back up the effects of the *ex-post* regulations, the Korean government plans to induce the companies to regulate themselves spontaneously, while severely punishing violations of competition law.

On the other hand, countries adopting the market economy system regulate the monopolization of markets, unfair common acts, and M&As to induce free and fair competition. Since the regulations serve the market economy, they are similar among market economies. Article 1 of the Fair Trade Act specifies that "[t]he purpose of this Act is to promote fair and free competition, to encourage thereby creative enterprising activities, to protect consumers and to strive for balanced development of the national economy...." Here, "promotion of fair and free competition" may well be understood as the value appearing naturally if "fair and free competition" is maintained.[61] In addition, 'competition' is not a static process but a dynamic one. Hence, the regulations should not control the business activities but serve to promote competition and conduce industrial development.[62]

Thus, in order to reform the competition law system to promote 'competition' in the Fourth Industrial Revolution, it would be necessary to (1) regulate business practices of companies based on a correct understanding of the new business models, (2) abstain from extremely abstract or unclear interpretations of the law, (3) pay attention to the international regulations or discussions about competition law since the transactions of digital or on-line platform commodities transcend national boundaries, and (4) revise regulations in response to rapidly-changing technological industries.

The Fair Trade Act tends to define competition-limiting acts passively and regulate rather than define competitive acts positively. Analyzing competition-limiting acts and means emerging anew in the Fourth Industrial Revolution, and arranging their counter-measures, may well be essential preparation for adequate *ex post* regulation based on a correct understanding of new industries. The draft amendment to the Fair Trade Act

---

[61] KWON & JEONG, *supra* note 13, at 11-12.

[62] Eunseok Han, *4cha San-Eob-Hyeog-Myeong Si-Dae-ui Gyeong-Jaeng-Chog-Jin-gwa Gyu-Je-Hyeog-Sin-e-ui Si-Sa-Jeom* [*Suggestions for Promotion of Competition and Reform of Regulations in the Age of the 4th Industrial Revolution*], KOFAIR RESEARCH REPORT 68 (Korea Fair Trade Mediation Agency, 2018).

proposed by the administration and discussed in this paper, along with revised M&A examination criteria, maybe the first movement arranged through prior examination and preparations. Pre-emptive analysis of innovative markets and efforts to promote competition should be sustained to help achieve the ultimate goals of competition law to encourage subsequent innovation and, thereby, facilitate the operation of new markets to achieve a virtuous cycle of market mechanisms.

Keywords
Fourth Industrial Revolution, Digital Economy, Platform Market, Artificial Intelligence (AI), Big Data, Merger Review Guidelines, Algorithm, Dynamic Competition

Received: 2019; *review completed and accepted*: 2020

CONSTITUTIONAL REVOLUTION REDUX: POSTWAR JAPAN AND SOUTH KOREA

Sung Ho Kim[*]

ABSTRACT

Constitutional change, be that via revision, amendment, interpretation, or complete overhauling, is a staple in the political discourse of contemporary Japan and South Korea. This similarity is especially striking in light of the fact that the Japanese Constitution has never been changed (at least the 'black letter'), whereas the Korean counterpart has undergone nine official revisions. Where does this similarity as well as difference come from? What do they tell us about the present state of democracy in both countries, as well as the concept of constitutional change per se? This article is a comparative investigation of constitutional revolution in postwar Japan and South Korea with a particular focus on the way in which the meaning of Article 9 (Japan) and economic provisions (Korea), the pillars of their respective constitutional identities, have changed and remained the same over time.

I. INTRODUCTION

As it appears now, Japan is going back to the future, while Korea is plunging into the unknown. To turn postwar Japan back to a 'normal state,'[1] the ruling Liberal Democratic Party (LDP) is pushing for a wholesale constitutional revision in earnest, and

[*] Professor, Department of Political Science, Yonsei University. Email: sunghokim@yonsei.ac.kr. Acknowledgment: The conceptual part of this article was presented at the Yonsei Law and Politics Workshop (on "Theorizing Constitutionalism") on February 25, 2019. For the helpful comments during the Workshop, the author would like to thank Chaihark Hahm, Chulwoo Lee, Youngjae Lee, Hajime Yamamoto, and Satoshi Yokodaido. Note on Styles: Japanese and Korean sources are used only when no English translation is available. All references to the contemporary constitutional texts of Japan and Korea follow the English translation provided by the authoritative Constitute Project (www.comstituteproject.org, last visited Feb. 1, 2020). References to the past constitutions especially in Korea are not included in the Project, thus their translations are the author's.

[1] On this conservative rhetoric in contemporary Japan, see Takashi Inoguchi, *2005 Japan's Ambition for Normal Statehood*, *in* BETWEEN COMPLIANCE AND CONFLICT: EAST ASIA, LATIN AMERICA AND THE "NEW" PAX AMERICANA 135-64 (Jorge I. Dominguez & Byungkook Kim eds., 2005).

Article 9 was already transformed via Abe Shinjo's cabinet decision in 2014. In 2018, the self-styled "candlelight-revolutionary" government in Seoul unveiled a comprehensive constitutional draft to turn South Korea into a "nation hitherto never experienced" in the words of Moon Jae-in's inaugural vow.[2] Regardless of the direction of those desired changes, undoing the long-held status quo is what they both seek. Some kind of constitutional revolution seems more imminent than ever in Japan and Korea, but what is meant by those changes remains unclear. That is, how do we tell if and when a constitution has changed, what has been changed and what has not, and whether those constitutional changes are legitimate and/or consequential?

Korea underwent nine constitutional amendments since 1948, while the postwar Constitution of Japan has not witnessed a single formal revision over the past seven decades. Even so, Japan's Article 9, the emblematic peace provision, has come to depart radically from its original meaning after the 1954 establishment of the Self-Defense Forces (SFD) in a way that has far-reaching implications for the basic identity of the so-called "Peace Constitution." One might say that in Korea, by contrast, the national aspiration towards a robust form of economic equality survived many constitutional revisions, still underwriting one of the core constitutional identities of Korea. Arguably, fewer constitutional revolutions took place than meets the eye in Korea, while Japan experienced a more sweeping constitutional change despite no formal amendment. From this altered vantage point, a comparative constitutional glimpse of Korea and Japan raises questions about the conventional way of explaining constitutional changes, especially when constitutional identities are concerned.

Against this backdrop, the article revisits the experiences of Japan and Korea during the Cold War era and its long aftermath to deepen our understanding of constitutional changes in general. This enhanced understanding will also help put the constitutional revolutions unfolding in those two countries in sharper analytic perspective. To this end, I will first turn to reflect upon what is called the constitutional revolution, unpacking my conceptual toolkit along the way.

---

[2] *Inaugural Address of the 19th President*, *in* Selected Speeches of President Moon Jae-in of the Republic of Korea, May-July 2017, Korean Culture and Information Service/Ministry of Culture, Sports, and Tourism 7 (2017) [author's translation].

II. REFLECTIONS ON CONSTITUTIONAL REVOLUTION

My reflection begins with the proposition that the making of a constitution marks the death of a revolution. According to this classic account, charismatic political energy unleashed by revolution causes an irreparable rupture in the legal status quo ante. Even for ardent Maoists, such a legal vacuum or anomie cannot be sustained permanently, and it is brought to an end with the establishment of a new set of legal institutions via constitutionalization of those revolutionary values and principles. All revolutions culminate in some kind of routinization called constitution-making—or so is presupposed by the conventional dogma in political and legal theories.[3] Japan's Miyazawa Toshiyoshi agrees with this constitutional dogma. The country's unprecedented defeat and unconditional surrender demanded a conceptual status that was on a par in magnitude with a total revolution in Japan's political life. That is to say, Japan's acceptance of the Potsdam Declaration in August 1945 had to be reconceptualized as an entirely novel ground of democratic legitimacy even as the postwar constitution-making took the empty formality of amending the Imperial Constitution. If a radically new constitution was made, then there had to be a political revolution prior to such a legal change. If none could be found, then a revolution had to be invented on paper, hence the legal fiction called the "August Revolution."[4] A drastic political rupture, formal constitution-making/amendment, and a substantive sea change in the constitutional landscape seemed to entail each other by logical and historical necessity.

Drawn from the great democratic revolutions of the eighteenth century, however, this dogma does not always do justice to the complex nature of constitutional change in general. The New Deal constitutional revolution, for one, was a genuine case of abrupt and decisive change in American constitutional history. And yet, it was neither preceded by an illegal or

---

[3] *See, e.g.,* HANNAH ARENDT, ON REVOLUTION 142 (1965). For a constitutional scholar's variation on this Arendtian theme, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 203-12 (1991). For a sustained critique of this political-legal dogma, see CHAIHARK HAHM & SUNGHO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA 13-65 (2015).

[4] Yasuo Hasebe, *The August Revolution Thesis and the Making of the Constitution of Japan*, 17 RECHTSTHEORIE 335, 335-42 (1997).

extraordinary political event nor followed by constitutionalization of the New Deal achievements via formal amendment. In the same vein and closer to our time, Egypt witnessed the so-called Jasmine Revolution in 2011, which was followed quickly by democratic regime-change and new constitution-making. However, the new constitution is often described as hardly a departure from the one it replaced, especially when it comes to the entrenched role of Islam and the military in the republic's civic life.[5] In Egypt, both political and legal changes of a seemingly revolutionary nature took place but with little revolutionary consequence of constitutional importance, whereas, in New Deal America, a profound and enduring constitutional change happened but without any recourse to a political revolution or legal amendment. It seems to be the case that the method by which a constitution is made and revised (i.e., whether via legal, illegal, or extralegal routes) is not necessarily commensurate with the scope and magnitude of the substantive changes that a new or amended constitution is supposed to usher in with lasting consequences.

This complexity is the reason an increasing number of comparative constitutional scholars (broadly following Bruce Ackerman's lead) are devising new concepts by which to theorize constitutional changes with more hues and shades. The latest examples would be an "unconstitutional constitutional amendment," "constitutional dismemberment," and "constitutional revolution." Although different in intent and interest, these concepts can be clustered together as they are all devised to address the key discrepancy between form (method) and substance (contents) in constitutional change.

From a predominantly legal-normative perspective, for instance, Yaniv Roznai asks if a constitutional amendment can be rightfully constrained by the very constitution it is proposing to change, and this question is answered in the affirmative. According to his revised theory of constituent power, amendment power is invested with a *secondary* form of constituent power that allows an amendment to override all legislated norms and practices save the constitutional essentials as originally laid down by the *primary* constituent power. Not all constitutional change can be justified, even if done by following the revision rules to the letter, making some constitutional amendments

[5] Michael Lipin, *Egypt's New Constitution: How It Differs from Old Version*, VOICE OF AMERICA, Dec. 25, 2012, https://www.voanews.com/africa/egypt's-new-constitution-how-it-differs-old-version.

unconstitutional—or, to quip, an "unconstitutional constitutional amendment."[6] Here the issue is whether an amendment meant merely to play a corrective, elaborative, and/or augmentative function can be used to change the constitution in a way that crucially alters the constitutional identity, making the amended constitution a novel one in substance.

This tension between form and substance of constitutional change is also the main theme behind the theory of "constitutional dismemberment."[7] Albeit in a more legal-positivistic vein, this concept also focuses on cases in which the boundary between constitutional revision and constitution-making is less than clear-cut. A classic example is the current US Constitution, which was written in 1787 formally as a revised version of the Articles of Confederation of 1777 (ratified 1781) but turned out to be a completely new and altogether different document in form and substance. Cases like these demonstrate that, irrespective of legitimacy or regardless of intensions, *de jure* revision may bring about not an amendment but a *de facto* dismemberment of the constitutional status quo. Here, too, the concept turns on the gap between form and substance in the practice of constitutional change. One of the most comprehensive attention to this key discrepancy has been under the conceptual rubric of "constitutional revolution." [8] This concept foregrounds the problem of form (i.e., the process by which a constitution changes) and substance (i.e., the degree of substantive transformation in the way constitutionalism is experienced), thereby opening up four distinct conceptual possibilities. They are: (1) *classic* constitutional revolution where the transformation is great, that is, abrupt, decisive, and enduring, and a result of cataclysmic political disruption and/or official amendment; (2) *quiet* constitutional revolution where the transformation is great even in the absence of such disruption and/or amendment; (3) *nominal* constitutional revolution where there is little transformation even after such disruption and/or amendment; and (4) *no* constitutional revolution where neither great transformation in substance nor sharp rupture in the process takes place. According to this schema of those

[6] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWER (2017).

[7] Richard Albert, *Constitutional Amendment and Dismemberment*, 43 THE YALE JOURNAL OF INTERNATIONAL LAW 1 (2018).

[8] Gary Jeffrey Jacobsohn, *Theorizing the Constitutional Revolution*, 2 JOURNAL OF LAW AND COURTS 1 (2014); GARY JEFFREY JACOBSOHN & YANIV ROZNAI, 2020 CONSTITUTIONAL REVOLUTION (2020).

haphazard examples of constitutional revolution cited above, the fictional August Revolution of Japan may be characterized as classic, America's New Deal revolution as quiet, and the Jasmine Revolution of Egypt as nominal.

		Substance[9]	
		Mini Change	**Maxi Change**
Process	**Rupture Yes**	*Nominal* CR (Jasmine Egypt)	*Classic* CR (Postwar Japan)
	Rupture No	*No* constitutional revolution	*Quiet* CR (New Deal US)

This conceptual schema opens up a line of related questions worth pondering. Firstly, let us assume that we can ascertain the manifestation of a rupture in the legal process with relative ease since "constitutional politics" towards an amendment creates an extraordinary disruption in the political routine, at least from the perspective of "ordinary politics" (Bruce Ackerman). For the convenience of argument, let us also assume that widespread mass actions on the street and outside the legally permissible boundary provide a reliable barometer for the presence of not just unrest or rebellion but a genuine political revolution that may end the status quo ante (provided it eventually achieves a modicum of success). Assuming, as I do here, that there was, in fact, a rupture in the political and legal process, then, how do we know whether a constitutional revolution took place at all? Evidently, even with the aid of those corrigible assumptions, this is not an easy question to answer.

The definition of constitutional revolution is clear enough: It is an abrupt, decisive and enduring transformation in the way in which constitutionalism is experienced. But how radical does the change have to be and in what aspect? What does it mean to say that there was a change in constitutionalism? Is it limited to a certain institutionalized practice that makes up the political and rights regimes, or does the change encompass something far larger and less tangible such as constitutional identity? How can we measure, if at all, a swift alteration of constitutional identity, which is inclusive of customs, culture, and ideology? Whose

[9] Drawn with modification from Jacobsohn, *supra* note 8, at 4.

change of experience counts for assessing constitutional revolution—that of political and government elites, courts and law enforcement agents, market and economic actors, civil society participants, the voting citizenry, or the 'people' in general? Even these random questions make it clear that assessing constitutional revolution, not only in its impact, scope, and durability, but also in terms of verifying its very presence at a certain discrete moment in time, is a separate genre of inquiry itself. Be that as it may, once again for the sake of argument, let us proceed with an assumption widely shared among legal scholars that the key criterion for verifying and evaluating a constitutional revolution *is* the change in the meaning of a certain constitutional *provision*.

Secondly, despite the obvious limitations of this court-centric, narrowly legalistic approach, the above questions are still sidelined in my conceptual sketch because it is imperative to focus on another set of questions raised by the schematic understanding of constitutional revolution. That is, if a veritable constitutional revolution indeed took place, what would be the driving force behind such a dramatic change in the basic charter of a nation? For sure, explaining political, economic, cultural, and other collective changes over a duration of time is the main staple of the modern social sciences, but the theoretical and empirical approaches to these matters are simply too numerous to recount here. In line with the first set of assumptions above, I will instead focus on changes in the constitutional provisions themselves through the prism of constitutional identity. That is to say, I will zoom in selectively on constitutional provisions that are generally considered to edify the basic identity of a constitution and investigate how and why those particular provisions underwent changes both in 'black letters' and/or judicial and other interpretations.

Here, I take 'constitutional identity' to mean something both narrow and wide—it is a loose constellation of aspirations and aversions as reflected in the constitution much as it is a cogent system of rights- and structure-provisions in the constitutional law. Generally, an inquiry into constitutional identity is about isolating attributes that make one constitutional order recognizably different from another. Those unique attributes have to do with the constituent's sustained aspirations and commitments that a democratic constitution edifies and implements with a prescribed set of institutional practice. The oft-cited example is Article IV, Section 4 of the US Constitution. By mandating that no member state shall adopt a non-republican form of government, it has the

effect of making clear the constitutional identity of the enlarged federal republic that had no precedent in world history. As such, those collective desires sanctioned by a legal gestalt of institutionalized practices do not and can never exist in a wholesome harmony. This has less to do with the quotidian difficulties with which the irreducible "fact of pluralism" (John Rawls) is managed constitutionally; it is the kismet, even curse, that befalls even those constitutions with only the faintest liberal credentials. The so-called "constitutional disharmony"[10] is rather about a cacophony that sounds out from within the constitution itself as it confronts the changes, or obstruction thereof, in its political, economic, and social surroundings.

All too well known in this regard is the disharmony that slavery had sewn into the constitutional identity of antebellum America, which had to find a solution on the battlefield and, legally, through a constitutional revolution in the form of the Civil War amendments. As a result, the US constitutional identity, "a republican form of government" in the above Guaranty Clause of 1789, has come to mean something radically different from that which would inform Amendment XIV in 1868. To draw from the quasi-Hegelian nomenclature of Ronald Dworkin, republic as an abstract "conception" is continuously overcome in reference to, even in confrontation with, republic as an empirical "concept." [11]

According to Carl Schmitt, to take another example of such constitutional dialectics, Weimar constitutionalism was doomed to fail from the inception because its robust liberal rights-regime could not be reconciled with the majoritarian-democratic principles of the government structure.[12] Famously (or notoriously rather), this built-in "constitutional disharmony" was held responsible for the Weimar Republic's failure to cope with the social and economic crises and political challenges that led to its ultimate demise. The bootstrapping by which the Basic Structure Doctrine was established in Indian constitutionalism may afford yet another glimpse into how constitutional disharmony works (although with far happier consequences). India's Constitution was written as a programmatic blueprint for a wholesale, albeit incremental, reform of the nation and, to that extent, stood in negation of and confrontation with the social realities of the

---

[10] GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 351 (2010).
[11] RONALD DWORKIN, LAW'S EMPIRE 70-72 (1986).
[12] CARL SCHMITT, LEGALITÄT UND LEGITIMITÄT [LEGALITY AND LEGITIMACY] 40 (Jeffrey Seitzer trans., Duke University Press 2004) (1932).

postcolonial subcontinent. This aspirational and transformative core of India's "aversive constitutionalism,"[13] however, could not be maintained on a secure base because the Westminster-style government system could make compromising amendments with relative ease for electoral and other myopic gains. To counter this political proclivity and borrowing from West German constitutionalism, the Supreme Court virtually invented the so-called Basic Structure Doctrine by which the parliament's amendment bill could be reviewed and unconstitutionalized on the grounds of impinging upon the fundamental constitutional identities of India, or the "five unamendable pillars."[14] Be it between slavery and equal liberty, between liberalism and democracy, or between aspiration and acquiescence, constitutions and/or constitutional identities frequently entail built-in disharmony at their core. More important, constitutional disharmony becomes a driving engine behind the radical changes or revolutions such as the Civil War amendments, Weimar's alleged suicide, or India's bootstrapping.

In summary, constitutional identities are less stable than meets the eye, more often than not caught in the ebbs and flows of the restless changes in the course of which constitutional law itself changes. The most radical among those transformations is a constitutional revolution that changes the way constitutionalism is experienced abruptly, decisively, and enduringly with ramifications for the core identity of the constitution. However, the way such a revolution in constitutional identity takes place also varies, as the form and substance of revolutionary changes make different combinations in practice. In other words, not all constitutional revolutions, even the most dramatic changes in constitutional identities, take a classic modality, a lesson that enables us to understand different ways, such as nominal and quiet, in which constitutional identities are revolutionized.

---

[13] JACOBSOHN, *supra* note 10, at 217.

[14] According to the Indian Supreme Court, those five pillars are "the constitutional supremacy, a republican form of government, secularism, separation of powers, and federalist principles." *See* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 274 (India). Although by no means the only and exclusive source of law, the Preamble enumerates those principles in as many words when it declares that India is a "sovereign socialist secular democratic republic." For more, see Gary Jeffrey Jacobsohn, *Sailing and Anchoring: Contrasting Imperatives of Constitutional Revolution*, *in* COMPARATIVE CONSTITUTIONAL THEORY 334-53 (Gary Jacobsohn & Miguel Schor eds., 2018).

III. ECONOMY AND DEMOCRACY IN SOUTH KOREA

South Korea has gone through constitutional amendment and revision nine times, making the current Constitution of 1988 the tenth supreme law of the land since its first promulgation in 1948. Of these frequent tamperings with the Constitution, five revisions may be described as revolutionary since each of them was made to launch a new "republic" (as locals call a new constitutional regime à la the French practice). The Founding Constitution of 1948 gave birth to the First Republic of Syngman Rhee, which was replaced by the Second Republic born in the aftermath of the so-called 4.19 student revolution and christened by the new Constitution of 1960. This short democratic interlude was interrupted by the 5.16 military coup of 1961, which soon led to the Third Republic with yet another Constitution. Although this Constitution would undergo a controversial amendment in 1969, it was not until 1972 that it was entirely replaced by the so-called Yushin Constitution as part of a palace coup staged to prolong Park Chung Hee's dictatorial presidency. His assassination brought an end to this authoritarian Fourth Republic; a brief yet widespread demand for democracy ensued only to be violently suppressed by another military junta; and, a new Constitution was promulgated yet again to usher in the Fifth Republic in 1980. This soft-authoritarian regime lasted seven years before it was brought down by civil protests on the street, out of which the current Constitution of 1988 emerged to codify the outcome of that successful struggle for democracy. These wholesale revisions of 1960, 1962, 1972, 1980, and 1987 represent substantive reorientations in the constitutional text, a fact which comprises, along with four other relatively minor amendments, a telling testimony to the checkered history of constitutional democracy in Korea.

According to this constitutional *précis*, Korea is a land of *classic* constitutional revolution, par excellence. Since its 1948 founding, one extraordinary political disruption followed another, and each post-revolutionary status quo sought edification by a new Constitution. How constitutionalism was experienced as a whole changed dramatically as a result of these cataclysmic ruptures in the political process and substantive rewritings of the constitutional text. Be that as it may, the changes introduced by the formal revisions were unevenly felt across different parts and various provisions of the Constitution. Some changes in the constitutional text were as dramatic as the revolution that triggered

them; others were seemingly trivial and harmless in words yet consequential in deeds; yet still others turned out to be less significant than initially met the eye.

This is why the above perfunctory outlook on the Korean constitutional experiences may come across as too simplistic a depiction based on overgeneralization. In other words, as dramatic as it may look, all constitutional revisions in Korea cannot be reduced to instances of classic constitutional revolutions. Rather, a closer textual scrutiny reveals that Korea's experience with constitutional change involves various modalities of *quiet* and *nominal* as well as *classic* constitutional revolutions. Let me explain what can be construed as examples of a nominal constitutional revolution in the Korean experiences before moving on to illustrate those of a quiet constitutional revolution.

A. Nominal Constitutional Revolution

In parts of the Korean Constitution, there are cases in which amendments are made to effect a significant reorientation, which nonetheless had little substantial impact on the core values and principles of those amended provisions. The best example for this kind of *nominal* constitutional revolution is what happened to the so-called "Economic Constitution," the gestalt of the provisions consisting of the Economy Chapter (mandating and enabling government policies on certain economic affairs) and the economy-related basic rights (e.g., on property or labor), where the latter set the limit on the former.

Devoting a separate chapter to matters of economic policy, as the Korean Constitution has done ever since its founding in 1948, is a practice rarely found in other constitutional experiences. Although constitutional attention to the economy became more prevalent in the twentieth century, even the Weimar Constitution, renowned for progressive socio-economic rights and the alleged source of inspiration for Korea's Founding Constitution, did not have a separate chapter on the economy. The so-called New Deal revolution that steered the United States decisively away from laissez-faire capitalism toward a mixed economy had no effect at all on the constitutional text itself. Closer to home in postwar Japan, the US General Headquarters (GHQ) draft Article 28, providing for virtual state-ownership of natural resources including land, was struck out at the last minute before its final

submission to the Imperial Diet.[15]

Korea's Economy Chapter was an anomaly (another exception being Republican China's 5.5 Charter of 1936), and the original drafters in 1948 were well aware of it. Writing the Economy Chapter was indeed reflective of their keen recognition of the critical importance of the economy for the future of the newly independent nation; and, to that extent, it was at once the most realistic *and* idealistic components of the Constitution. That is why the Economy Chapter of the Founding Constitution turned out to be "socialistic"[16] for a new nation born on the capitalist side of the Cold War's fault line.[17] These national- or state-socialistic provisions reflected both the economic reality of the time and the aspiration of the newly independent nation. On the one hand, they were a facsimile of the immediate postcolonial economy, where well over 85% of the national wealth was state-owned. Those economic assets formerly owned by the Japanese government and their colonial settlers were conscripted by the US occupation authorities and scheduled to be transferred to the new Korean government after 1948. In short, there were next to no private business and market economy to be regulated by the Constitution. On the other hand, the economic Constitution was expressive of the Korean people's insatiable desire for

---

[15] RAY A. MOORE & DONALD L. ROBINSON, THE JAPANESE CONSTITUTION: A DOCUMENTARY HISTORY OF ITS FRAMING AND ADOPTION, 1945-1947, RM213.SP2.P48 (1998).

[16] *See, e.g.,* Paul S. Dull, *South Korean Constitution*, 17 FAR EASTERN SURVEY 207 (1948) ("Chapter Six, entitled 'Economy,' ostensibly makes the Korean Republic a *socialistic* state." [emphasis added]).

[17] This "socialistic" chapter began with the proclamation that the basic principle of Korea's economic order shall be to realize social justice, meet every citizen's basic demands, and develop an equitable economy whereas the economic liberty of individual citizens shall be protected only within the parameters set thereby (Article 84). In order to realize this goal, the chapter also provided for state-regulation of foreign trade and government management of most public utilities (Article 87) as well as state-ownership of most natural resources (Article 85). Even those private enterprises permitted under this chapter could be made state-owned or government-managed when necessary for the public welfare as well as national security (Article 88). In other parts of the Constitution, too, while the right of property was recognized, the Constitution made clear that its exercise must "conform to the public welfare" (Article 15). The state had a duty to protect those unable to work due to old age, infirmity, or incapacity (Article 19). In addition to a general provision for labor rights, the Constitution gave special protection for the labor of women and children (Article 17). Most unusual, perhaps, was the provision for a so-called workers' right to an equal share in the profits of private enterprises (Article 18).

equality as Article 86 on farmland reform edified. In a land where, for thousands of years, the absolute majority of the population was engaged in small-scale tenant farming, this was a genuinely revolutionary mandate, which, after its expedient implementation right before the outbreak of the Korean War, destroyed the landowning class overnight and created a small, self-tilling peasantry in one stroke. This revolutionary change in the economic demography would prove to have a lasting impact on the subsequent industrialization and democratization of the nation. Both acquiescent and aspirational, the Economic Constitution of 1948 made sense against this backdrop and its long aftermath in Korean society.[18]

It is for the same reason of constitutional realism combined with idealism that the original Economic Constitution underwent changes as the Cold War deepened after the Korean War. The postwar economic rehabilitation, the most pressing national agenda of the time, could be achieved only with the aid of the foreign investment orchestrated by the United States. Put against the background of this new reality, the original Economic Constitution was deemed in need of substantial amendment in the direction of a more open, market-oriented economy. In part as a result of the pressures from Washington, the 1954 constitutional revision liberalized foreign trade and facilitated privatization of the state-controlled economy. In particular, state-ownership and public management of natural resources and major industries were entirely abandoned (Article 85 and 87), and a new prohibition was introduced to ban the state-ownership of, and public control over, private enterprises (Article 88).

As a measure of placation to those apprehensive of Korea's over-dependence on foreign aid, especially from Japan, Article 84 (declaring the basic 'socialistic' economic order) was preserved in 1954 and again in the 1960 revision. Even this token measure was nonetheless overhauled in 1962 when the newly written Article 111 redefined the economic order of Korea "as based on respect for the freedom and creative initiatives of individuals in economic affairs." In light of this declaration, it is little wonder that Article 18, the unusual mandate on the equal share of corporate profits, was finally removed by the same revision along with Article 84. It was also in tandem with this fundamental reorientation that Article

[18] For more on the making of the original Economic Constitution and its meaning, see HAHM & KIM, *supra* note 3, at 98-115.

87 was rewritten to shift emphasis from the state's right of control to an obligation to foster foreign trade (Article 116). Although followed by a proviso authorizing state intervention on the grounds of "social justice and equitable economic development," Article 111 was arguably a dramatic, even revolutionary, departure from the allegedly "socialistic" spirit of the Founding Constitution and a continuation and culmination of those constitutional developments of the 1950s. In 1962, constitutional realism carried the day, or, one might say, the new constitutional zeitgeist was economic development. It is not entirely fortuitous that the export-led industrialization of Korea would take off under the auspices of the 1962 Constitution.[19]

The Economic Constitution as substantially revised in 1962 survived the authoritarian setbacks under the Yushin Constitution and yet another military coup of 1979, contributing to the transformation of Korea into a modern industrial nation in less than a generation. Arguably, the successful economic development and the consolidation of the middle class as its corollary were the single most important factors in the demise of the Yushin dictatorship and the semi-authoritarian Fifth Republic, in the end underwriting the successful democratic transition that culminated in the Constitution of 1987. Be that as it may, the imprint that this democratic constitutional revolution left on the Economy Chapter was deeply ambivalent. On the one hand, the spirit of Article 111 was augmented in a business-friendly direction: In the first clause of the new Article 119, "enterprises" in addition to "individuals" was inserted as the proprietor of "economic liberty and creative initiative," which was again affirmed as the foundation of Korea's economic order. The auxiliary proviso of 1962, on the other hand, was also given a remarkable expansion in the second clause of Article 119:

> The State may regulate and coordinate economic affairs in order to maintain a 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 [emphasis added].

For sure, constitutionally authorizing an active role for

[19] *Id.* at 115-125.

government in economic affairs comported with Korea's entrenched experience of state-led development. No doubt, constitutional realism of the Economy Chapter needed to be balanced with a healthy dose of idealism that would sanction even stronger forms of state-intervention in coping with the growing social ills that came with the rapid economic and social transformation of Korea. And yet, how Article 119 spelled out this constitutional idealism was extraordinary as it set concrete policy goals with such attention to details. Also, under the broad and general rubric of "democratization of the economy," the new Article 123 went so far as to mandate a "balanced development" for farming and fishing interests, small and medium businesses, and across different regional provinces. Its fourth clause even obliged the state "to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems."

Given such constitutional attention to what are basically policy matters, it is no wonder that the Economic Constitution of 1987 has been at the center of public controversies both in and out of the courtroom. Although the Constitutional Court has consistently held that the first clause (on economic liberty) declares the main foundation of Korea's economic order with the second clause (on economic democratization) a supplementary principle,[20] such a ruling has only intensified the controversy among justices, lawyers, and scholars over the nature of Korea's Economic Constitution. Even under the current Constitution, there is a motion to reintroduce the employee's right to an equal share of corporate profits, which was first established in the Founding Constitution but subsequently eliminated in the 1962 revision. The reason is mainly that economic liberty and economic democratization in Article 119 are better interpreted as constituting two principles of equal value and importance. This reading, a significant departure from the Court's, recognizes the questionable right to an equal share of profit as one of the "rights of citizens [that] shall not be neglected on the grounds that they are not

[20] *See, e.g.,* Constitutional Court [Const. Ct.], 88Hun-Ka13, Dec. 22, 1989, (1 KCCR, 357) (S. Kor.); Constitutional Court [Const. Ct.], 96Hun-Ba12, Nov. 27, 1997, (9-2 KCCR, 607) (S. Kor.); Constitutional Court [Const. Ct.], 2001Hun-Ma605, July 18, 2002, (14-2 KCCR, 84) (S. Kor.); Constitutional Court [Const. Ct.], 2005Hun-Ba34, Dec. 26, 2008, (20-2(2) KCCR, 594) (S. Kor.).

enumerated in the Constitution" (Article 37).[21] As such, this interpretation relies on a historical argument by asserting that giving equal weight to political liberty and economic equality is the original intent behind the Economic Constitution of 1948 and, as such, a guiding constitutional spirit that survived nine official revisions.[22] According to such a quasi-Originalist interpretation of the Economic Constitution, which finds many a sympathetic ear in contemporary Korean society,[23] the constitutional revisions of 1954 and 1962 were merely instances of a *nominal* constitutional revolution that introduced substantial changes in the 'black letter' laws without enduring consequences for the constitutional identity of Korea.

In light of these recent developments, it is not surprising that the government's draft constitution of 2018 proposed to steer the Economy Chapter in the direction of more robust "economic democratization."[24] Although this proposal failed to pass the National Assembly, with the Supreme and Constitutional Court already reformed in the image of the present progressive government, it is likely that the established court rulings on the Economic Constitution may be overturned even before the next push for a constitutional revision resumes. Even more likely is that the supporters of this direction of constitutional change, be that formal or informal, shall see in such a change the restoration of the original intent and re-edification of the unchanging identity of the Economic Constitution of Korea. As such, that constitutional soul shall be revered as having survived all those constitutional revolutions that proved to be merely *nominal* in retrospect.

---

[21] Seungheum Hwang, *Kyŏngje Hŏnpŏp ŭi Byŏnchŏn* [*Change of the Economic Constitution*], 9 HYŎNDAESA KWANGJANG [CONTEMPORARY HISTORY FORUM] 88-89 (2017).

[22] *Id*. at 104.

[23] During the 2017 presidential campaign, for example, the leading progressive candidate from the Justice Party openly advocated the rejuvenation of this particular constitutional right. Staff Writer, *Sim Sang-jŏng, "Iik-kyunjŏmkwŏn Myŏngsi haeya…Sahoe-Kyŏngje jŏk Kwŏlly-Kanghwa* [*Sim Sang-jŏng, The Right of an Equal Share to Corporate Profits Needs to be Constitutionalized….To Empower Socio-Economic Rights*], THE JOONG-ANG ILBO DAILY, Apr. 12, 2017, https://news.joins.com/article/21468249.

[24] GOVERNMENT DRAFT FOR CONSTITUTIONAL AMENDMENT 26-28, National Assembly Bill No. 12670, Mar. 26, 2018, http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_S1N8H0U3D2M6Y1W4W5I9F4R0K4P8Z5.

B. Quiet Constitutional Revolution

The claim that the constitutional change in the Economy Chapter is less dramatic than meets the eye and better seen as an instance of nominal constitutional revolution does not mean that substantial constitutional transformation has not occurred in Korea. For instance, the constitutional protection of basic rights has waxed and waned subtly but significantly, along with political ups and downs. It just means that such a constitutional change does not always adopt the form of a classic constitutional revolution. Even in Korea, those revolutionary changes can take place without any formal revision of the 'black letter' law of the Constitution to effect what can be called a quiet constitutional revolution.

In this regard, a good place to start is the General Provisions, in which the fundamental political identity of the nation is declared along with the human and territorial boundaries of the nation. In particular, Article I (providing for the basic form of the polity and the ultimate locus of sovereignty) can be traced back to the 1919 Charter of the Provisional Government of Korea and other proto-constitutional documents that an organization of the exiled independence activists produced in China before 1945. Its Article 1 declares that the "Republic of Korea is a democratic republic," as all subsequent constitutional laws have done invariably since then. Only an eye trained in the history of European and North American political thought would see little redundancy in the expression, "democratic republic," since republic and democracy represented two very distinct models of polity as late as the time of the United States founding. According to James Madison, for instance, they are not only distinguishable—democracy represented the "diseases most incident to republican government."[25] Unequipped with such conceptual sophistication, the term "democratic republic" in Korea has come to mean different things to different people at different times, even as the nomenclature remained unchanged for a century.

When the declaration made its first appearance in 1919, it was meant to signal a historic break from the defunct dynasty of Choson responsible for the colonization as well as a pointed rebuke to its perpetrator, the Empire of Japan, also ruled by a

[25] FEDERALIST PAPER NO. 52 (1788).

hereditary monarch.[26] The identical term was revived for the Founding Constitution in its Article 1 after the Japanese imperial rule collapsed and a return to the pre-annexation monarchy became a foreclosed conclusion in the postcolonial constitutional politics. This was mostly because the political semiotics had changed, and the "democratic republic" came to signify something altogether different.

Now the main political *signifié* of this concept was the rivalry with North Korea, where a communist regime was emerging under Soviet occupation in the name of a "people's republic." If the pre-1945 usage meant indeed "people's republic" as a rejection of both the Choson monarchy and the *tennō*'s empire, the "democratic republic" of 1948 came to have a radically different connotation in a way that antagonized the "people's republic" of the North. For the drafters of the South Korean Constitution, in other words, the "people's republic" was no longer a symbolic depository of national and popular sovereignty but a code name for the Marx-Leninist dictatorship of the proletariat. In conscious contrast, the "democratic republic" of South Korea came to acquire a new constitutional connotation that went beyond popular sovereignty—it now had an added meaning of *liberal-democratic* separation and balance of governing powers as opposed to the *communist* concentration of power in the one-party state.[27] The denotation remained unchanged before and after 1945, but its connotation was radically transformed, even revolutionized, in the process of constitution-making in South Korea.

Thus revived against the dawning Cold War backdrop, Article 1 has been undergoing a *quiet* constitutional revolution triggered by the thawing of the Cold War. This transformation began, albeit unwittingly, with the making of Article 4 (mandating unification with North Korea) in the 1980 Constitution and was further fueled by the United Nations admission of the two Koreas in 1991. These developments in constitutional and international law have complicated the interpretation of "democratic republic" in Article 1, now also involving that of Article 3 as well as Article 4. Never amended since 1948, Article 3 defines the territory as the "Korean peninsula and its adjacent islands" in a total and purposeful disregard of the political reality that the northern half of the

[26] CHANSEUNG PARK, TAEHAN MIN'GUK-ŬN MINJU KONGHWAGUK-IDA [THE REPUBLIC OF KOREA SHALL BE A DEMOCRATIC REPUBLIC] (2013).

[27] CHINO YU, SHIN'GO HŎNPŎP HAEŬI [CONSTITUTIONAL LAW EXPLAINED, REVISED EDITION] 19 (1959).

peninsula is under the effective territorial jurisdiction of the Democratic People's Republic of Korea. According to this provision, the North Korean government is merely a *de facto* entity, without a *de jure* status, in unlawful occupation of a part of South Korean territory. In mandating a "peaceful unification [with the North]," by contrast, Article 4 signals some kind of recognition of the North Korean government without saying as much, an interpretation that is reinforced by the two Koreas' simultaneous admission to the United Nations. This post-Cold War status quo has further strained the domestic constitutional dilemma regarding how to reconcile these new realities, mandates, and assumptions that pulled constitutional interpretation in different directions. Unsurprisingly, those new developments have prompted various attempts at legal-dogmatic legerdemain without clear consensus among justices, lawyers, and scholars in contemporary Korea.[28]

What is more, the international coexistence and national unification with North Korea poses particular challenges to Article 1, because the meaning of "democratic republic" needs to be substantively expanded to allow room for a mandated unification with the hostile communist regime in the North. In these changed circumstances, the Cold War anti-communist intent behind making Article 1 is in need of reexamination, if not elimination, lest the Constitution sounds out an insufferable dissonance regarding its most foundational identity. One heated debate after another thus ensued over the basic constitutional identity not only in the courtrooms (e.g., regarding the constitutionality of the anti-communist National Security Law) but also at the level of civil society (e.g., surrounding how to teach Korea's constitutional identity in school textbooks). The main question revolves largely around whether the "democratic republic" of Article 1 means *liberal democracy* in the narrow sense of the term or *democracy with no adjective* that may be elastic enough to accommodate the so-called "people's democracy" of the North *pace* the original intent of 1948. The current progressive government has vowed to make a total constitutional overhaul and already unveiled its revision draft in 2018, which was suspected to be underwritten largely by the latter understanding of democracy in Korea.[29]

---

[28] For an authoritative survey of this issue, see MINISTRY OF GOVERNMENT LEGISLATION, HŎNPŎP JUSŎKSŎ I [CONSTITUTIONAL COMMENTARY I] 118-137 (2010).

[29] Both the Preamble and Article 4 make clear that a "free and democratic basic order" is the meaning of democracy in Korea. During the deliberation process,

While the government draft failed to pass the National Assembly, the "democratic republic" of Article 1, that most enduring and fundamental constitutional identity of South Korea, may be undergoing yet another *quiet* constitutional revolution presently.

IV. WAR AND PEACE IN POSTWAR JAPAN

The relatively large number of constitutional revisions in Korea does not necessarily indicate that the constitutional revolution in the classic sense of the term happened with as much frequency. The way in which constitutionalism was experienced in Korea changed materially without formal revision in some cases, but not always so, despite significant changes in the constitutional text. Likewise, closer scrutiny might reveal that, even as postwar Japan witnessed no formal amendment to its constitutional law, its Constitution, at least in some parts, has undergone what may be described as a constitutional revolution. In other words, neither *classic* nor *nominal* constitutional revolution can be said to have taken place for the all too self-evident reason. Even so, this undeniable fact cannot warrant the conclusion that there was *no* constitutional revolution in postwar Japan.

A. Constitutional Revolution of 1954

Seen from a longer perspective, Japan is indeed *not* without its own experience of constitutional revolution, and it followed quickly on the footsteps of the total defeat in 1945. The postwar constitution-making was as much about designing a new future as it was about negotiating its rupture with the immediate past. In an important sense, the postwar Constitution was born in the penumbra of the prewar Imperial Constitution, even as it was

---

the report was made that the government draft would eliminate "free" from the Preamble and Article 4. Indeed, the government's commentary on the revised Preamble emphasized democracy and democratization only. *See* GOVERNMENT DRAFT FOR CONSTITUTIONAL REVISION, *supra* note 24, at 4. Although this omission did not happen in the final proposal (thanks in part to this scandal), such a movement within the government fueled conservative suspicion about the Moon government's ulterior motive, undermining its already slim chance of passing the National Assembly where consent from two-third of the members are required.

rejecting that "unmasterable past."[30] This predicament has drawn a long shadow over the way the meaning of such a dis/continuity was teased out by the Japanese government and the public at large under the U.S. military occupation.

The conservative government made every effort during the deliberation process to ensure that, despite the unconditional surrender, the novel "symbol emperor system" was a continuation in essence of the sovereign emperorship of the prewar Constitution—or, to use a prewar term, the *kokutai*.[31] If this impossible argument was to be believed, the constitutional revolution in postwar Japan was only *nominal* when it came to the emperor's sovereign status irrespective of the formal introduction of popular sovereignty. For liberals, in contrast, the new democratic Constitution represented a decisive departure from its imperial predecessor and a genuine constitutional revolution both in form and substance. As such, the postwar constitution-making is better understood as the legal edification of a political revolution that was posited as a matter of logic where none existed in fact. In other words, the total defeat in August 1945 became a proactive revolution, even if only on paper, because Japan's acceptance of the Potsdam Declaration had the effect of shifting the ultimate locus of sovereignty from the emperor to the people. According to this so-called "August Revolution" theory, then, the postwar constitution-making was an archetypical case of a *classic* constitutional revolution. In the beginning was the constitutional revolution, in short, although it remains unclear if it was nominal or classic in postwar Japan.

Even after this constitutional big bang, Japan cannot be said to have remained immune to revolutionary constitutional changes. And, of course, even more pertinent evidence for this kind of seemingly counterfactual claim can be found in what happened to Article 9 over the past seven decades, or in the changes that may be understood in terms of *quiet* constitutional revolutions.

Article 9 mandates in two terse clauses that Japan shall renounce war, prohibit armament, and surrender the right of

---

[30] CHARLES MAIER, THE UNMASTERABLE PAST (1997).

[31] Kanamori Tokujiro, Yoshida's Minister of State in charge of explaining the government draft to the Diet, was particularly instrumental in presenting this impossible argument. To the criticism that the new Constitution would alter the *kokutai*, he responded that, although sovereignty now belongs to the entire people of Japan, also included among "the people" is the emperor. *See* MOORE & ROBINSON, *supra* note 15, at RM325.PM.SP4.

belligerency. Extraordinary though it was for a workable constitution, the meaning of these mandates was curiously undebated during the deliberation process for a number of reasons. Of course, it was welcomed and genuinely embraced by the war-weary public. For those bureaucratic pragmatists in the government, it was merely a facsimile representation of defeated Japan in which there was no military to be legally recognized after its total dismantlement.[32] At the helm of the government and parliamentary leadership was shared a tacit knowledge that Article 9 was a Faustian bargain by which the military was given up to save the emperor.[33] All those different reasons for embracing or acquiescing to this extraordinary constitutional pacifism converged broadly on the interpretation represented by Prime Minister Yoshida Shigeru and other cabinet ministers during the deliberation process in 1946. The government's official position was that no war, even for self-defense purposes, could be authorized since the absolute ban on armament prevented Japan from exercising any right of self-defense, even if such were permissible under Article 9.[34] Ironically, only the Communist Party questioned this restrictive interpretation by the Cabinet Legislation Bureau (CLB), which denied Japan the universal right of sovereign nations as per the newly minted UN Charter.

Another irony was that this official interpretation, consistent with the GHQ's original intent,[35] served Yoshida's diplomacy well in resisting Washington's pressure to rearm during and after the Korean War. Constitutionally, the consequence of this diplomatic maneuver against the second imposition (rearmament) on account

---

[32] *Id.* at RM058.1.

[33] In a sense, the sacrifice was a matter of course. The war had been fought against the militarism of imperial Japan, and its utter defeat was bound to demand that the "Emperor's Military" (*kōgun* 皇軍) be broken up somehow. Faced with the prospect that the emperor (皇) and his military (軍) would no longer be allowed to share the same fate, both the Supreme Command for the Allied Powers (SCAP) and the Japanese government chose to sacrifice the military and save the emperor. *See* Hideo Otake, *Two Contrasting Constitutions in the Postwar World: The Making of the Japanese and the West German Constitutions, in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 50 (Yoichi Higuchi eds., 2001).

[34] MOORE & ROBINSON, *supra* note 15, at RM319.PM.SP3.P3.

[35] *See* the second item of the famous MacArthur Notes of February 1946, laying out the three basic principles for the GHQ draft, which reads: "War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security." https://www.ndl.go.jp/constitution/e/shiryo/03/072shoshi.html.

of the first (disarmament) was the deeper entrenchment of Article 9 in its most self-constraining guise.[36] By the time the Self-Defense Forces (SDF) was created in 1954, this interpretation of Article 9 became an established convention shared by both the government and the public at large. This development also meant that the official interpretation, if not Article 9 itself, had to be changed in a way that reversed its previous position to square the second imposition with the first.

Obviously, the SDF fell out of Article 9's original purview, and the Constitution's parameters had to be stretched to accommodate this *de facto* military establishment that was "legal but unconstitutional."[37] Having rejected Washington's suggestion for a wholesale revision, the Japanese government thus managed to negotiate the pivotal constitutional change via various cabinet reports to the Diet in 1954 as the SDF Law was enacted. In its essentials, this reinterpretation was predicated on the explicit affirmation of Japan's sovereign right of self-defense under international law, which justified the maintenance of minimum armed forces necessary for national security. The reasoning was the exact reversal of the original position, that is, "if no military, then no meaningful right of self-defense," from which followed that a military ought to be recognized in one form or another in order for the right of self-defense to have any meaning.

At the same time, the SDF was constrained in a way that other military establishments were not. Permissible armament was limited to the minimum necessary level; more to the point, the scope of authorization was restricted as *not* all the rights of self-defense (à la the UN Charter) were permitted—it affirmed only the right of individual, and not collective, self-defense. Enabling and disabling in one stroke, the new Article 9 of 1954 had it both ways as it recognized a *de facto* military establishment while constraining its organization and operation in a constitutionally binding way. This remarkable constitutional change by the CLB reinterpretation was subsequently endorsed by

---

[36] HAHM & KIM, *supra* note 3, at 92.

[37] This paradoxical proposition holds that, on the one hand, Article 9 cannot be construed to sanction the SFD in view of the original legislative intent as manifested during the Diet deliberation process in 1946. The procedural legality by which the SFD was created in 1954, on the other hand, cannot be questioned and invalidated in the absence of clear judicial intervention. KOBAYASHI NAOKI, KENPŌ DAIKYŪJŌ [CONSTITUTION ARTICLE 9] 149-54 (1982).

the voting public in the 1955 general election[38] and upheld by the Supreme Court in the *Sunagawa* case of 1959,[39] persisting with remarkable integrity and consistency until the end of the Cold War. It may be seen as a great feat of *quiet* constitutional revolution indeed that combined no formal revision with enduring consequences for the way Article 9 was experienced in postwar Japan.

In accounting for this development, one might alternatively argue that the 1954 reinterpretation represented less an instance of constitutional change, let alone revolution, than a part of an extended constitution-making process.[40] For the meaning of Article 9 remained fluid until it met the test of Cold War reality, which came with the establishment of the SDF only seven years after the Constitution was established and required a revision of the CLB's original 1946 interpretation. In that sense, it was not unlike the "socialistic" Economy Chapter of the Founding Constitution of Korea, which was readjusted in the direction of a free market economy in 1954 in order to reflect the post-Korean War reality. For both cases, a good comparative example may be the first ten amendments of the US Constitution. Amendment in name only, they were, in fact, part of the pre-ratification bargain in which the Bill of Rights was promised to placate apprehension over the powerful federal government (especially by Virginia). As such, those amendments of 1792 merely elucidated and foregrounded the rights-principles that were already inherent in the Constitution.

This analogy to the US Bill of Rights, however, sheds little light on the case of Japan's Article 9. The 1954 reinterpretation made material changes in a way the US Bill of Rights did not—after all, a *de facto* military came to have a *de jure* status. The original interpretation was overturned to produce a positive effect, which greatly altered the legal status quo ante. This fiat was done deliberately by the same authority via the same process that was used to render the original interpretation. The new Article 9 was the pivotal issue in the general election, which voted in the

---

[38] *See generally* JUNNOSUKE MASUMI, POSTWAR POLITICS IN JAPAN, 1945-1955 (E. Carlile trans., University of California Press 1985) (1985).

[39] Saikō Saibansho [Sup. Ct.] Dec. 4, 2007, 13 Keishū 13, 3225, 3232 (Sup. Ct. Grand Bench) (Japan). An English summary of the judgment is available at http://www.courts.go.jp/app/hanrei_en/detail?id=13 (last visited Feb. 1, 2020).

[40] Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INTERNATIONAL LAW JOURNAL 427, 468-69 (2017).

so-called "1955 System" as a measure of cautious endorsement of the new constitutional arrangement. All-in-all, what happened to Article 9 in 1954 greatly transformed the way constitutional pacifism was practiced, experienced, and understood, although such a change was done without recourse to the formal amendment. From these perspectives, it was a constitutional revolution and a quiet one at that.

B. "Dismemberment by Stealth" of 2014

By comparison, it is not at all clear if the same label of quiet constitutional revolution can do justice to what the Japanese government under Abe's premiership has done to change Article 9, lately. First, Article 9 is no longer the primary goal of the constitutional revision pursued by Abe, the LDP, and other conservative elements in Japanese society. In this regard, Abe's proposal of 2017 suggested merely adding a third clause to Article 9 to recognize the SDF explicitly, thereby purporting to end controversies about its constitutionality once and for all. In other words, the first and second clause, always loathed by the right-wing advocates of a return to the "normal state," were left intact in Abe's proposal.

This seeming oversight does not indicate a change of mind but a reflection of the new status quo regarding constitutional pacifism. Article 9 had in fact already been reinterpreted in 2014 so as to endorse the right of collective self-defense in a pointed departure from the 1954 interpretation. Now fully equipped with both the rights of individual and collective self-defense, Japan has already become a *de facto* "normal state" that may wage a war as per the United Nations Charter as well as a more equal partner in the military alliance with the United States (now that the military assistance can be mutual). To Abe and his right-wing supporters, gutting Article 9 as such must seem neither necessary nor politically prudent. For the conservative constitutional agenda has a long list of other provisions that need to be revised in the direction of 'Japanization'—that is, shifting the emphasis from individual freedom and universal human rights to duty and obligations, family and tradition, and country and the emperor.[41]

[41] Thus, the LDP Q&A for the draft of its 2012 revision explains its overall policy as follows:

Compared to these cumbersome issues, amending Article 9 seems to be a *fait accompli.*[42]

For sure, it may be argued that this *fait accompli* is an outcome of yet another constitutional revolution, a quiet one indeed that triggered a great constitutional transformation without changing the 'black-letter' law of the Constitution. This argument, however, is not easy to maintain because how Article 9 was changed in 2014 is significant, in fact disconcertingly, different from the quiet constitutional revolution of 1954. Most remarkably, the 2014 reinterpretation was unveiled as a cabinet decision in an unprecedented process that raised questions about the proper authority over constitutional interpretation. The Japanese Constitution vests the Supreme Court with such authority; but, given the Court's notoriously passive approach towards its own power of judicial review, it fell to the CLB to make the authoritative interpretation as it did in 1946 and 1954 regarding Article 9 (Article 76 and 81).[43] And, the CLB adhered to its own

---

> Rights are gradually generated from the history, tradition, and culture of the community. Accordingly, human rights provisions need to be based on the history, culture, and tradition of our country. There are some provisions in the current Constitution that could be viewed as being derived from the European idea that human rights are granted by God. We believe that these provisions need to be revised.

Quoted in Shigenori Matsui, *Fundamental Human Rights and 'Traditional Japanese Values': Constitutional Amendment and Vision of the Japanese Society*, 13 ASIAN JOURNAL OF COMPARATIVE LAW 74 (2018). Never mind that the underwriting conservatism is also a European idea derived from Edmund Burke! Those provisions to be revised under this general philosophy are too numerous to list here. Even a random glance at the 2012 LDP draft shows that the current emphasis on the universal fundamental character of constitutional rights was toned down in Article 11 and 97, even as those rights could be reserved by ordinary law on account of "public interest or public order," as in the prewar Imperial Constitution, as provided in Article 13 and 21 (freedom of expression). The state and public support for Shintoism could be permitted on account of "social ceremonies or customary practices" in Article 20, while the new Article 24 added family values to the rights regime in a way potentially prejudicial to women's status in Japanese society. For more, see Keigo Komamura, *Constitution and Narrative in the Age of Crisis in Japanese Politics*, 26 WASHINGTON INTERNATIONAL LAW JOURNAL 75, 84-92 (2017).

[42] Carl F. Goodman, *Contemplated Amendments to Japan's 1947 Constitution: A Return to Iye, Kokutai, and the Meiji State*, 26 WASHINGTON INTERNATIONAL LAW JOURNAL 19 (2017).

[43] For the CLB's role in the interpretation of Article 9, see Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 WASHINGTON INTERNATIONAL LAW JOURNAL 99, 108-11 (2017). On the judicial passivism of

1954 reinterpretation with remarkable steadfastness over the years. For instance, when politically pressured in 1983 to change its interpretation regarding the collective self-defense right under Article 9, the CLB Director General rebutted that, when the government tries to pursue a policy that cannot be implemented unless the constitutional interpretation is reversed, the government must amend the Constitution.[44] This counsel was heeded until 2014.

In 2014, having given up on a formal amendment (via first amending Article 96) and in a move that effectively sidelined the CLB (by making an unprecedented appointment for its directorship), the Abe cabinet promulgated its reinterpretation based on reports produced by the Panel for the Reconstruction of the Legal Foundation for National Security, created ad hoc to change Article 9. Chaired by a political scientist from the University of Tokyo, Kitaoka Shin'ichi, this private advisory board for the prime minister was curiously devoid of legal expertise as well as a clear constitutional ground. As a consequence, the "cabinet approval" of the constitutional reinterpretation paid scant attention to the Constitution itself. Other than Article 9, perfunctory references were made only to Article 13 ("the right to life, liberty, and the pursuit of happiness") and the Preamble ("the right to live in peace") that has no legal effect in the Japanese court of law. The decision was instead concerned mostly with security issues and foreign policy matters on which the legitimacy of the right of collective self-defense was based. In short, in addition to its questionable ground of authority, this so-called constitutional interpretation was written mostly in extralegal terms so contingent and ambiguous that its conclusion became nearly nonjudicial in the strict legal sense. Thus, an expert commentator on the 2014 change of Article 9 concludes that an "interpretation that either renders the provision irrelevant or hopelessly ambiguous and vague…simply cannot be accepted as a normal interpretive development."[45]

Granted, a constitution is not a suicide pact. Some policy issues may control constitutional interpretation on account of their extraordinary urgency, and national security certainly counts

---

the Supreme Court in general, see Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASHINGTON UNIVERSITY LAW REVIEW 1375 (2011).

[44] Yamamoto, *supra* note 43, at 112.

[45] Martin, *supra* note 40, at 501-02.

among those. The merit of the Abe cabinet's decision to affirm the right of collective self-defense can be debated through legislative and judicial channels or in the tribunal of public opinion. Regardless of its merits, however, what makes this decision truly unprecedented is the irregularity with which it was reached and justified, rendering Article 9 hardly enforceable in the end. The crux of the problem is, in short, that the cabinet decision has undermined the viability of Article 9 as a living constitutional norm, thereby potentially threatening the pacifist identity of the postwar Constitution in effect.

Arguably, this constitutional irregularity orchestrated by the Abe cabinet may have to do with the more structural problems of Japanese democracy. In order for something like a quiet constitutional revolution to take place, genuinely contestatory party politics, judicially vigilant courts, and alert participatory citizenship are necessary lest those informal revisions be abused. For all its virtues, postwar democracy in Japan is not renowned for these cultural and institutional conditions that enable wholesome constitutional politics. [46] This may, however, be an oversimplification or overgeneralization, for compelling counter-evidence can be found in the 1954 constitutional revolution. Indeed, it was no small achievement for the then-budding constitutional democracy of postwar Japan in which institutions such as the CLB proved their sturdiness and the electoral party dynamics did compel a national referendum of the sort that culminated in the "1955 System." Albeit with passivity, perhaps even meekness, the Supreme Court also went along to render an *a posteori* endorsement of this constitutional rearrangement. Overall, the outlook was that of a quiet constitutional revolution successfully executed with lasting consequences. Abe's 2014 reinterpretation of Article 9 has none of these features, a deficiency that cannot be blamed solely on the cultural and institutional peculiarities of Japanese constitutional democracy.

This evaluation of what the Abe cabinet has done to potentially disarm constitutional pacifism brings back the original question about whether the 2014 reinterpretation of Article 9 may be explained in terms of a quiet constitutional revolution. To remind, a quiet constitutional revolution can be said to have taken

[46] Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments?: A Reflection on the Japanese Article 9 Debate*, 74 UNIVERSITY OF NEW SOUTH WALES LAW RESEARCH SERIES No. 17-74 (2017).

place when the transformation in the way constitutionalism is experienced is abrupt and decisive, even absent an official amendment or an irregular disruption in the process of constitutional change. This means that, even if it happens outside the formal revision process, a quiet constitutional revolution still unfolds along other constitutionally prescribed or permissible courses that involve ordinary legislation, judicial interpretations, electoral politics, and/or a national referendum. The 2014 reinterpretation of Article 9 features few of these characteristics that make up a quiet constitutional revolution.

In fact, the 2014 reinterpretation resembles less a constitutional revolution of any sort than what is called "constitutional dismemberment" and/or "constitutional amendment by stealth." The former concept applies to a situation in which formal or informal constitutional change results in a radical, unauthorized, reorientation in the fundamental core of a constitutional identity.[47] The latter describes a constitutional change done with the specific intent of circumventing formal revision and entrenching the change as a constitutional convention that is subsequently binding, a method that is characterized by the lack of transparency, accountability, and predictability, which are required under the rule of law.[48] As such, the Abe cabinet's decision looks like an affront to the postwar pacifist identity to such an extent that it resembles a dismemberment rather than a reinterpretation of the "Peace Constitution." Moreover, the reinterpretation was done in a way that falls perilously outside the open rule of law processes of democratic decision-making.

It is perhaps still premature to evaluate the durability of Abe's tampering with Article 9. Although unlikely, the Supreme Court might still abandon its long-held "political questions doctrine" and adopt a more activist posture at last. Another unfathomable possibility is a political turn of fate in which a new cabinet might decide to revert to the Article 9 of 1954 against the precedent set by Abe in 2014. For now, however, it seems more likely that the constitutional feat of 2014 will go down in history as a "dismemberment by stealth," which has shaken up the core constitutional identity of postwar Japan by a method that is constitutionally questionable, if not outright unconstitutional.

---

[47] Richard Albert, *Constitutional Amendment by Stealth*, 60 MCGILL LAW JOURNAL 673 (2015).
[48] *Id.*

V. CONCLUDING REMARKS

Constitutional change is hard to define and harder to evaluate. A significant constitutional change can take place without a formal amendment, whereas an official revision of the constitutional law may not amount to such a change. Postwar Japan and South Korea are cases in point.

The advent of the Cold War in East Asia quickly followed by the hot war on the Korean Peninsula stretched the limit of Korea's and Japan's respective constitutional frameworks, which had been designed only a few years earlier. The new Cold War reality made Japan's peace provision vulnerable to the domestic allegation of unhinged idealism as well as to the subsequent pressure for rearmament from Washington. The same external pressure compelled changes in the nationalistic and/or socialistic economic provisions as Korea struggled to rehabilitate its war-torn economy with the aid of foreign investment. It was not until the year 1954 when Japan established the Self-Defense Forces followed by a radically new interpretation of Article 9 that the dust settled, albeit neither permanently nor incontrovertibly, in and around the meaning of unarmed peace in postwar Japan. Likewise, the same year, 1954, saw changes to the economic provisions of Korea's Founding Constitution in a way that could moderate the government's ownership of major industry and control over a free market. All in all, it seems fair to say that both Japan's and Korea's constitutional identities were readjusted to the political and economic reality immediately following their original making before their original meanings could be discerned with a modicum of stability. The constituent moments in Korea and Japan are therefore better expanded to include these later developments culminating in the constitutional revolutions of 1954.

For all those similarities, the differences are also striking. The first is the blatant fact that Japan's creation of a *de facto* military, a feat of constitutional revolution by any measure, did nothing to affect the 'black letter' law of the Constitution. In comparison, retuning the economic provisions in Korea took the posture of a constitutional amendment, while leaving the constitutional essentials comprising the Economic Constitution intact except for provisions that have more narrow policy rather than constitutional ramifications. In other words, Korea seems to have experienced a "nominal constitutional revolution" in contrast to the Japanese case in which a "quiet" but genuine constitutional revolution took

place.

This contrasting pattern of constitutional change is also borne out by the subsequent constitutional development in the two countries. In the ensuing decades, Korea went through six formal revisions triggered in turn by a student revolt, military coups, and a democratization movement. In tandem with those amendments, the Economic Constitution also changed incrementally towards a more free-market form of capitalism. Still, the basic identity of Korea's Economic Constitution survived them all and remains essentially unchanged in the present Article 119, the so-called 'economic democratization' provision. It is no surprise then that the left-leaning government of Moon Jae-in presently wants to reinforce this constitutional identity via a comprehensive constitutional revision as well as judicial reinterpretations by the supreme and constitutional courts.

The contrast to Japan could not be starker. In the quiet constitutional revolution of 1954, the authoritative Cabinet Legislation Bureau held in essence that maintaining a "minimum necessary force" and military alliance for "self-defensive" purposes were permissible, but exercising the right of "collective self-defense" as an armed ally or UN member was not. This long-held position was changed in 2014, however, when the current Abe government announced a decision to stretch the penumbra of Article 9's meaning via reinterpretation. Japan may now exercise the right to engage in collective self-defensive actions abroad if faced by an "existential crisis" even when its territory is not under direct attack. Arguably, one might characterize this decisive move as yet another instance of "quiet constitutional revolution" comparable to what transpired in 1954, and, to that extent, as conforming to the pattern of constitutional change established in postwar Japan. Were it merely a precursor to the wholesale constitutional revision as sworn by the resolute Abe cabinet, the relatively minor constitutional revolution of 2014 would likely go down in history as a prequel to a greater revolution in the Japanese constitutional history not only in substance but also in the method of constitutional change. For it would mean that the postwar Constitution of Japan would be "dismembered" through a legal process of amendment, the outcome of which may be unconstitutional. The impact of such a constitutional dismemberment will be hard to fathom, especially when it comes to the pacifist constitutional identity of postwar Japan.

Keywords
Constitutional Revision and Amendment, Constitutional Revolution (Quiet, Nominal, and Classic), Constitutional Dismemberment, Constitutional Identity, Japan's Constitutional Pacifism (Article 9), Korea's Economic Constitution

Received: 2019; *review completed and accepted*: 2020

SOCIAL EQUALITY AND THE KOREAN CONSTITUTION: CURRENT STATE AND LEGAL ISSUES

Jongcheol Kim[*]

ABSTRACT

This paper aims to look into why the discrepancy between constitutional reality and norms in terms of social equality has deepened in South Korea.

Above all, the paper will explore how the ideal of social equality is envisaged to be fulfilled in the value orientation and normative system of the Korean constitution. In particular, it will be explained that the ideal of social equality is enshrined in a variety of constitutional provisions ranging from those declaring the basic value orientation of constitution-making, such as the Preamble, Article 1 (form of state as a democratic republic) and Article 10 (the protection of inalienable fundamental human rights of individuals), and those guaranteeing social rights, from Articles 31 and 36 to those related to the economic order including Article 23 (the right to property). Even the international human rights agreements in pursuit of social justice can be regarded as legal bases of social equality in Korea through Article 6(1) of the Korean Constitution regarding the domestic incorporation of international law.

The article then moves on to examine some legal issues through which the ideal of social equality pursued by the Korean Constitution is fulfilled. Firstly, it will point out the ramifications of the legalization of social equality that is realized in the Korean Constitution by way of guaranteeing individual rights rather than declaring relevant principles. This Section stresses the possibility that social rights become concrete rights through the application of practical principles, such as the principle of actual liberty and the principle of maximum realization on the condition of available resources. It is also stressed that there is a strong need to elaborate and articulate the minimum standard based on realistic and positive research to support a concretized level of social

[*] Professor of Law, School of Law, Yonsei University. Email: jkim386@yonsei.ac.kr.
This paper is an English version of the author's Korean article published in 4(1) HEON-BEOB-JAE-PAN-YEON-GU [JOURNAL OF CONSTITUTIONAL JUSTICE] 211 (2017).

protection. Secondly, it is argued that the provisions of economic democratization and the constitutional duty to use the right to property in ways compatible with the general welfare will require that the state institutionalize social equality by enhancing the participation by a variety of subjects in the economic field. In particular, it will make clear that the principle of subsidiarity, declared a constitutional doctrine by the Constitutional Court of Korea, cannot be applied to those cases in which basic social needs are to be met by the state, for example, child support, education, transportation, social infrastructure, and social security benefits. Thirdly, the incorporation of international human rights into the domestic legal order will be strongly supported so that legislative and administrative discretion in deciding the scope and extent of social rights may be subject to the international guidelines.

In conclusion, the article argues that the discrepancy between constitutional norms and reality has maximized because legislative, administrative, and judicial powers, including constitutional adjudication, have failed to effectively adapt the constitutional order to fully achieve social equality.

I. INTRODUCTION

The unbridled forces of globalization and neoliberalism have aggravated the income gap and social inequality around the world. Since the mid-1990s, especially after the 1998 Asian financial crisis and subsequent IMF bailout program, South Korea has experienced sluggish growth in earned income with the average income of the bottom 40% declining and that of the top 10% on the rise, contributing to an ever-growing economic disparity—a stark contrast to the period of the country's rapid growth when the average income grew across all income groups.[1] The worsening long-term trend since 2000 is evidenced by the income quintile share ratio and relative poverty ratio, two measures of the inequality of income distribution. The country's income quintile share ratio, calculated as the ratio of total income received by the

[1] The income disparity in average income between the top 0.1% and the bottom 20% grew in 2010 compared to 1996. *See* Naknyeon 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] 125, 151 (2012).

20% of the population with the highest income to that received by the 20% of the population with the lowest income, stood at 4.2 in 2015 with the disposable incomes for urban families of two or more persons taken into account. The relative poverty ratio, defined as the percentage of families whose incomes are less than 50% of the median income, was 10.4% in 2015.[2]

Korea's earned income gap among paid workers is the second highest after the United States among key OECD members.[3] The male-female income disparity is also the highest among major OECD member countries. The income gap between regular- and non-regular workers remains significantly high as well. Over the past ten years, temporary workers have earned 70% as much as regular workers while dispatched/temporary agency workers have made 57% and part-time workers have earned 28% as much. This divide also appears based on corporate size as the income gap has widened between employees at big companies and smaller ones.[4]

The overall income gap in Korea and the resulting wide economic disparity and social inequality seem to have contributed to ever-worsening societal problems. The suicide rate has soared since the 2000s, with 26.5 out of 100,000 people taking their own lives in 2015, which is twice as high as that in 2000. The rate is the highest among OECD members.[5] The fertility rate, an indicator affected by economic factors or social competition, is among the lowest in the world with the total fertility rate standing at 1.21 in 2014 and remaining below 1.3 over the past decade, which is considered the lowest-low fertility, while the poverty rate among seniors is one of the highest among key OECD countries.[6]

The growing inequality in Korea is highly regrettable as the country aims to become a democratic welfare state with social justice being the nation's goal and basic social rights explicitly guaranteed by the Constitution. This paper will explore how legal

---

[2] *Household Trend Survey-Income Distribution Index 2015, in* STATISTICS KOREA, http://kosis.kr/wnsearch/totalSearch.jsp (last visited May 8, 2017).

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

[4] *Wage Gap Index, in* STATISTICS KOREA, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=2898 (last visited May 8, 2017).

[5] *Suicide Rate Index for Key OECD Countries, in* 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).

[6] 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).

issues lead to the discrepancy between constitutional norms and reality. Firstly, the paper will look at the value orientation and normative system of the Korean state and society, which are embodied in the Constitution as guiding principles for addressing social inequality so that all members of society can enjoy the inviolable basic rights to pursue human worth, dignity, and happiness. Assuming that the discrepancy comes from the failure of state authorities, including the legislature to fulfill their constitutional mandate, efficiently, the paper will then move to its primary objective of providing a venue for discussing key legal issues that help support this assumption from the perspective of legal policy and interpretation. As the paper was presented at an international conference, some of the facts well known in Korea will be discussed in detail for introduction as well as comparison with other countries.

II. THE CONCEPT OF SOCIAL EQUALITY IN THE KOREAN CONSTITUTION AND ITS LEGAL BASIS

A. The Concept of Social Equality

One of the fundamental elements of modern constitutionalism is the state′s mandate to uphold not only individual freedom but equality. However, such equality was mostly construed and delivered as formal equality focused on providing equal opportunity and banning arbitrary discrimination in order to ensure individuals would not face injustice in the course of enjoying the liberties and rights guaranteed by the constitution. As the notion of formal equality among free individuals does not take into account discrepancies arising from the interaction between varied individual competences and external influences, such disparities become entrenched in the social structure, undermining effective response to *de facto* inequality in real-world situations.[7] If a commonwealth were to deliver happiness for all, it should ensure equality of conditions, with at least a minimum set of legal

[7] For an opinion that explains this phenomenon in the context of an asymmetry between the conceptual vagueness and structural possibility of liberty and the conceptual clarity and actual (im)possibility of equality, see Kwangseok Cheon, *Sa-Hoe-jeog Gi-Bon-Gwon-ui Non-Ui-Gu-Jo* [*Rethinking The Horizon of The Social Basic Rights*], 14 YU-LEOB-HEON-BEOB-YEON-GU [EUROPEAN CONSTITUTION] 153, 160-161 (2013).

and institutional arrangements, in order to prevent structural issues from nullifying formal equality of opportunity to pursue liberty and also realize substantive equality, a concept referring to limited equality of outcome or results at certain levels.[8] As described above, social equality provides the basis to overcome the limitations of formal equality centered around 'individual justice' to serve 'social justice' focused on addressing *de facto* inequalities in the economic and societal realms.[9]

B. Constitutional Basis

1. Preamble

The preamble of the Korean Constitution proclaims that it aims 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. The objective of destroying all social vices and injustice is social equality, which apparently seeks the delivery of social justice. While the goal of affording equal opportunities to every person in all fields is to ensure formal equality of being free from discrimination in a strict sense, it can also be safely construed as meaning substantive equality in opportunities in a broad sense. It is obvious as well that elevating the quality of life for all citizens is both the prerequisite to, and the outcome of, successful delivery of social justice that goes beyond individual justice.

2. Article 1

Article 1, Section 1, of the Constitution declares that the Republic of Korea is a democratic republic. The normative meaning of a democratic republic, a form of state system, may be interpreted variously. However, given that the coherent and systematic interpretation of the entire Constitution is closely linked to the clause proclaiming that the country is a democratic republic, which is the normative basis of the community, the

---

[8] Cheon, *supra note* 7, at 176-180; Jina Cha, *Sa-Hoe-jeog Pyeong-Deung-ui Ui-Mi-wa Sil-Hyeon-Gu-Jo* [*The Significance and Delivery Mechanism of Social Equality*], 21 AN-AM-BEOB-HAG [ANAM LAW REVIEW] 227, 227-233 (2005).

[9] Cheon, *supra* note 7, at 177; Cha, *supra* note 8, at 235-238.

paragraph can be understood not only as a formal declaration where the sovereignty of the political community resides[10] but also as a guiding principle in realizing the community's objective of social justice.[11] If a republic is construed as a political community seeking the republican coexistence of its members, it can also be said that Korea is based upon republican coexistence where its citizens enjoy the right to pursue human worth and dignity while being unhindered by any form of discrimination and protected by a free, democratic political and societal order.[12] A democratic republic must ensure its members have the right to demand that the government rectify poor living conditions as they constitute social discrimination.[13]

3. Article 10

Article 10 of the Constitution declares, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." Constitutional law scholars and legal practitioners differ in their opinions on the nature of human worth and dignity and the right to pursue happiness. However, they agree that the concept of human worth and dignity justifies the realization of liberty and equality as fundamental values underpinning constitutionalism, whether the concept is seen as linked to all forms of liberties and rights embodied in the Constitution or regarded as a 'principal' basic right, a prototype of all other liberties and rights. As the realization of social equality is an obvious prerequisite to human worth and dignity, the value of

---

[10] KWANGSEOK CHEON, HAN-GUG-HEON-BEOB-LON [INTRODUCTION TO THE KOREAN CONSTITUTION] 77 (11th ed. 2016).

[11] Seontaek Kim, *Gong-Hwa-Gug-Won-Li-wa Han-Gug-Heon-Beob-ui Hae-Seog* [*Constitutional Principle of Republic and Interpretation of Korean Constitution*], 15(3) HEON-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 213, 233, 240-242 (2009).

[12] Jongcheol Kim, *Gong-Hwa-jeog Gong-Jon-ui Jeon-Je-lo-seo-ui Pyeong-Deung* [*Equality as the Basis of a Republican Coexistence*], 19(3) HEON-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 1, 29-30 (2013).

[13] Viroli, a republican philosopher, emphasized that falling ill or aging is not a crime and that a republic is not a for-profit company but a coexistent lifestyle that strives to protect the dignity of citizens and, thus, has a duty to provide relief based on the inherent rights of citizens and not out of sympathy for them. MAURIZIO VIROLI, REPUBLICANISM 142-143 (Kyunghee Kim & Donq Kim trans., Ingansarang Publishing 2006) (1999).

social equality is also justified by the human dignity and worth clause in the Korean Constitution.[14] For example, "a life worthy of human beings" described in Article 34, Section 1, can be considered a constitutional right that embodies the values of human worth and dignity.[15]

4. Articles 31 through 36

Articles 31 through 36 stipulating basic social rights are the provisions guaranteeing the rectification of unjust outcomes, as demanded by substantive equality or the most direct underpinnings of the pursuit of social equality. Article 31, Section 1, provides that all citizens shall have an equal right to receive an education corresponding to their abilities. The next clauses describe how to guarantee, substantively, this right. They set forth the rights and obligations regarding free, compulsory education; the independence, professionalism, and political impartiality of education and the autonomy of institutions of higher learning; the state's mandate to promote lifelong learning; and the principle that fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by statutes. Article 32, Section 1, guarantees the right to work for all citizens. In particular, the state should endeavor to promote the employment of workers, guarantee optimum wages through social and economic means, and enforce a minimum wage system. The subsequent clause declares how all citizens shall have the duty to work, and the state shall prescribe by statute the extent and conditions of the duty to work in conformity with democratic principles; how standards of working conditions shall be determined by statute in such a way as to guarantee human dignity; and the special protection afforded to working women and children. It is worth noting that the provision also includes a clause stipulating preferential employment opportunities accorded under the conditions prescribed by statute to those who have given distinguished service to the state, wounded veterans and police officers, and the bereaved families of military service members

---

[14] SOOWOONG HAN, HEON-BEOB-HAG [CONSTITUTIONAL LAW] 293 (2nd ed. 2012).

[15] Dukyeon Lee, *'In-Gan-da-un Saeng-Hwal-eul Hal Gwon-Li'ui Bon-Jil-gwa Beob-Jeog Seong-Gyeog* [*The Nature and Legal Status of 'the Right to a Life Worthy of Human Being'*], 27 GONG-BEOB-YEON-GU [PUBLIC LAW REVIEW] 235, 244 (1999).

and police killed in action.

Article 33 stipulates workers' rights to independent association, collective bargaining, and collective action to enhance working conditions; to the three labor rights of public officials that may be limited by statute; and to the right to collective action by workers employed by important defense industries, which a statute may restrict or deny.

Article 34 provides that all citizens shall be entitled to a life worthy of human beings as a general social right. In particular, the Article stipulates that the state shall have the duty to endeavor to promote social security and welfare; the obligation to promote the welfare and rights of women, senior citizens, and youth; and the mandate to protect citizens who are incapable of earning a livelihood due to a physical disability, disease, old age, or other reasons. The last and sixth sections of the Article that describes the state's duty to prevent disasters and to protect citizens from harm therefrom is a confirmation that safety is essential in guaranteeing a life worthy of human beings.

Article 35, Section 1, stipulates that all citizens shall have the right to a healthy and pleasant environment and that both the state and all citizens shall endeavor to protect the environment. Sections 2 and 3 provide that the substance and exercise of these environmental rights are determined by statute and that the state shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like. Article 36, Section 1, stipulates that marriage and family life shall be entered into and sustained on the basis of individual dignity and gender equality, while Sections 2 and 3 of the same Article provide that the state shall endeavor to protect motherhood and the health of all citizens.

5. Economic Constitution (Chapter 9) and Exercising Property Rights in Conformity with the Public Welfare (Article 23)

A salient feature of the Korean Constitution is a chapter describing the state's role in coordinating and regulating economic affairs. In particular, Article 119, Section 2, clearly sets forth the state's constitutional role of regulating and coordinating 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. In addition, Sections 1 and 2 of Article 23, while guaranteeing the right to property, an outcome of economic liberties, provide that the contents and limitations of such right shall be determined by statute and require that property owners exercise their right in conformity with public welfare.

Moreover, Section 3 allows denial of the right to property as long as it meets the formal requirement of having a legal basis and the substantive requirement of due compensation, while Article 126 stipulates that private enterprises shall be nationalized or transferred to local government ownership, or their management shall be controlled or administered by the state in cases as prescribed by statute to "meet urgent necessities of national defense or the national economy." These provide a constitutional justification for significant adjustment by the state of economic liberties and property rights.

The broad constitutional power conferred on the state to coordinate and regulate economic affairs can be seen as a commitment to guarantee, substantively, basic social rights and to set proactive roles for the state to play in order to ensure social equality. This constitutional arrangement concerning the economic and social order demonstrates a transition from an ideal of the individualist-based civil state, which places importance on individual freedom against the intervention of the state, to a proactive value orientation toward an ideal of a social republic, which pursues freedom as 'non-domination' through the state.

6. Sub-conclusion

As shown in its provisions and basic framework, the Korean Constitution clearly aims to pursue a modern welfare state rooted in constitutionalism that transcends the modern civil state's attitude toward formal equality and promotes substantive social equality. [16] A modern welfare state as defined by the Constitutional Court is a social state, which enshrines social justice in its constitution; involves itself in social phenomena for intervention, distribution, and coordination in order to create a just

[16] Jongcheol Kim, *Ib-Heon-Ju-Ui-ui Bon-Jil-gwa Hyeon-Dae-jeog Ui-Ui* [*The Nature and Modern Significance of Constitutionalism*], GOSIGYE [GOSI LAW] 6, 6-19 (Sept., 2000). For rulings with the same opinion, see Constitutional Court [Const. Ct.], 96Hun-Ka4, May 28, 1998, (10-1 KCCR 522) (S. Kor.); Constitutional Court [Const. Ct.], 2002Hun-Ma52, Dec. 18, 2002, (14-2 KCCR 904) (S. Kor.); Constitutional Court [Const. Ct.], 2002Hun-Ma328, Oct. 28, 2004, (16-2 KCCR 195) (S. Kor.).

social order in all domains of the economy, society, and culture, instead of remaining a passive actor; and has the duty to provide substantive conditions that allow its citizens to enjoy substantive freedom.[17]

C. Legal Basis of Social Equality through Incorporation of International Human Rights Mechanisms

According to Article 6, Section 1, of the Korean Constitution, treaties signed and proclaimed under the Constitution and generally-accepted international laws have the same effect as domestic law. This clause confirms the principle of respecting international laws as a concrete tool to realize the constitutional principle of world peace. The basis of legal arrangements for promoting social equality can also be found in treaties and international customary law. For example, Korea became a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on July 10, 1990.[18] The ICESCR lists a variety of rights essential to realizing social equality. Articles 6 and 7 of the Covenant on labor rights correspond to Article 32 of the Korean Constitution; Article 8 of the Covenant on the formation of labor unions and the right to strike to Article 33's three labor rights; Article 9 of the Covenant on the right to social welfare to Article 34; Article 11 of the Covenant on the freedom of marriage and the respect for families to Article 36(1); Article 12 of the Covenant on physical and mental health and the right to medical service to Article 36(3); and Articles 12 and 13 of the Covenant on the right to education to Article 31's right of all citizens to receive an education corresponding to their abilities.

There has been some debate on what effects international human rights mechanisms and customary laws on social equality have under domestic law. As will be discussed later in this paper, it is evident that the acceptance of international human rights mechanisms into the Korean legal scheme confirms that social equality is a bedrock of the Constitution, at least on conceptual

---

[17] Constitutional Court [Const. Ct.], 2002Hun-Ma52, Dec. 18, 2002, (14-2 KCCR 904) (S. Kor.).

[18] The ICESCR was adopted at the UN General Assembly on December 16, 1966 and took effect on January 3, 1976. For the background of this covenant, see Jooyoung 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] 125, 126-132 (2016).

and ideological levels.

III. REALIZATION OF CONSTITUTIONAL SOCIAL EQUALITY: LEGAL ISSUES

A. Legalization of Social Equality

Conventionally, there are three ways of legalizing social equality. One is to declare the principle of a social state aimed at delivering social justice in the general clauses of the Constitution. Another is to realize social equality by guaranteeing basic social rights and allowing the state to coordinate and regulate economic affairs under the Constitution. Those two ways are similar regarding social equality as a state mandate on the constitutional level, but they differ in that the former takes a conceptual approach while the latter focuses on guaranteeing citizens' rights. The third is to rely upon legislative policies instead of constitutionalizing social equality. Germany has adopted the first approach by declaring itself a democratic, social federation in Article 20, Section 1, of the Basic Law, while the third way is found in the United States Constitution, a typical constitution based on liberal traditions. Korea has adopted the second way.

Mechanisms aimed at guaranteeing fundamental rights with a focus on civil rights, as adopted by the United States, are unusual given that the world has experienced an evolution from civil-state constitutionalism to welfare-state constitutionalism. A democratic republic cannot ignore the fact that humans inherently depend on the community; and, thus, the constitution, the most fundamental set of national and social norms, should make clear that the state exists to guarantee civic and political freedom and equality, at least by eliminating social discrimination against its members to transcend individual justice and realize justice on the social levels. In other words, the constitution of a democratic republic should set forth 'value-based guidelines' on how to realize a just distribution of values under its social order.[19] It is up to the state whether it declares these principles only as national goals on the conceptual level or allows individuals to challenge the government to play a greater role in realizing citizens' rights.

[19] For a commentary on how the concept of the social state is not value-neutral, see Lee, *supra* note 15, at 237.

B. Significance and Limitations of Using Basic Social Rights to Realize Social Equality —Legal Nature as Concrete Rights

1. Significance and Method of Exercising Rights

While it is not imperative for all forms of constitutionalism to constitutionalize the idea of social equality, such a mechanism better reflects the advances of humanity than systems depending solely on legislative discretion. Opinions vary on the two forms of constitutionalization. As will be discussed later, given that international schemes tend to advocate for human rights as a way to deliver social equality, guaranteeing rights appears to be a better tool than declaring principles. As set forth in the Constitution, basic social rights allow citizens with less bargaining power in economic and social affairs to demand that the state provide at least a minimum set of material and institutional resources in the form of benefits and mechanisms that are needed for substantive protections of individual liberties and rights. This scheme implies a fundamental change in the relationship between individuals and the state in that social benefits and mechanisms are now seen as citizens' legal rights rather than measures for state dispensation.[20] Realizing social equality by guaranteeing rights rather than by declaring principles confers on the citizens a legal tool to urge the state to clarify its mandates and act on them in concrete domains.[21] In this respect, guaranteeing rights can be considered a constitutional attitude that took a major step forward in light of protecting more advanced social equality.

Under this scheme of guaranteeing social rights, the state has a duty to ensure the livelihood of the entire citizenry; strive to provide the socially vulnerable with social security and safety; prevent the socially powerful from abusing their liberties and rights; and act as a coordinator responsible for restricting socioeconomic liberty that is not essential for the public good.[22] Realizing social equality requires a delivery of basic social rights as well as restrictions of liberty or changes in individual legal status to serve the public good, in which case such a mechanism

---

[20] Cha, *supra* note 8, at 239-240.
[21] CHEON, *supra* note 10, at 478.
[22] HAN, *supra* note 14, at 294-296.

subjects individuals to a heavier duty of accepting inconveniences (a social nature of human rights) compared to that when civic and political freedom are prioritized. A classic example is Article 23, Section 2, of the Constitution, which provides that exercise of property rights shall conform to the public welfare.

2. Limitations of Realizing Social Equality by Ensuring Rights

Despite its significance, the scheme of realizing social equality by guaranteeing basic social rights has mostly been seen as carrying intrinsic and extrinsic limitations, just like the process of delivering on the principles of the social state. Kwang Seok Cheon says:

> In spite of its conceptual clarity, social equality has both intrinsic and extrinsic limitations in practice. While legal equality passively deals with the relationship between given situations, social equality focuses on a heavy involvement in realizing equality with a certain set of rules within the bounds of consensus. However, it is impossible to agree on the extent and method on the constitutional level. The constitution does not directly address the criteria for developing concrete principles to equally guarantee the conditions necessary for realizing individual freedom. In the same vein, social equality boils down to the issues of political ideology and policy validity, which tend to create strong tensions between legal and social equality. Here lie the intrinsic limitations of social equality:Iit only functions as an objective principle in the legislative process and not as a subjective right to claim. Social equality, on the extrinsic level, is in tension with individual liberty in legal arrangements modified for the purpose of delivering social equality, and it also carries the same limitations as basic social rights such as lack of resources or other practical issues when it is realized through direct benefits from the state.[23]

To summarize this conventional view, the concept of social equality and the idea of realizing it through a system of basic

[23] Cheon, *supra* note 7, at 178-180.

social rights face limitations arising from the nature of the legal system and practical conditions. Social equality as a constitutional ideology is bound to depend on the political process, typically the legislative process. There has been prevalent pessimism about basic social rights—a set of tools for delivering social equality—as a concrete right to demand action from the state.[24] Soowoong Han says that the list of basic social rights in the Korean Constitution does not clarify their legal implications and serves merely as a statement of important national goals as a legislative technique.[25] He does not see basic social rights as concrete rights as they are difficult to deliver through a judicial process.[26] He claims that since the Constitution does not specify the details, method, and target timeline of desired outcomes, it is impossible to clarify the contents of protection through the interpretation of the Constitution itself.

This leads to the lack of criteria for judicial review and a limited possibility of judicial review by the Constitutional Court to determine whether certain basic social rights have been violated. Therefore, it should be left to the political process and legislature to agree on the details of basic social rights, and any attempt to entrust the judiciary with such a task could lead to the collapse of democratic order and the rule of law.[27] According to this view, the Constitutional Court reviews the implementation of basic social rights from a limited perspective, such as prohibiting insufficient guarantees or enforcing the principle of minimum guarantees, focusing only on the presence of clear unconstitutionality.[28] Due to these criteria of clear unconstitutionality, Han argues that it is only theoretically possible for the judiciary to ensure the implementation of basic social rights, and these rights are rendered practically meaningless. Since these rights are not 'active' rights, which provide a basis for demanding certain legislation or benefits from the state, but 'passive' rights, which allow for determining the unconstitutionality of a failure to enact laws aimed at guaranteeing basic social rights or to implement sufficiently such laws, they should be construed as a national goal of objective

---

[24] Soowoong Han, *Sa-Hoe-Bog-Ji-ui Heon-Beob-jeog Gi-Cho-lo-seo Sa-Hoe-jeog Gi-Bon-Gwon* [*Basic Social Rights as a Constitutional Foundation for Social Welfare*], 18(4) HEON-BEOB-HAG-YEON-GU [CONSTITUTIONAL LAW REVIEW] 51, 51-104 (2012).
[25] *Id.* at 75.
[26] *Id.* at 76-79.
[27] *Id.* at 79.
[28] *Id.* at 82-83.

nature.[29]

Even if social equality is acknowledged as a concrete right or guiding principle, the ability to implement it is limited by a number of hurdles, such as lack of financial resources. Such limitations have been recognized as a differentiator between social equality as a principle or right and other fundamental rights, including liberty rights.

The Constitutional Court shares this conventional view as well. In connection with Article 34, Section 1, of the Constitution on the right to a life worthy of human beings and Article 34, Section 5 stipulating the state mandate to protect the disabled, a typical vulnerable group, the Court interprets the latter clause in a limited sense as follows:

> It is a prerequisite that basic social rights (Articles 31 through 36 of the Constitution) should take precedence over other policy tasks in order to ensure that the state implements those rights to some extent. However, in the legislative or policy-making processes, including budget allocation, it is untenable to demand that the state prioritize the implementation of basic social rights over that of others. With respect to the relationship between basic social rights and other important constitutional obligations of the state, as well as the relationship among those rights competing for priority, the legislators take into account competing and conflicting national objectives in the social and economic realms and strive to align them and set priorities on a case-by-case basis. The state needs to review its mandate of ensuring basic social rights in relation to other policy goals and tasks, aligning different policy objectives and setting priorities within its fiscal and economic capacity. Thus, basic social rights do not always take precedence in the legislative or policy-making process and are simply given due consideration. In this respect, basic social rights mean the state's duty to review national goals arising from those rights in all decision-making processes.[30]

For example, the government's failure to adopt low-floor

[29] *Id.* at 84-86.

[30] Constitutional Court [Const. Ct.], 2002Hun-Ma52, Dec. 18, 2002, (14-2 KCCR 908-909) (S. Kor.).

buses would not violate the right of the disabled to a life worthy of a human being:

> While it is desirable for the state to do its utmost for the socially vulnerable including the adoption of low-floor buses to promote the welfare of the disabled within the bounds of available resources, the mandate falls on the legislature and administrative bodies, the prime actors responsible for realizing a social state, and does not constitute, in principle, a task whose implementation could be ordered by the Constitutional Court. Given the separation of power between state agencies, the Constitutional Court can determine the unconstitutionality of a failure by such an agency to implement a certain mandate through constitutional adjudication only when the Constitution imposes a specific mandate on the agency.[31]

3. Critical Analysis of Denial of Basic Social Rights as Concrete Rights

It is undeniable that the realization of social equality through basic social rights depends on legislation. Practical limitations arising from fiscal constraints also should be acknowledged to a certain extent. However, these limitations should not serve as an excuse to deny basic social rights as concrete rights, and the interpretation of denying basic social rights as concrete rights is hardly in line with the spirit of the Constitution, which stipulates social equality as both a constitutional principle and right and requires the state to strive for its concrete implementation.

a. Concrete and Substantive Right to a Minimum Guarantee—Actual Liberty and Basic Social Rights

First, it is possible to formulate legislative guidelines on basic social rights through constitutional interpretation. If deemed essential in implementing personal liberty under the principle of actual liberty,[32] legislative and administrative mandates with concrete, substantive content could be established along with

---

[31] *Id*. at 909-910.
[32] Lee, *supra* note 15, at 246.

corresponding rights. It is worth noting that, in connection with the 1997 ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) declared that the state should respect, protect, and fulfill social rights and that the duty should be extended to include not only obligations of conduct but obligations of result.[33] These interpretation guidelines of the CESCR stipulate an inviolable minimum core for each right, which all signatories are mandated to guarantee.[34]

For example, while the state has discretion to decide how and when to ensure the right to movement for the disabled, it would constitute a failure by the state to fulfill its obligation to protect the group if it does not provide any options or develop policies for offering essential services or benefits to those who need them. Even if the right to demand the adoption of low-floor buses may not be derived directly from the right to a life worthy of human beings, one should be allowed to urge the state to formulate policies on mobility for the disabled and implement them on a continuous basis. In the aforementioned case, the Constitutional Court dismissed the claim, citing the separation of powers, and the Court limited control over the discretionary power of the legislature and administration. However, the Court should have acknowledged that the right to welfare for the disabled had been interfered with and then should have reviewed whether any action or inaction of the legislative or administrative body in question met the minimum requirements for protecting the welfare of those with disabilities. If the adoption of low-floor buses is the only mobility option for the disabled, given their socioeconomic circumstances in connection with transportation access, or there is a lack of resources for providing other alternatives, the right to demand the operation of low-floor buses may be derived directly from the right to welfare for the disabled.

b. Critical Analysis of Limited Resources Claim: Good-faith Maximum Delivery

On the issue of fiscal constraints, it also seems inappropriate to consider that no limits can be inferred from constitutional interpretation. While it may be right for the Constitutional Court to

---

[33] Sanghie Han, *Sa-Hoe-Gwon-gwa Sa-Beob-Sim-Sa* [*Judiciability of the Economic, Social and Cultural Rights*], 39 GONG-BEOB-YEON-GU [PUBLIC LAW REVIEW] 96 (2010); Lee, *supra* note 18, at 135-138.

[34] Han, *supra* note 33, at 96, 122; Lee, *supra* note 18, at 136.

say that the Constitution itself cannot mandate the highest priority and there is a need for adequate consideration, such adequacy should be construed as an obligation to uphold the essential elements embodied in individual social rights to the maximum extent possible and fiscal constraints should be interpreted in the context of the state's duty to make the best use of available resources. In sum, the core principles of social rights require the state to make the most use of resources available to deliver those rights. If such a requirement is not met, it could constitute a failure by the state to fulfill its duty of ensuring social rights.

As regards the right to liberty, the extent of protection is already in place, and the state takes a passive stance of no intervention that does not carry any need for government spending. With basic social rights, on the other hand, especially those that require the provision of benefits, the need for government spending prompts some to highlight practical limitations arising from fiscal restrictions. However, the right to liberty also presumes spending needs. The state cannot guarantee it simply by respecting the right and should engage proactively in protection against infringement for the sake of maintaining order. The right to liberty and social rights are not fundamentally different when it comes to spending needs, and both should be guaranteed as much as possible by making the best use of available resources. Whether such protection is a national goal or a right, spending needs are inherent in the state system, and they may not be considered as external costs to be reviewed for allocation or adjustment based on administrative convenience or policy alternatives.[35] The state may not create and implement basic social rights without constitutional limits, and the core of those rights that requires a minimum guarantee may be considered as a government spending item predetermined from the constitutional level before making decisions on long- and short-term economic and fiscal policies.[36]

c. Critical Analysis of Judicial Non-Intervention Claim: Need for Active and Positive Concretization of Minimum Requirements

Compared to other fundamental rights, there is a lack of definite criteria for judicial review of basic social rights, which, in

[35] Lee, *supra* note 15, at 248.
[36] *Id.* at 248.

turn, limit the judiciary's ability to intervene for the sake of ensuring them.[37] As distinguished adequately by the Constitutional Court, the state's mandate to protect basic social rights serves as guidance for the legislature and administration, while it works as a restrictive factor for the judiciary, including the Constitutional Court. Thus, the judiciary is not usually requested to specify the optimum extent of delivering basic social rights.[38]

However, there exists an inherent need to set constitutional limits on legislative and administrative authorities, particularly in connection with the degree of minimum protection of essential elements of rights. The Constitutional Court cites "clear violation" as a review criterion: "It is deemed in violation of the Constitution when the state fails to enact any legislation on the protection of livelihood or such legislation is inadequate to the extent that it is clearly outside the bounds of discretion allowed by the

---

[37] Han, *supra* note 24, at 69.

[38] The Constitutional Court mentioned that basic social rights function differently among different government authorities, in a case reviewing the unconstitutionality of the livelihood protection criteria, as a way of recognizing that the legislature and administration have substantial discretionary power:

> The Constitution provides that all citizens have the right to a life worthy of human beings and the state has the duty to protect people who cannot support themselves. While this clause binds all state organizations, the binding duty applies differently between the legislature or administration involved in active and formative activities and the Constitutional Court engaging in judicial control through constitutional trial. The above constitutional clause serves as a guidance for action by the legislature and administration to ensure that all citizens enjoy not only the minimum standard of living but also a healthy and culturally-rich lifestyle befitting their dignity as human beings to the maximum extent possible by taking into account the national income and fiscal resources. But the same clause functions as a guidance for control by the Constitutional Court in reviewing the constitutionality of the actions by other state organizations, namely the legislature and administration, in order to confirm that they have fulfilled their duties to take minimum measures needed to ensure that citizens enjoy a life worthy of human being. Thus, when the judiciary reviews whether government organizations have fulfilled their constitutional obligations to ensure a life worthy of human beings for citizens, it is deemed in violation of the Constitution when the state fails to enact any legislation on the protection of livelihood or such legislation is inadequate to the extent that it is clearly outside the bounds of discretion allowed by the Constitution. (Constitutional Court [Const. Ct.], 94Hun-Ma33, May 29, 1997, (9-1 KCCR 543, 553-554) (S. Kor.)).

Constitution."[39]

Setting the range of minimum protection can be done by conducting an objective and substantive review of actual socio-economic conditions. Thus, those entitled to basic social rights have the right to demand minimum welfare benefits as determined through such substantive review.[40] For example, the appropriate range of mobility service for the disabled may be estimated objectively by taking into account general and specific socioeconomic factors, including the quality of public transportation, the state of mobility rights, the distribution and composition of available resources, and the potential costs of offering a certain mode of transportation and service. Dukyeon Lee contends, "Unlike the issue of truth, socio-scientific evaluation does not represent an objective criterion for assessing value distribution or the optimum level of social protection.

---

[39] *Id.* at 543, 555.

[40] My contention is that minimum welfare protection could be essential to ensuring basic social rights. There exists a view that Article 37, Paragraph 2, of the Constitution does not apply to basic social rights because these rights lack essentiality. *See* Han, *supra* note 24, at 90-92. Han says that such essentiality is based on natural rights that exist before the state and thus does not apply to basic social rights that depend on the establishment of a state. With regard to basic social rights as concrete rights, however, it could and should be recognized that the range of benefits critical to the delivery of human dignity or substantive liberty constitutes such essentiality. Given that the substantive protection of the right to liberty is practically impossible without substantial social equality, the right to liberty and social rights are inseparable, and the latter should be recognized as being critical in upholding inherent human worth and dignity. *See* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (Hyoje Cho trans., GYOYANGIN Publishing 2009) (2008). This is a reasonable interpretation in line with the advances in the international human rights regime (Han, *supra* note 33, at 95, 103) particularly because the Korean Constitution includes basic social rights in its catalogue of individual basic rights. The view that Article 37, Paragraph 2, of the Constitution, regarding the principle of general legal-reservation, does not apply to basic social rights goes against the stated idea of ensuring "the liberty and rights for all citizens." The word "limitation" in the aforementioned clause could be interpreted to mean both the reduced range of protection against state action that undermines interests of the concerned entity (limitation in a narrow sense) and the legislative formation of state action that benefits the entity. Given that the final range of protection for basic rights in a certain time and space is determined by legislation in accordance with the principle of general legal-reservation, the right to liberty and social rights do not differ. The only difference lies in the fact that a judicial review of these basic rights may lead to a condition where they are subject to either the principle of prohibiting excessive restriction or the principle of banning insufficient protection depending on their legal nature.

However, setting the minimum range of fundamental rights to be protected is predicated upon the values enshrined in, and reviewable by, the Constitution." [41] If the legislature or administration sets the degree and timing of benefits and services in a way that goes against this objective estimation, it should be deemed outside the bounds of discretion.[42]

d. Critical Analysis of Arguments Based on the Separation of Power and Democracy

Benefits and adjustments aimed at realizing social equality entail limitations brought on by principles of the rule of law or democracy. Basic social rights also carry undeniable limitations in that they require the formation by legislative and administrative authorities. If the judiciary denies such authority and abuses its right to render rulings on unconstitutionality, it may be outside the bounds of its functional mandate and violate the separation of powers and democratic principles. As pointed out earlier, however, the above contention does not hold if, rather than denying such discretion to authorities, the judiciary simply tries to prevent the abuse by those authorities. It is worth remembering that the mechanism of constitutional adjudication, including adjudication on the constitutionality of law and constitutional complaints, came into being as a check against legislative and administrative authorities, after facing strong opposition from entities citing the separation of power and democratic values. When the legislature and administration abuse their discretionary powers in a way that violates social equality and basic social rights set forth in the Constitution, allowing the judiciary to exercise its rights, including constitutional adjudication for the sake of substantially guaranteeing human rights, would be conducive to the system of constitutional democracy.

In Korea, some critics say that any constitutional interpretation that strengthens basic social rights as concrete rights goes against democratic values as it undermines the authority of the legislature and administration as bodies representing the

---

[41] Lee, *supra* note 15, at 248.

[42] In the aforementioned case reviewing the unconstitutionality of the livelihood protection criteria (Constitutional Court [Const. Ct.], 94Hun-Ma33, May 29, 1997, (9-1 KCCR 543) (S. Kor.)), the Constitutional Court ruled that the discretionary power was not abused. However, it is somewhat questionable whether the Court conducted the review in a substantive and detailed fashion.

citizenry. One can indirectly refute this claim by citing the fact that the laws on election and political parties do not effectively guarantee political freedom, a core principle of a democratic republic and that the country's election system fails to represent adequately the entire constituency and, thus, does not fully legitimize those bodies representing the population.[43] Given that basic social rights concern the socioeconomically disadvantaged more than other groups and that their status as a minority makes it difficult to have their voices heard in the political process, it is hard to justify denying the concrete values of fundamental social rights by citing democratic principles.[44]

e. Differential Approach to the Legal Status and Effect of Rights

Some contend that it is possible and necessary to take a phased or differential approach to basic social rights according to their function and value, by classifying their legal effects and required levels of benefits. Dukyeon Lee divides the right to a life worthy of a human being into three categories—ideal, minimum standard, and biological survival—and introduces Byeong-ho Han's discussion on the right and his classification of its legal features into prescriptive, incompletely concrete, and concrete, respectively. Lee says the survival category can be recognized as a concrete, complete right.[45]

This attempt to classify basic social rights and take a differential approach offers an important argument against the attitude of denying basic social rights as concrete rights without any consideration of their relevance and interconnectedness with the reality. Despite these advances, Lee's range for the right to a life worthy of human being, which constitutes a concrete right, is

---

[43] For the overly-regulating nature of the Korean political system, see Jongcheol Kim & Jimoon Lee, *Gong-Hwa-jeog Gong-Jon-eul-wi-han Jeong-Chi-Gae-Hyeog-ui Pil-Yo-Seong-gwa Jo-Geon: Jeong-Bu-Hyeong-Tae Gae-Heon-Lon-eul Neom-Eo-Seo* [*The Necessity and Conditions of a Political Reform for the Republican Co-prosperity: Beyond Inconsistent Proposals for Constitutional Revision of the Presidential System*], 20 SE-GYE-HEON-BEOB-YEON-GU [WORLD CONSTITUTIONAL LAW REVIEW] 63, 63-92 (2014).

[44] For the same opinion, see Lee, *supra* note 18, at 150. For the view that the underprivileged should receive preferential treatment to ensure political equality from the perspective of political philosophy, see, in particular, RONALD MYLES DWORKIN, SOVEREIGN VIRTUE §4 (Sukyun Youm trans., Hangilsa Publishing 2005) (2000).

[45] Lee, *supra* note 15, at 240-246.

so narrow that it fails to significantly strengthen the nature of basic social rights as concrete rights. The problem with Lee's classification is that only the biological survival category constitutes a concrete right.[46] This limitation is also evidenced by the fact that even Soo-woong Han, who denies basic social rights as concrete rights, recognizes the biological survival category as constituting a concrete right. Han's contention differs from Lee's in that Han's recognition is not based on the principle of social state or the right to a life worthy of human beings but on human dignity and the resulting right to life that justifies the right to demand that the state provide minimum livelihood security.[47]

However, both of these contentions offer the same range that warrants a concrete demand for social protection. Given that the Constitution not only states the guarantee of human dignity together with the right to a life worthy of a human being but also stipulates the state's obligation to address specific areas of everyday living, social protection should go beyond minimum livelihood security to allow for a greater right to claim concrete benefits in the core domains of social welfare. People need for both survival and relationships with other members of the community and thus should at least be given minimum protection so they can realize their potential as an individual and citizen. Such expansion of welfare should be based on a comparison with western countries that offer high levels of social protection, including Germany, which simply has declared itself a social state, and the United States with no constitutional basis for social equality.[48] In a legal and cultural environment, where the political process does not fully guarantee democratic representation and oppresses the political freedom of the underprivileged, the

---

[46] Lee, *supra* note 15, at 246.

[47] Han, *supra* note 24, at 63.

[48] Circumstances vary from country to country. With GNP as a criterion of the size of the economy, however, Korea spends only a fraction of its available resources on social welfare. This warrants in-depth discussions from the perspective of the Constitution as a guidance. In 2014, Korea's welfare spending as a percentage of GDP was the lowest among the OECD countries surveyed, and this trend has continued ever since. The share of social welfare in Korea's total spending (10.4%) is less than half that of the OECD average (21.6%) and a third of France (31.9%) and Finland (31%). *See* Tae-jong Kim, *Han GDP Dae-Bi Bog-Ji-Ji-Chul Bi-Yul, OECD-jung Choe-Ha-Wi* [*Korea Spends Least on Welfare among OECD Countries*], YONHAP NEWS, Feb. 5, 2015, http://www.yonhapnews.co.kr/bulletin/2015/02/04/0200000000AKR20150204186400002.HT ML.

Constitution could serve as guidance in reducing, if necessary, the discretionary authority of the legislature and administration.[49]

C. Significance and Limitation of Leveraging Economic Order

1. Economic Democratization: Social Equality through Engagement

a. Institutionalization of Social Equality by Engaging People in Economic Order

The economic order plays a critical role in delivering social equality. As the economic gap is the main cause of social inequality, the quest for social equality could serve as a driving force for regulating and coordinating economic activities.[50] In addition, social rights, the bedrock of social equality, could be in tension with the right to liberty, including economic freedom and property rights.

As mentioned earlier, the Korean Constitution has a chapter dedicated to the economy (Chapter 9) that stipulates the basic principles and institutional elements of the economic order. Article 119, Paragraph 2, of the Constitution presents reducing the economic gap, the main reason for social inequality, as a key policy goal in a bid 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, ultimately, to "democratize the economy through harmony among the economic agents." Opinions may vary on the

[49] Such an active role of the judiciary is not justified when it undermines the fundamental elements of the democratic-republican system and human rights instead of promoting it. In other words, it depends on the circumstances to decide whether to limit the judiciary's ability to control and evaluate the state's action. For details, see Jongcheol Kim, *'Jeong-Chi-ui Sa-Beob-Hwa'ui Ui-Ui-wa Han-Gye* [*Constitutional Implications and Limits of the 'Judicialization of Politics'*], 33(3) GONG-BEOB-YEON-GU [PUBLIC LAW REVIEW] 229, 244-246 (2005).

[50] The 1948 inaugural Constitution specifically mentioned the social tasks of the economic order whereas the current one does not. However, given that the Constitution stipulates basic social rights and the state's role of coordinating and regulating economic activities for economic democratization, the constitutional clauses on the economy and the realization of social equality are inseparable. CHEON, *supra* note 10, at 880-882.

meaning of economic democratization,[51] but the fact that the concept is predicated upon the harmony among the economic agents confirms that it is line with the principle of democracy.[52]

The Constitution not only guarantees the right of workers as

[51] For further details, see Jongcheol Kim, *Heon-Beob-gwa Yang-Geug-Hwa-e dae-han Beob-jeog Dae-Eung* [*Social Polarization and the Korean Constitutional Law*], 31 BEOB-GWA SA-HOE [KOREAN JOURNAL OF LAW AND SOCIETY] 9, 23-29 (2006). Soowoong Han contends that economic democratization as a way to regulate unequal economic relationships in a democratic manner is simply an attempt to incorporate a policy tool aimed at realizing the principle of the social state in the legislative policy-making process and, thus, should not be seen as a concrete constitutional policy to realize the principle of democracy. *See* HAN, *supra* note 14, at 141-143, 320-321. My contention is that, while economic democratization is partly aimed at realizing the ideals of a welfare state for substantive equality, democratic ideals should not be limited to the political domain. *See* Kim, *supra* note 51, at 23-29. As will be discussed later, the democratization of economic agents could mean the formation of democratic networks by individual social units, and these networks could serve as an element of pluralistic democracy and help involve civic groups in politics. Denying the different interpretations of economic democratization only reveals the limitations of the liberalistic view that puts the possibility of civic groups as political forces in a somewhat negative light.

[52] Soowoong Han says that economic democratization may mean employee involvement in company decision-making. Along with employees, there are other economic agents such as consumers, companies, and households, and their relationships could be complex and varied. Han cites this condition as a basis for his argument that economic democratization should go beyond the relationship between management and employees. *See* HAN, *supra* note 14, at 320. However, the existence of various economic agents could also mean that the management-employee relationship is just one of many. This plurality should not serve as a basis for denying the interconnectedness between economic democratization and democracy. Nor should economic democratization be limited to co-management by the employer and employees. The concept of economic democratization may include the corporatism model, where various economic agents work together to develop and implement economic policies. In sum, the Korean Constitution uses the clauses on economic democratization as a constitutional foundation to adopt different policies, such as engaging employees in company decision-making. This should not be categorically criticized for being unconstitutional as argued by those who place significant emphasis on economic liberty. It is up to the political process to decide whether to embrace the concept or not. *See* Kim, *supra* note 18, at 23-29; Jongcheol Kim, *Heon-Beob-gwa Gyeong-Je-Min-Ju-Hwa – Han-Gug-Heon-Beob-ui Gyeong-Je-Jo-Hang-eul Jung-Sim-eu-lo* [*The Constitution and Economic Democratization – With reference to the Economy Chapter in the Constitution*], *in* DAE-BYEON-HWAN-UI PAE-LEO-DA-IM-EUL CHAJ-A-SEO [LOOKING FOR A TRANSFORMATION PARADIGM] § 2, 40-48 (in particular) (Youngryeol Park et al. eds., 2013).

economic agents to association, collective bargaining, and collective action, but recognizes self-help organizations formed by different economic agents by mandating that the state foster organizations founded on the spirit of self-help among farmers, fishers, and business people engaged in small and medium-sized industry (Article 123, Paragraph 5). It guarantees a consumer protection movement intended to encourage sound consumption activities and improvement in the quality of products under the conditions prescribed by statute (Article 124). A comprehensive look into the clauses containing principles and guidelines for action reveals that such self-help organizations have the characteristics of both economic and political groups. In a pluralistic democracy, economic agents achieve their socioeconomic goals through the political process. This necessitates a systematic control over their economic activities and equal bargaining power in negotiations, which, in turn, requires organizational autonomy predicated upon internal democratization. Since a key tool for alleviating social inequality is collectivism aimed at enhancing bargaining power and influence as a political group, one should not ignore the fact that the Constitution enshrines economic democratization and recognizes self-help organizations. With the realization of freedom as non-domination, being dependent upon the socioeconomic conditions, this value orientation of the Constitution should be construed as a pursuit of pluralistic methodology and republican coexistence founded on substantive equality.

b. Significance and Limitation of the Principle of Subsidiarity[53]

The quest for social equality, along with the coordination and regulation of economic order by the state, inherently limits other basic rights, including economic freedom and property rights, and, thus, should be pursued in harmony with principles of the rule of law and democracy. This prompts the need to accurately understand social equality, the concept of the social or welfare

[53] This part is based on Jongcheol Kim, *Beob-Lyul-Bog-Ji-Gae-Nyeom-ui Heon-Beob-jeog Jeong-Dang-Hwa-wa Bal-Jeon-Bang-An: Beob-Lyul-Gu-Jo-ui Pae-Leo-Da-Im Jeon-Hwan-eul Wi-Han Si-Lon* [*A Constitutional Justification for a New Paradigm of Legal Welfare: Beyond a Supplementary Concept of Legal Aid*], 43 BEOB-GWA-SA-HOE [KOREAN JOURNAL OF LAW AND SOCIETY] 47, 54-56 (2012).

state as guidance in pursuing social equality, and the relationship between basic social rights and the rule of law combined with democratic ideals, as well as control over state authorities.

As can be seen in the rulings of the Constitutional Court in its early years, where it presented a 'democratic welfare state'[54] as a state goal, the concepts of democracy and the welfare state are closely interconnected. They complement each other in that democracy involves free and fair access to the political process while the welfare state serves as a guiding principle in ensuring such freedom and equality through a democratic process. In other words, the two concepts are inseparable as a welfare state is impossible or undesirable without political democratization, and it props up political democratization.[55]

The rule of law and the notion of the welfare state are mutually complementary as well. A law-governed state develops its policies in the form of law within the bounds of the constitution, implements such policies for its members in accordance with the constitution and other laws, and resolves legal disputes through an independent, good-faith trial process in accordance with the constitution and other laws, while allowing people to seek legal justice by exercising their fundamental right to a trial.[56]

When the state provides social protection as mandated by the principle of the welfare state, such an arrangement limits people's activities to a degree, which, in turn, creates tensions between the rule of law and the notion of the welfare state. For example, social control based on the principle of the welfare state could collide with basic rights derived from the rule of law when the state restricts individual economic activities and property rights by making it mandatory to obtain approval for land transaction to prevent excessive real estate speculation to ensure balanced growth of the national economy and provide a safe and pleasant

---

[54] Constitutional Court [Const. Ct.], 88Hun-Ka13, Dec. 22, 1989, (1 KCCR 357) (S. Kor.).

[55] Kwangseok Cheon makes it clear that social security, a key element of the welfare state, is predicated upon democracy; and, conversely, the socialization of democracy is a prerequisite to the balanced delivery of social security. KWANGSEOK CHEON, HAN-GUG-SA-HOE-BO-JANG-BEOB-LON [KOREAN SOCIAL SECURITY LAW] 19 (2010).

[56] "Article 27 of the Constitution provides that all citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act. It is safe to say that the basic constitutional rights and legal rights are guaranteed by exercising this right to be tried in court." Constitutional Court [Const. Ct.], 2001Hun-Ba28, May 30, 2002, (14-1 KCCR 490) (S. Kor.).

environment for all citizens. As part of an effort to diffuse this tension, the principle of the welfare state or social control by the state should intervene only when individuals abuse their right to liberty and cause social problems. Under the assumption that individual liberty is protected, such an intervention should enter as a complementary tool when it is absolutely necessary—the principle of subsidiarity. The Constitutional Court recognized the principle of subsidiarity from a constitutional perspective:

> As the state aims to respect the dignity of individuals and uphold their liberties and rights to creative endeavor to the maximum extent possible, individuals should be able to enjoy autonomy and make decisions independently while the state should play a complementary role when it intervenes out of absolute necessity. Since the complementary nature of such intervention also applies to the national economy, respect for individual independence should undeniably serve as an overarching guidance in a free democracy.[57]

The notion of subsidiarity comes in part from the conventional perception that views social welfare not as a primary vehicle but as a residual and complementary tool, which is needed only when normal means of satisfying needs do not function properly.[58]

The principle to pursue a welfare state has developed into a new constitutional principle, but it cannot be denied that it may be limited by practical limitations such as lack of fiscal resources. However, this does not necessarily mean that social control or social welfare should only function as a subsidiary vehicle. Modern welfare states understand that a laissez-faire approach to socioeconomic affairs could lead to abuse of the right to liberty by the select few and eventually hinder individual liberty, and they believe that the state should counter such abuse in a democratic manner. Given that individuals can enjoy independence only in an environment that ensures substantive freedom and equality, social control should be regarded not as a complementary tool but as a primary function of the state. In the same vein, the Constitutional

---

[57] Constitutional Court [Const. Ct.], 88Hun-Ka13, Dec. 22, 1989, (1 KCCR 357) (S. Kor.).

[58] NEIL GILBERT & PAUL TERRELL, DIMENSIONS OF SOCIAL WELFARE POLICY 21 (Chanseob Nam & Taegyu Yu trans., Press of Sharing House 2007) (2005).

Court rightly acknowledged that individual autonomy derived from the principle of subsidiarity carries certain limitations: "Individual autonomy should not be allowed limitlessly but respected only when it promotes harmony and balance with other individuals or the community and thus contributes to, or at least does not undermine, the coexistence and co-prosperity of the entire community."

In this respect, one should not see social welfare as a safety net—a complementary tool for protecting people when they face insurmountable hurdles in their independent activities—but as a normal first-line function in its own right, which is essential in modern industrial society.[59] Kwangseok Cheon aptly pointed out that the principle of subsidiarity does not apply to certain areas:

> First, it does not apply to the supply of public goods necessary to protect the basic principles of the Constitution, such as democracy, the rule of law and welfare state. Such goods include childcare and education. Second, it does not apply to public goods, which the market is not likely to provide in a stable manner. They include transit services and social infrastructure. Third, it does not apply to an environment where the market determines the prices of goods and services, and consumers cannot buy them to satisfy their needs because they lack resources. Such goods include social security benefits.[60]

2. Substantive Equality through Extended Legislative Discretion in Property Rights and Social Responsibility of Property Holders

One of the biggest challenges in implementing socio-economic regulations and adjustments for the sake of substantive social equality is a conflict with personal property rights and economic freedom. When the state actively intervenes to reduce structural economic inequality, it inevitably places limits on the exercise of property rights and economic freedom, which serves as a foundation for property rights.

The laissez-faire approach adopted for a short period after the

---

[59] *Id.* at 22.
[60] CHEON, *supra* note 10, at 883.

advent of modern states saw the absolute protection of economic freedom and property rights as fundamental elements of the constitution and state. However, in the nineteenth century, such rights started to be limited to promote public welfare in the course of democratization towards constitutional democracy.[61] This trend strongly influenced Korea's inaugural constitution, and its basic elements still affect the current Constitution. Article 23, Paragraph 1, provides that the content and limitation of property rights should be determined by statute, a far cry from the traditional view of property rights as a right to liberty that needs to be protected from government intervention. Paragraph 2 of the same Article recognizes that property rights should be exercised in the context of public welfare.[62] Paragraph 3 stipulates that private property can be expropriated, but a just compensation must be paid, while Article 126 provides that private enterprises could be nationalized or transferred to ownership by a local government in certain circumstances.

The fact that few took issue with the Korean government's decision to inject public funds to bail out ailing private companies

---

[61] For the change in the status of freely contracting in the early years of modern civic states, see P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1985). For the transition from the nineteenth-century laissez-faire approach to the age of social control, see A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1940). For the transition from old rights focusing on personal ownership, such as property rights, to new rights aimed at promoting human dignity, such as the right to due process and equality, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 243-244 (Daekyu Yoon trans., KyungNam University Press 2001) (1985).

[62] The Constitutional Court, in principle, made it clear:

> The Korean Constitution stipulates that, unlike other basic rights, the content and limitation of property rights should be specified in concrete terms by law. This means that such a law forms, and no limits, property rights (Constitutional Court [Const. Ct.], 92Hun-Ba20, July 29, 1993, (5-2 KCCR 36, 44) (S. Kor.))….The legislator exercises a comprehensive right in determining the content and limitation of property rights; and, thus, laws that govern property rights are deemed constitutional unless they violate the rules of legislation, such as those that prohibit such laws from undermining the core principles of property rights or require them to be line with a social mandate (Constitutional Court [Const. Ct.], 98Hun-Ma36, June 29, 2000, (12-1 KCCR 869, 882-883) (S. Kor.); Constitutional Court [Const. Ct.], 2008Hun-Ka3, Sept. 30, 2010, (22-2(1) KCCR 568, 579) (S. Kor.); Constitutional Court [Const. Ct.], 2010Hun-Ba217, Mar. 29, 2012, (24-1(1) KCCR 423,433-434) (S. Kor.)).

Soowoong Han and Youngsoo Chang argue that this social nature of property rights means that the principles of the social state have been incorporated into the realm of property rights. *See* HAN, *supra* note 14, at 841; YOUNGSOO CHANG, HEON-BEOB-HAG [CONSTITUTION STUDIES] 588 (2nd ed. 2007).

during the financial crises in 1998 and 2008 demonstrates that economic liberty and property rights can hardly take precedence over public welfare in balancing interests. Nothing could have better proved that the Constitution, the bedrock of national and societal order, aims to promote substantive equality in order to ensure freedom as non-domination and create a free democratic republic that respects human dignity than the bailout decision. It warrants concern that the current state of constitutional reality in Korea is a direct opposite of the intended outcome of the constitutional mandate aimed at preventing economic forces from spilling over to other areas of national and societal importance. With regard to the interpretation of the Constitution, the strict scrutiny review standard is often invocated to thwart the attempt to enact legislation aimed at restricting economic liberty and property rights. This has led to a widespread view that such strict application of the rule of law can ward off socioeconomic reform bills founded upon the principle of social welfare, which jeopardizes social integration based on republican coexistence.

IV. INCORPORATION OF INTERNATIONAL HUMAN RIGHTS REGIMES: NEEDS AND LIMITATIONS

Earlier in this paper, international human rights laws were presented as a legal ground for social equality in line with Article 6, Paragraph 1, of the Constitution that recognizes international treaties and customary laws as having the same effect as domestic laws. This necessitates a discussion on the implications of incorporating those international regimes into the Korean legal system regarding social equality.

A. International Human Rights Laws that Address Social Equality

After World War II in the twentieth century, it was the Universal Declaration of Human Rights that served as a catalyst for international human rights laws. However, the declaration was seen as a non-binding political statement. Later, discussions began on binding human rights regimes. They include the ICESCR and the International Covenant on Civil and Political Rights

(ICCPR),[63] and their protocols. The ICESCR is very similar to the Korean Constitution in terms of clauses on social rights. In addition to the ICESCR, Korea has signed a variety of treaties that address social equality. The Korean government signed with parliamentary approval the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and Final Protocol, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Labor Charter, the Convention Relating to the Status of Refugees, and the Protocol Relating to the Status of Refugees, and the ILO Minimum Age Convention (No. 138). The government also signed without parliamentary approval the Convention on the Political Rights of Women, the United Nations Convention on the Rights of the Child, the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, and the Convention on Discrimination in Respect of Employment and Occupation (ILO Convention No. 111).

B. Effect of International Human Rights Regimes

1. Domestic Legal Effect of International Laws

Article 6, Paragraph 1, provides that treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law shall have the same effect as domestic laws. However, the former may be different from the latter, which is understood as international customary law, in terms of status as international law, and there exist differing views on their domestic legal effects (status) from the perspective of policy and interpretation. In Korea, few discussions have taken place on

[63] The ICCPR was adopted at the 21st UN General Assembly on December 16, 1966 and took effect on March 23, 1976. The fact that the ICESCR and ICCPR were passed as separate covenants on the same day means that a dualistic view that emphasizes the difference between the two might have had the final say. Under this dualistic view, the difference in nature between the two is as follows: The right to liberty can be reviewed through the judicial process and implemented immediately, whereas social rights are mostly seen as goals to be achieved over time and should be pursued by taking into account the state's fiscal resources available. The difference in the implementation method is as follows: The features of the right to liberty make it easy to file a petition with international bodies or conduct monitoring if and when any violation takes place, which is not the case for social rights. For more information, see Lee, *supra* note 18, at 129-132.

the issue. This is in part because international laws are rarely cited in the judicial process, including rulings. In this respect, it is safe to say that the Korean legal community has had somewhat nominal and peripheral respect for international laws.

On the issue of international laws' domestic legal effect, the academic community views treaties and international customary law differently. Treaties are not recognized as having the same validity as the Constitution but are mostly seen as having the force of statute or statutory instrument depending on their nature, though some strongly argue that international human rights laws have the same effect as the Constitution and thus take precedence over laws.[64] With regard to international customary laws, some contend that they should be recognized as having the same validity as the Constitution; others argue that they have the force of the Constitution, statute, or statutory instrument depending on their nature; and, still others say that they hold the same effect as a statute or statutory instrument.[65]

2. Effect of International Human Rights Laws in Domestic Law and Social Equality

Most international human rights treaties signed by Korea have features that warrant supra-legislative status. Granting only a statutory status to them in Korea might go against the constitutional principle of respecting international laws and guaranteeing the fundamental and inviolable human rights of individuals (Article 10 of the Constitution)—the ultimate goal of a free, constitutional democracy. Apart from international laws in general, it would be reasonable to recognize at least international human rights laws as having a supra-legislative status. Therefore, the judiciary should refer to them in its judicial process, including constitutional trials.

With the same international human rights law, however, domestic legal effects on the Constitution's social rights clauses are more problematic than on those dealing with the right to liberty. This might be in line with the continued tendency in Korea to distinguish the two in the Constitution. Unlike the ICCPR, the ICESCR has sparked controversy over treaty self-execution as it

---

[64] JAEHWANG JEONG, SIN-HEON-BEOB-IB-MUN [AN INTRODUCTION TO CONSTITUTIONAL LAW] 189 (6th ed. 2016).

[65] *Id.* at 193.

requires the obligation of the signatory state broadly to confirm or guarantee liberty and human rights rather than grant specific rights to individuals.[66] As discussed earlier, it is worth noting that the basic social rights in the Korean Constitution, whose content is similar to that in the ICESCR, tend to be seen as incomplete in terms of status as a concrete right. Some contend that basic social rights only open the door for constitutional complaints about the failure to enact legislation and hardly invoke the constitutional adjudication process aimed at forcing the state to protect those rights fully.[67] By the same token, others might question the effectiveness of recognizing the supra-legislative status of international socioeconomic regimes.

However, the right to liberty and social rights are increasingly viewed as inseparable since an effective protection of the former also requires socioeconomic and institutional resources. Thus, it would be inappropriate to give up the fight for having social rights recognized as concrete rights. As social rights could serve as a robust basis for urging legislation by the state, recognizing the ICESCR as having the ability to force legislation would be conducive to protecting universal human rights as well as fundamental human rights.[68] It is also worth noting the view that direct application of international human rights regimes, in principle, is possible and that the only remaining issue is how to interpret and apply them in real situations.[69]

Given that signatories to international human rights laws are increasingly obligated to abide by the ICESCR, there is a growing need to incorporate them into the domestic judicial process. On December 10, 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, mandating the notification of, and investigation into, violations of the ICESCR as with the ICCPR. In

---

[66] In line with this view, the Japanese Supreme Court does not recognize the ICESCR as having the characteristics of trial norms. *See* Yasushi Higashijawa, *Jae-Pan-Gyu-Beom-eu-lo-seo-ui Gug-Je-In-Gwon-Beob* [*International Human Rights Law as Adjudicatory Norms: Toward the Actualization of International Human Rights Law by the Judiciary*], 13 SEO-UL-GUG-JE-BEOB-YEON-GU [SEOUL INTERNATIONAL LAW JOURNAL] 69, 77 (2006).

[67] HAN, *supra* note 14, at 912.

[68] For the same view, see Myongung Lee, *Gug-Je-In-Gwon-Beob-gwa Heon-Beob-Jae-Pan* [*International Law of Human Rights and Constitutional Justice*], 83 THE JUSTICE 181, 195-197 (2005).

[69] Chanun Park, *Gug-Je-In-Gwon-Jo-Yag-ui Gug-Nae-jeog Hyo-Lyeog-gwa Geu Jeog-Yong-eul dul-leo-ssan myeoch ga-ji Go-Chal* [*Study on Domestic Effect and Application of International Human Rights Treaties*], 609 BEOB-JO [KOREAN LAWYERS ASSOCIATION JOURNAL] 141, 165-170 (2007).

addition, the Committee on Economic, Social and Cultural Rights (CESCR) has continued to offer general comments on individual rights contained in the ICESCR and corresponding obligations of the signatories. It is of note that the CESCR classifies essential elements of goods and services needed for protecting each of the social rights in the ICESCR with categories such as availability, accessibility, acceptability, and quality, which better equip the signatories to develop, execute, and assess their strategies and limit their discretion in fulfilling their obligation.[70]

V. CONCLUSION

The Korean Constitution declares the country as a democratic republic and presents a democratic welfare state founded upon free and democratic order as the goal of the state. In other words, the Constitution mandates that the state uphold liberty, equality, and welfare as key values and confirm and protect the basic rights of individuals. The mandate is detailed in the clauses on basic social rights that recognize the delivery of social equality as critical in promoting substantive liberty and in the general clauses that stipulate the state's authority to coordinate and regulate the economic domain for the sake of economic democratization.

However, the country has seen the Constitution increasingly lose its influence as guidance for promoting social equality and has been mired in social conflict and a growing disparity between rich and poor. This discrepancy between the constitutional ideals and reality is partly attributable to the crisis of representative democracy brought on by political legislation, including the election law, which fails to protect the citizenry's political freedom and rights effectively. The judiciary, including constitutional adjudication, has also played a part. Trapped in the notion of functional limitation, it has not done enough to implement the constitutional ideals. Intense introspection may be in order, given that many in the legal community deny basic social rights as concrete rights both in theory and practice and that the judiciary has misinterpreted the principle of subsidiarity as a constitutional principle and failed to contribute to the development of welfare policies and the creation of socioeconomic order. The failure of theorists and practitioners in Korea to help enact legislation for

[70] Lee, *supra* note 18, at 138-139.

promoting social equality is due in part to an attitude that has overlooked or ignored the increasingly robust mandate of international human rights regimes, including the ICESCR, although the Constitution recognizes respect for international laws as part of its principles. This reality calls on both academics and practitioners in the constitutional law community to revisit the constitutional mandate of ensuring "security, liberty and happiness for ourselves and our posterity forever" and to contemplate the need for a change in view on social justice and equality.

Keywords
Social Equality, Social Rights, Concrete Rights, Principle of Subsidiarity, Domestic Effects of International Human Rights Law, Korean Constitution

Received: 2019; *review completed and accepted*: 2020