Korea

Bridging the gap between Korean substance and Western form

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1 Introduction

The Republic of Korea (hereinafter Korea), commonly called South Korea as opposed to North Korea,1 is a highly homogeneous, yet intensely dynamic nation. Located in East Asia on the southern half of the Korean peninsula, and neighboured by China to the west and Japan to the east, Korea has a population of over 48 million people in a territory of just 100,032 square kilometres, which is similar to the size of Portugal. As two-thirds of the land is mountainous terrain, Korea is one of the most densely populated countries in the world. Along with this high population density, Korea’s ethnic and linguistic make-up render it a highly homogeneous nation. At the same time, Korea has experienced continuous ups and downs throughout its modern history, and has made considerable efforts to respond to each and every challenge in a timely manner. This has resulted in Korea’s high level of dynamism. It can be seen in the dramatic changes that have occurred in the Korean economy and politics. Korea was once one of the poorest nations in the world. This was so following the devastating Korean War (1950–53), yet the nation miraculously grew to become the 15th strongest economy in the world in terms of gross domestic product (GDP) in 2008.2 Although the Korean economy had to face numerous crises, including the so-called IMF (International Monetary Fund) crisis of 1997 that impacted not only upon Korea

1 The Democratic People’s Republic of Korea occupies the northern half of the Korean Peninsula. Since 1948 North Korea has been a socialist single-party state, run by the Korean Workers’ Party.
2 This is according to the statistics released by World Bank in July 2009. In 2002 and 2003 Korea ranked 11th in the global GDP rankings but with the rise of Brazil, Russia, India and Australia, the Korean economy fell four notches to 15th in place in 2008. The data for 2008 is available at The World Bank, Data and Statistics <http://econ.worldbank.org/WEBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20399244~menuPK:1192714~pagePK:64133150~piPK:64133175~theSitePK:239419~isCURLY00.html#ranking>. 

but also upon other Asian countries, and the global financial crisis of 2007 which originated from the US liquidity crisis, Korea successfully maintained its status as an ‘economic miracle’. During the past few decades, the country has also experienced dramatic changes in the political realm. There was a time when Korea regressed in terms of its democracy; yet on the whole, the nation has made gradual progress towards becoming a fully democratic society, and it is now safe to say that democracy has broadened and deepened in Korea more than ever before in its history. With success in both its economic and democratic reforms, Korea is often mentioned as a model for other developing countries.

Its newfound political and economic infrastructure laid a solid basis for the development of the rule of law. Drawing on the experiences of other nations and creatively adapting these lessons to its own context, Korea has developed a firm and sound legal system. Despite numerous difficulties, it has responded to the demand of the people for a more reasonable and fair society. It is against this backdrop that the legal system of Korea is explored in this chapter.

2 Historical context

2.1 Kojoseon Dynasty and the beginning of Korea’s legal tradition

Delving into the legal past of a nation is a highly meaningful task in attaining a deeper understanding of the present legal system. It is noteworthy that Korea has had a long tradition of written law under the ideal of the rule of law.

Korean history is said to have begun in 2333 BCE, when the first dynasty, Kojoseon, was founded. The legal tradition of Korea is as old as this, for Kojoseon had its own statutory law. This law consisted of eight articles, of which only three remain today. These articles stipulated capital punishment for murder, compensation with grains for personal injury, and the enslavement of thieves. Ever since, Korean dynasties throughout history have had their own legal systems and written laws, demonstrating the nation’s long tradition of statutory law.

Yet it is not the purpose of this chapter to go through all the legal systems of the numerous dynasties that have existed in the history of Korea. It suffices to start with the Joseon Dynasty, the last dynasty, established a little more than 600 years ago.

2.2 Joseon Dynasty and the pre-colonial period

The Joseon Dynasty (1392–1910) was founded by Yi Seonggye, who was a main figure in the overthrow of the preceding kingdom of the Goryeo Dynasty


4 Ibid.

5 Ibid.

6 ‘Goryeo’ is the name from which the English name ‘Korea’ has been derived.
(918–1392). While Buddhism had been the key religion and ideology during the prior Goryeo period, Confucianism was the ideology that supported the Joseon Dynasty. It was so strong that its effects still linger to a certain extent in Korean society today. Joseon strove to spread this ideology throughout its reigning period, and this Confucianisation process immensely influenced the overall shape of the social system and culture. The dominance of Confucianism could have undermined the significance of the statutory laws in the dynasty. However, the founding fathers of Joseon did not ignore the legal foundations necessary for their kingdom. The first king of the dynasty, King Taejo, promulgated the Six Codes for Governing the Country (Kyeongje Yukcheon) in 1397, five years after the establishment of the dynasty. Unfortunately, the exact contents of these Codes are unknown at this point. However, the contents of the second large-scale codification of the Great Code for Governing the Country (Kyeongguk Taejeon) are still available. It was in 1484, during the reign of King Seongjong, that the Great Code was compiled and came into effect. This Code remained the core framework of the legal system throughout the Joseon Dynasty. Law in the dynasty was not just a superficial tool, but was actually drafted and used under consistent principles. In this sense, Korea was not unfamiliar with the tradition of rule of law.

This legal tradition lasting over several centuries was, however, not fully compatible with Western ideas of law. Western legal theories were introduced to the dynasty as early as the 17th century. However, many scholars were against their reception and expressed strong criticism while at the same time defending Confucianism. This resistance did not last long. After the middle of the 19th century, the Joseon Dynasty finally saw an influx of Western culture. This significantly affected the legal sector. King Gojong dispatched Sinsa Yuramdan, a group of members organised to experience foreign things, visit Japan in 1881 when Japan was in the process of rigorous reforms, or to put it otherwise, undergoing Westernisation. On his return to Korea one member of that group, Oem Seyong, filed a seven-volume report on the Ministry of Justice in Japan and Japan’s legal system. There were direct observations on Western nations as well. For instance, Yu Giljoon was a Korean scholar who studied in the United States of America from 1883 to 1885. After returning home, he wrote Seoyugyeonmoon (My Observations on Western Things). This book introduced the Western concepts of state, law, rights and liberty to Joseon for the first time. Suh

9 The drafter of the Code, Cheong Dojeon (1337–98), was one of the key contributors to the establishment of the dynasty. He is said to have the idea that people are the foundation of the nation and should be honoured by the King. This idea led to another idea prevalent in the Joseon Dynasty that people have the right to dethrone the King, which seems to have a connection with modern constitutionalism. See C Choi, Law and Justice in Korea: South and North, Seoul National University Press, Seoul, 2005, p. 168.
12 ibid.
Jaepil, who studied at the Washington University, founded the Dongnip Hyuphoe (Independence Club) and published a newspaper, the Dongnip Shinmun, in an effort to educate Joseon people on the principles of democracy and Western legal systems.

Governmental measures to modernise the legal system also followed. In 1894 the first modern system separating the judiciary from other branches of the state was initially introduced, when King Gojong promulgated the 14 Articles of Hongbum. Based on this measure, the Court Organization Law was passed in 1895, which completed the separation of the judiciary and executive sectors of the government. In the same year, the first modern legal education and training institute, the Bubkwanyangseongso, was founded. By the end of the century, King Gojong re-established the country as part of the Daehan Empire, and promulgated Korea's first modern Constitution (Daehanguk Gukje), in 1899. The Joseon Government took various measures to introduce some features of Western legal systems into the country. However, these actions were not free from foreign interventions, especially those of Japan.

Through the international treaty signed with Japan at Kanghwado in 1876, the channel for international exchange was forced open. This treaty put Joseon in an inferior position for diplomatic affairs, and the Joseon Government had great difficulty in implementing reforms independently. Gradually, the dynasty was pushed to follow the Japan's path in terms of reform. A series of unfair treaties were made, including the Japan–Korea Annexation Treaty of 1907, in which the judicial power of Joseon was transferred to Japan. Joseon's sovereign power was controlled and gradually diminished until full Japanese annexation of Joseon in 1910.

2.3 Colonial period

After annexation in 1910, the colonisation process in Korea was carefully planned and executed by the Japanese Government. The legal sector was no exception. Instead of the codes that had been set up by the Joseon Government, Japanese codes took their place and functioned as the primary source of law in Korean territory. This legal integration was one of the tools used to fully integrate Korea into Japan. In the course of receiving Japanese influence in the legal sector, Korea indirectly accepted Western legal tradition, since Japan itself had also received Anglo-American, French and German jurisprudence. Having been most influenced by Germany, the Korean legal system and jurisprudence eventually became quasi-German.

The legal system of colonial Korea was not something that could be defined as modern and democratic. The main reason for that was the context in which the

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15 ibid.
legal system was structured and operated. Power was structured by law to enable Japan to efficiently rule Korea as a colony. The Japanese Governor-General of the colonial government had unrestrained power over both the executive and legislative branches, and little autonomy was guaranteed to the judicial branch, as it was categorised as a subordinate part of government. Constitutional law did not exist in Korea, and the human rights of the people were not sufficiently valued by the law.\textsuperscript{17} Although the law in colonial Korea had the form of modern law, it was also an essential tool of retaining colonial order in the Korean peninsula.

Another interesting aspect of the colonial law was the establishment of customary law in the realm of private law. Although the Japanese Government was applying Japanese laws to the colony, it also promulgated a decree that private legal matters not covered by the laws were to be handled under Korean custom.\textsuperscript{18} The difficulty for the judges was that there was no written official form of customary law in Korea at that time. Therefore, the colonial government and judiciary had to go through a thorough investigation of Korean customs and ascertain their contents in each case they encountered.\textsuperscript{19} The colonial construction of customary law has been described as a creation of Korean customs viewed through the window of Western (or Japanese in some cases) legal concepts.\textsuperscript{20} This tradition of ‘filling the gap between Korean tradition and Western law’ has influenced the Korean judiciary even in the post-colonial period.\textsuperscript{21}

\section*{2.4 Post-colonial period}

Although Korea was finally liberated from Japanese colonial rule with the end of World War II in 1945, the Japanese influence was still prevalent for a long period of time. This was mainly due to the fact that those Koreans who worked in official posts during the colonial period comprised the main pool of potential officers for the new government. After Japan surrendered to the Allied Forces, nearly all of the people who managed the important functional positions in Korea returned to Japan. The newly formed Korean Government had no alternative but to hire those workers from the colonial era, including Koreans who had worked for the Japanese police to arrest nationalists. Even these people managed to work their way up to high posts in every public field, including within the legislative and judicial branches.\textsuperscript{22}

It was not only human resources but also the legal infrastructure that remained as a colonial residue. Many laws from the colonial period were still applied to the independent state of Korea under the orders of the American military government. For example, Japan’s \textit{Civil Code} was in full force until the newly drafted

\begin{itemize}
\item \textsuperscript{17} D Choi, op. cit., pp. 76–7.
\item \textsuperscript{18} M Kim, ‘Customary Law and Colonial Jurisprudence in Korea’, \textit{American Journal of Comparative Law}, vol. 57, no. 1, 2009, p. 207.
\item \textsuperscript{19} ibid., p. 214.
\item \textsuperscript{20} ibid., p. 247.
\item \textsuperscript{21} ibid., p. 205.
\item \textsuperscript{22} D Choi, op. cit., pp. 84–5.
\end{itemize}
Korean Civil Code took its effect in 1960. There were efforts to eliminate Korea’s colonial remnants. For example, a special examination committee was established by the Government in 1948 to take punitive measures against pro-Japanese personnel, charged with committing malicious anti-national acts during the colonial period. However, the goals of this committee were barely reached as there was opposition from inside the Government, and as a result only a few people were punished. As pro-Japanese Koreans retained their high posts, the Japanese influence persisted in the making of law and in its application. In the midst of the rush for freedom, the dark side of the colonial period still lingered in Korea.

However, it was not only Japanese traces that impacted upon establishing a new Korean legal system. Direct Western influence also existed in Korean law. This was particularly strong in the area of constitutional law which never had existed in the colonial period. The drafters of the Korean Constitution were looking for models outside Asia. The Korean Constitution was influenced by many Western Constitutions, including the Weimar Constitution of Germany as well as the American, English and French Constitutions. Among these, the most significant influence came from the American Constitution. Many features of the Korean Constitution were designed in keeping with American constitutionalism: a single-document national Constitution with a preamble of guiding principles; a list of individual rights and freedoms; a separation of the powers of the national government among three branches; and so on.

The post-colonial period was the first true beginning of the establishment of the modern legal system. The first general election was held, and the first Constitution was written by newly elected legislators. The Constitution of 1948 provided the basis for the independence of the judiciary. Accordingly, the Court Organization Act was promulgated in 1949. Other fundamental pieces of legislation became effective, including the Criminal Code on 3 October 1953, the Civil Code and the Civil Procedure Code on 1 January 1960, and the Commercial Code on 1 January 1963.

3 Sources of law and legal traditions

3.1 Brief overview

As one can infer from the historical development described above, Korea has long possessed a tradition of written law. The influence of continental legal systems, also based on written law, reinforced this tradition. Not surprisingly, then, the primary source of law in Korea exists in the form of written law made by the legislative branch, not in the form of case law developed by the judicial branch.
Customary law functions as an inferior source of law, and its significance is slight in Korea’s contemporary legal system due to the well-organised process offered by written law. When neither written law nor customary law can provide a legal basis for the adjudication of a case, judges should rely on the ‘nature of things’, or in other words, general principles of law, in order to decide the case. It is broadly accepted that when courts cannot find a relevant law, they should not fill the gap from their own perspectives, but consider how the legislative branch would have handled the shortfall. However, invocation of the ‘nature of the things’ rarely happens in reality. Even when there seems to be no provision of written law that can directly be applied to a case at first glance, judges tend to creatively expand the interpretation of relevant provisions so as to adjudicate the case at issue.

3.2 Written law

Hierarchy of the written law

As with most jurisdictions drawing from the continental legal tradition, written law in Korea has its own hierarchy. The Constitution is at the top and provides guiding principles for all forms of law. Statutory law made by the National Assembly gives detailed shape and substance under the guidance of the Constitution. A treaty is also considered a part of statutory law once it acquires domestic effect. Besides exercising its law-making power, the National Assembly delegates a certain portion of its legislative power to the executive and judicial branches to supplement statutory law. As a result, decrees and regulations are set forth by the President, Ministers, the Supreme Court and the Constitutional Court. At the local government level, there are ordinances passed by local assemblies which have application only for that locality.

The Constitution

Korea’s Constitution first came into effect on 17 July 1948. It implemented the presidential system, as opposed to the Cabinet system. The Constitution has been amended nine times up to now, the first amendment taking place in 1952 and the last in 1987. Five of the amendments (1960, 1962, 1972, 1980 and 1987) were considerable, to the extent that they each resulted in the establishment of a different republic.

The existence of six republics during the 60-year history of the Constitution reflects the political hardships the country has been through. Some amendments were directed towards prolonging a presidential term or strengthening presidential power. For instance, the second amendment, in 1954, was aimed at removing a term limit for President Syngman Rhee. The 1972 amendment, which brought about the Constitution of the Fourth Republic (widely known as the Yushin Constitution), was to provide the constitutional basis for an indefinite presidential
term and to strengthen presidential power for President Park Junghhee. These occurrences represent the failure of true constitutionalism in the midst of political turmoil. However, the yearning for democracy pushed forward the expansion of true constitutionalism, despite some twists and turns along the way. Eventually, in the wake of massive pro-democratic protests nationwide, the current Republic and Constitution of 1987 were established with the approval of 93 per cent of Koreans in a national referendum.

The current Constitution consists of a preamble, 130 articles, and supplementary provisions. It provides the fundamental framework for the system of government and the distribution of power. The executive branch is headed by an elected President who serves a single five-year term, and an appointed Prime Minister with no fixed term. There is a unicameral legislative branch, the National Assembly, and a judicial branch consisting of the Supreme Court and its lower courts as well as the Constitutional Court which adjudicates constitutional matters.

The Constitution also contains a bill of rights under which the fundamental rights of people are guaranteed and protected. Nearly all the rights that are recognised in modern Constitutions, including the right to due process, freedom of expression, and judicial access, are stipulated therein. The blossoming of constitutional adjudication in Korea has become a driving force in enhancing fundamental rights in the country. It is also noteworthy that Korea has the National Human Rights Commission to oversee the enhancement of human rights.

Statutes
Statutes are the most significant source of law. Considering the high number of statutory laws in Korea, just a few statutes that are of significance will be mentioned.

The first is the Civil Code, which is the lengthiest and perhaps the most influential of all Korean statutory laws. The Code is a comprehensive and fundamental norm that covers the entire area of private law. Most private transactions and familial matters are governed by the principles and doctrines provided by the Code. It was first promulgated on 22 February 1958 and came into effect on 1 January 1960. It bears much resemblance to the overall structure of the Bürgerliches Gesetzbuch (BGB), the Civil Code of Germany, in that it follows a Pandekten (digest) system, which begins with the general principles to be applied, followed by separate provisions governing particular areas of law. Thus the Korean Civil Code consists of five parts: General Provisions, the Law of Property, the Law of Obligations, Family Law and the Law of Succession. Although there have been some minor amendments the first three books remain almost the same as they were.
were at the time of enactment. However, the Ministry of Justice is carrying out an ambitious plan for a large-scale recodification in the wake of ongoing modernisation of private law across the world. This project started at the beginning of 2009 and will proceed on a step-by-step basis for a four-year period.\(^\text{30}\) The basic aim of the recodification is to reflect social changes that have taken place in the last five decades so that the Civil Code becomes more relevant to people in their everyday lives. Moreover, a host of ideas from foreign Civil Codes and international model laws will be incorporated into as part of the updating process.\(^\text{31}\)

Also worth noting in the field of private law is the Korean Commercial Code, which is of great significance to business entities in Korea. This Code consists of four parts: General Provisions, Company Law, Insurance Law and Maritime Law. Company law is drawing special attention from foreign firms as they attempt to establish their subsidiaries in Korea. Four forms of corporate entities are available under this Code: a stock company, a limited liability company, a limited partnership and partnership. Most common is the stock company, which allows the public to hold shares and become shareholders. With regard to the stock company, the Commercial Code governs important transactions such as the transfer of stocks, and merger and acquisition activities. Other specific laws which need to be understood comprehensively in order to understand how company-related activities are carried out in Korea include the Security Transaction Act, the Fair Trade Act and the Financial Investment Services and Capital Market Act.

The Korean Criminal Code also needs to be mentioned as the source of some of the most fundamental societal norms. Since its enactment in 1953 it has undergone little revision. It is comprised of 372 articles, organised into four chapters of general provisions and 42 chapters of specific provisions. These provisions govern rudimentary crimes. There are other special statutes containing other types of criminal provisions that are not found in the Criminal Code, or that modify the criminal penalties found in the Criminal Code. In cases where provisions in a special Act create an apparent conflict with the Criminal Code, the special statute is usually given preference.

Among the issues related to the Criminal Code, the retention of the death penalty and the criminalisation of adultery have caused the hottest controversy. Korea is one of few industrialised countries in the world, along with the United States and Japan, which allows the death penalty as a form of punishment for certain serious crimes. The constitutionality of the death penalty has been challenged frequently in the Supreme Court and the Constitutional Court,\(^\text{32}\) but none of these challenges has been successful. However, concerted efforts have been made to abolish the death penalty. In 2001, 155 law-makers proposed a Bill for its abolition, but it failed to pass through the National Assembly. In 2005 the

\(^{30}\) See The Law Times <http://www.minbub.or.kr> for information on the recodification process (available only in Korean).

\(^{31}\) The international model laws include the Principles of European Contract Law, the Draft Common Frame of Reference and the UNIDROIT Principles of International Commercial Contract Law, which are the fruits of efforts to harmonise private law area at the international level.

\(^{32}\) Supreme Court Decision, 28 February 1963, 62Do241; Supreme Court Decision, 24 April 1990, 90Do319; Supreme Court Decision, 26 February 1991, 90Do2906; Constitutional Court Decision, 28 November 1996, 95Hunba1.
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National Human Rights Commission of Korea, the national institution for human rights advocacy, recommended abolishing the death penalty, and in early 2006 it recommended that the Government set out a plan for human rights including abolition of the death penalty. In 2007 Amnesty International classified Korea as an abolitionist country in practice (meaning that the country has not executed for more than 10 years). The last executions were carried out in December 1997, when 23 people were hanged.

The punishment of adultery has been another topic of controversy for a considerable period of time. According to art 241 of the Criminal Code, persons found guilty of adultery can face up to two years in prison. The constitutionality of the provision has been challenged four times on the grounds that it is anachronistic and infringes on personal freedom, but the Constitutional Court has repeatedly rejected these claims, most recently on 30 October 2008. According to the ruling of the Constitutional Court, society still perceives adultery to impair the social order and infringe on another’s right; accordingly the need to prevent adultery through imposing criminal sanctions still exists. The ruling held that the penal provision against adultery was within the appropriate discretion of the legislative body even though it restricts the right of self-determination concerning sexual activity and the right to privacy to a certain extent. However, it is interesting to note that the Court came very close to declaring the provisional unconstitutional. The Justices’ opinions were sharply divided, with five out of nine Justices showing a negative stance towards penalising adultery. Although the claim was rejected on the basis of an insufficient Court majority, the division even within the circle of Constitutional Court Justices shows that the law against adultery will still remain one of the most complex and sensitive issues in the future.

Other sources of written law

A treaty, an international agreement concluded between states in written form and governed by international law, is also at the level of a domestic statute. Some treaties need to be ratified by the National Assembly before taking effect domestically. Since the establishment of the Korean Government in 1948 until the end of 2008, 2584 treaties – 2016 bilateral and 568 multilateral – have been concluded by the Republic of Korea and implemented.
At the lower end of the hierarchy are decrees issued by the President or Ministers. Since it is impossible in a complicated society to govern everything by primary legislation, the significance of decrees as secondary legislation is indeed grave. However, this delegated legislative power is by no means unlimited. It is to be exercised only within the boundary set forth by the statutory law from which it is derived. Validity is denied once it crosses the limit.

The Supreme Court and the Constitutional Court are also endowed with rule-making power within their scope of jurisdiction. The Supreme Court may establish rules and regulations under its judicial law-making power, concerning judicial proceedings, discipline within courts and management of business insofar as these are not contrary to law.38 The same judicial law-making power is given to the Constitutional Court.39 These powers are all directly delegated by the Constitution. In this regard, they differ from delegated legislative power exercised by the executive branch, which has to be specifically commissioned by specific statutory law.

In addition, there are local ordinances that are set forth and applied by local governments. According to art 117, para 1 of the Constitution, local governments may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes. This power may be differentiated from state law in a federal system. Unlike state law, local ordinances are subject to the limits set forth by statutory law and are a part of the single national legal system.40

### 3.3 Customary law

Customary law also functions as a source of law. It is a set of norms that was naturally formed in the society and accepted by the general public as binding, although not in a codified form. In line with this, the Supreme Court requires there to be ‘legal conviction’ of the people in order for a certain custom to be recognised as customary law. Customary law is merely supplemental to written law. Art 1 of the Civil Code declares this principle clearly by stating that customary law may be applied only when there are no statutes available in the case being adjudicated. In other words, statutes precede customary law.

Theoretically speaking, it is a useful means for a society to bridge the gap between a real norm and an existing norm that codification cannot promptly address. But in reality, there is a circumstance where customary law that has been formed in the past can impede the advancement of the society. The Supreme Court has denied the application of customary law when it is deemed to be against the legal order. A relevant Court decision to consider is on the customary law relating to the *jong-joong*, the traditional patriarchal clan organisation.41 The primary purpose of the *jong-joong* was the performance of ancestral rituals for a

38 *Constitution*, art 108.
39 *Constitution*, art 113.
41 Supreme Court Decision, 21 July 2005, 2002Da1178. See also Supreme Court Decision, 20 November 2008, 2007Da27670.
common ancestor as well as to strengthening the bonds among members of the same clan. It has been solid customary law that only adult males automatically become members of this clan organisation. As Confucian tradition has withered, the organisation has become less meaningful, but being a member still meant that one could have a right over the jong-joong’s assets. For instance, a jong-joong would receive a large sum of money as compensation when real estate owned by the clan organisation was reclaimed for a public purpose by government; occasionally this money would be distributed to the members of the jong-joong by a resolution of the organisation. Because females were not able to become members of the jong-joong, it meant they were deprived of the chance to enjoy in a share of the wealth.

In this case before the Supreme Court, married daughters who were not allowed to share in the compensation raised a complaint against their jong-joong. The Supreme Court acknowledged that the subordination of women was derived from Confucian tradition and that this was no longer acceptable in the current legal order which was based on the idea of gender equality. Consequently, the Supreme Court declared, contrary to the longstanding customary law, that married females are entitled to equal membership and property rights associated with jong-joong.

3.4 Case law as a de facto source of law

According to art 8 of the Court Organisation Act, a higher court’s decision binds a lower court only in the specific pending case. Therefore, there is no principle of stare decisis as is recognised in common law jurisdictions. However, the decision of a higher court, particularly the Supreme Court, does have a de facto binding effect. It is likely in practice that lower court judges will follow the pattern of rules that have been accumulatively set forth by the Supreme Court. This has been made much easier with the development of electronic searching tools. Nowadays, most of the Supreme Court’s decisions are electronically published by the Supreme Court Library and are readily accessible. Thus, the possible outcome of a case can be predicted by examining how the Supreme Court has decided in a similar case. In this way, Supreme Court decisions function as de facto source of law.

4 Legal institutions

4.1 Law-making authority

In principle, the National Assembly is the sole law-making body of the state. The National Assembly consists of 299 legislators who serve for a four-year term. 42

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42 For more information see the Supreme Court Library website: <http://library.scourt.go.kr/jsp/index.html>.
of which are elected by a plurality of votes from electoral districts and 56 through a proportional representation system where seats are distributed to parties based on the percentage of total votes they garnered.\(^{43}\) As the representative body of the people, the National Assembly reserves the power to amend the Constitution, to enact and amend the statutory law, and to consent to the conclusion and ratification of treaties. The President of the Republic has special powers whereby he or she can take measures in response to threats to national security or public peace and order.\(^{44}\) However, the President is obliged to promptly notify the National Assembly of these measures and gain approval, otherwise the measures cannot proceed.\(^{45}\)

Bills are submitted through two channels. To begin with, 10 or more legislators can introduce a Bill. The Government also can submit a Bill. In terms of volume, the former is the more common way of initiating legislation. In the 17th Assembly (2004–08), a total of 7489 Bills were submitted.\(^{46}\) Of these 6387 were from legislators whereas 1102 were from the Government. In the 16th Assembly (2000–04), a total of 2507 Bills were submitted. Of these 1912 were from legislators and 595 were from the Government. However, the pass rate of Bills is much higher for Government-led Bills. During the 17th Assembly, 51.0 per cent of the Bills submitted by the Government passed as opposed to only 21.1 per cent of the Bills by legislators. In the 16th Assembly, the gap was even wider; 72.4 per cent versus 26.8 per cent. This is due to the fact that the executive branch is better equipped and has greater expertise and information in particular areas of law, such as taxation laws and other administrative laws.

When a Bill is submitted either from legislators or the Government, it is referred to a relevant standing committee for further examination. Then the standing committee presents it via the Legislative and Judiciary Committee\(^ {47}\) to the plenary session\(^ {48}\) for a vote. If the Bill passes the National Assembly with a majority vote, it is sent to the President of the Republic for signature and promulgation. The President must promulgate the Bill within 15 days upon receiving it from the National Assembly. Unless otherwise specified, the Bill takes effect 20 days after its promulgation. However, the President reserves veto power.\(^ {49}\) The President exercises this right by returning the Bill to the National Assembly with a written explanation of the veto and a request for the reconsideration. However, the President is not allowed to request the National Assembly to reconsider the Bill in part, or with proposed amendments. If the National Assembly again passes the Bill with the attendance of more than one

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\(^{44}\) Constitution, art 76, para 1.

\(^{45}\) Constitution, art 76, paras 3 and 4.

\(^{46}\) For more information see The National Assembly of the Republic of Korea [http://likms.assembly.go.kr/law/jsp/main.jsp].

\(^{47}\) The Committee examines the legality of the bill and prepares the final wording.

\(^{48}\) The regular session opens on 1 September every year and lasts for as long as 100 days. In addition to the regular session, extraordinary sessions can be held for as long as 30 days upon the request of the President of the Republic or a quarter or more members of the National Assembly. See art 47 of the Constitution and art 4.5 of the National Assembly Act.

\(^{49}\) The veto procedure is stipulated in art 53 of the Constitution.
half of the total members, and with a concurrent vote of two-thirds or more of the members present, it becomes an Act.

4.2 Adjudicative authority

The Supreme Court and the lower courts

Art 101 of the Constitution endows courts with the power to adjudicate all legal disputes. To perform this mission, the Court Organization Act sets forth the basic structure of the court system, providing for a three-tier system.

At the first level is the District Court. Currently there are 13 District Courts nationwide, each of which represents a geographical area. District Courts are the courts of first instance, exercising general original jurisdiction. Branch Courts, Branch Courts of the Family Court and Municipal Courts are established under the District Courts. Family Courts and Administrative Courts are at the level of District Courts.

At the appellate level is the High Court. The High Court serves as the court of appeal. Five High Courts are located in major cities – Seoul, Busan, Daegu, Gwangju and Daejon. However, it should be noted that High Courts are not the only appellate courts under the Korean system. High Courts hear all appeals from judgments issued by a panel of three judges, and appeals from judgments by a single judge in a civil proceeding when the amount in dispute exceeds 50 million Korean won.51 Appeals from other judgments that have been rendered by a single judge will be heard by an appellate panel in District Courts. In this sense, appellate jurisdiction is divided among High Courts and District Courts, according to the nature of the case. Another court that is positioned at the same level is the Patent Court. Its major function is to deal with appeals against decisions of the Korean Intellectual Property Office (KIPO) with regard to intellectual property-related cases (patent, utility model, design and trademarks). Copyright is not handled by the KIPO.

At the highest level is the Supreme Court. It serves as the court of last resort. The Supreme Court is comprised of 14 Justices, including the Chief Justice. One of them serves as the Minister of National Court Administration, the administrative body of the Supreme Court. The Supreme Court Justices are recommended by the Chief Justice, appointed by the President and approved by the National Assembly. The Chief Justice is also appointed by the President and approved by the National Assembly. They all serve a six-year term. The Supreme Court hears appeals from the High Courts and the Patent Court. It also hears appeals from District Courts and Family Courts when they adjudicate as courts of appeal. The grounds for appeal to the Supreme Court are limited by law.52 If the appeal

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50 This material draws primarily from Y Kwon, op. cit., pp. 115–18.
51 Equivalent to approximately US$41,666 as of September 2009.
52 According to art 423 of the Civil Procedure Code, the violation of the Constitution, Acts, administrative decrees, or regulations are grounds for appeal to the Supreme Court. Furthermore, art 424 enumerates absolute grounds (meaning that these grounds are deemed justifiable) including the participation of the ineligible judge in a trial or violation of an exclusive jurisdiction.
does not contain the cause enumerated by law, the Court dismisses the appeal without further examining the case. Generally, a case is assigned to a Petty Bench composed of four Justices. A case is decided by the Petty Bench unless it falls within one of the following categories: the Justices fail to reach a consensus on the case; any order, rule or regulation is in violation of the Constitution or statutes; it is deemed necessary to change the former opinion of the Supreme Court regarding the interpretation and implementation of the Constitution, laws, orders, rules or regulations; when it is deemed that adjudication by a Petty Bench is not appropriate.

**Role of the court**

The role of the court in Korea has been significant in the several decades since the modern legal system was established. Without sufficient prior experience courts had to apply newly enacted legislation in a way that met the needs of the country and resonated with the changing circumstances. Attracted to this responsibility, the brightest legal minds of the nation thronged to the judiciary and contributed, by dedicating their time and energy, to building the new framework.

The civil law tradition, as opposed to the common law tradition, sees the court as interpreting laws made by the legislative branch, with little discretion. In this sense, courts are law-applying rather than law-making institutions. However, the civil law/common law divide is not as significant in practice as in theory. Korean courts do exercise de facto law-making power. Courts take the broadly worded statutory language and then develop a set of rules on the basis of the policy underlying the language. As courts incrementally create, modify, refine and expand these rules over a multitude of cases, these court-made rules attain the de facto status of law. This 'gap-filling' function of the courts is a theme throughout Korea’s judicial history.

Take, for instance, the case where the Supreme Court ruled that a female-to-male transsexual should be allowed to change the gender listed in his family registry from female to male.53 The Family Registry Law54 did not provide any procedure by which gender could be changed for transsexuals. However, there had been constant call in society to allow transsexuals to change their legal gender on psychological and sociological grounds. The Court held that if a person is clearly recognisable as the opposite sex in appearance as well as in his or her individual and social life after having sex-reassignment surgery, that person should be legally recognised as being of the opposite sex as long as it does not run against public interest in the context of the case. Two Justices were against this ruling, asserting that it went far beyond the scope of interpretation to law-making. Yet the concurring opinion by Justice Kim Jihyeong clearly stated out that the decision could be the way to alleviate the suffering of transsexual people at a time legislative measures to protect their rights seemed a long way off.

53 Supreme Court Decision, 22 June 2006, 2004Su42.
54 The family registry or hojeok system has been subsequently abolished and replaced by a family relation registry system.
The Constitutional Court

The Constitutional Court was established in September 1988 in the wake of the ninth amendment of the Constitution. It is an independent constitutional institution, with jurisdiction over following areas: determining the constitutionality of a statute; ruling on disputes over competence between and among governmental entities; adjudicating constitutional complaints filed by a private party; deciding on impeachment charges brought by the National Assembly; and making judgments on the dissolution of political parties.

The composition of the Constitutional Court Justices is quite unique. To begin with, nine Justices are appointed by the President. However, three are elected by the National Assembly and another three are designated by the Chief Justice of the Supreme Court. The President is bound to appoint these six Justices who have either been elected or designated by other institutions.

The Constitutional Court has been highly successful in positioning itself as the final adjudicator of constitutional disputes. From its foundation in 1988 until the end of 2007, 15,716 cases have been filed and 14,789 have been decided. Of the latter, 773 cases have been decided 'unconstitutional.' This flood of filing was made possible through a peculiar system of 'constitutional complaint' which can be filed by any individual citizen. Under art 68 of the Constitutional Court Act, anyone whose fundamental rights guaranteed by the Constitution have been infringed through the exercise or non-exercise of governmental powers may petition the Constitutional Court for relief. If a legislative act, presidential decree, ordinance or other law directly infringes upon an individual's fundamental or basic rights, the individual may file a constitutional complaint against the law itself on the condition that the individual has resorted to all other prior procedures to remedy the situation. This path between the highest constitutional adjudicator and individual citizen has received immense attention and has been utilised to the utmost extent. Highly political in its nature, adjudication by the Constitutional Court has often significantly influenced the nation. Two landmark decisions in 2004 show the impact of the Constitutional Court decisions on the political life of the country.

The first decision concerned the impeachment of the then President Roh Moo-hyun. The National Assembly passed an impeachment resolution against President Roh on multiple grounds including the violation of political neutrality, corruption and government maladministration. The claim was rejected by the Constitutional Court. Although the Court confirmed the violation of political neutrality by the President, it reasoned that it was not grave enough to justify the removal of the President from his post.

55 See further the website of the Constitutional Court of Korea: <http://english.ccourt.go.kr>.
After this favourable outcome to the President and the Government, the Constitutional Court frustrated the ambitious governmental plan to relocate the capital of Korea. At issue was the *Special Act on the Establishment of the New Administrative Capital*, a Bill that contained a plan to construct a new administrative capital in Chungcheong Province in central Korea. This Bill was held unconstitutional. 58 The complainants in this case were Korean citizens domiciled across the nation, who filed the constitutional complaint in this case on grounds that the Bill was unconstitutional in its entirety as it was an attempt to relocate the nation’s capital without revision of the *Constitution*, and that the Bill violated the right to vote through a referendum 59 and the rights of taxpayers. The Court, however, invoked unexpected logic in holding the Bill unconstitutional. The majority of the Justices ruled that there is a customary constitutional law that designates Seoul as the capital of Korea although there is no explicit provision that states so. This norm, according to the majority, has been formed over a period of over 600 years since the Joseon Dynasty and has achieved national consensus as a part of constitutional custom even prior to the introduction of the written *Constitution*. Thus, it would be unconstitutional to change the capital without going through the constitutional amendment procedure under art 130 of the *Constitution*, which requires at least two-thirds majority in the National Assembly and a national referendum vote in favour of the proposed amendment.

These two decisions show the tension between the Constitutional Court and other branches of government, and at the same time demonstrate the overwhelming impact of the Constitutional Court’s rulings under Korea’s current constitutional scheme.

## 5 Legal professions

### 5.1 Overview

Three words represent traditional legal professionals in Korea; homogeneity, scarcity and prestige. These features are all intertwined with each other. All are apparent in the two channels legal professionals go through: the National Judicial Examination (NJE) and the Judicial Research and Training Institute (JRTI). 60 The NJE is an annual nationwide test that is hosted by government to select prospective lawyers. The JRTI is a professional legal training centre run by the Supreme Court of Korea for would-be lawyers before their entrance into the practice. 61 Regardless of their profession, all lawyers in Korea have passed

59 Article 72 of the *Constitution* states that the President may submit important policies relating to diplomacy, national defence, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.
60 There is an exception to this. Judge advocates who pass the Judge Advocate Examination and complete two years of training at the JRTI qualify as lawyers after 10 years’ service in the military, pursuant to art 7 of the *Judge Advocate Appointment Act*.
61 See the JRTI website: <http://jrti.scourt.go.kr/english>. 
the same test and trained together in the same institute following the same curriculum. This explains the high homogeneity of the legal profession in Korea. Further, this group has been very few in number. Until 1977 the annual number of persons passing the Bar Examination was less than 100. In 1981 this quota was raised from 100 to 300. It gradually increased to approximately 1000 around 2002. Still, the number of lawyers per capita in Korea is only a quarter of the OECD average according to a survey by the OECD in 2008. This in turn restricts competition and keeps prices high. Scarcity in number has helped the legal profession to keep its prestigious social status. The high entry barrier contributed to maintaining the quality of lawyers, which in turn upheld their prestige. In particular, judges and prosecutors were deemed exceedingly prestigious based on the longstanding tradition and culture in which public officials are held in high regard. However, the role of legal professionals in Korean society was not as significant as their prestige. Despite the increase in the number of lawyers, they were too small in number to satisfy the increased demand of the society. They were too homogeneous to correspond to diversified social issues. They were too domestic-oriented to meet the need for globalisation. This brought about the request for legal reform. The new trends in the legal professions and legal education will be discussed later in this chapter.

5.2 Judges

By delegation of the Constitution, the Court Organization Act stipulates qualifications necessary for judges. According to the art 42 of the Act, persons who have passed the NJE and have completed the two-year training program at the JRTI or those who have obtained qualifications as lawyers are eligible to become judges. Judges are appointed by the Chief Justice with the consent of the Council of Supreme Court Justices. Judges have a 10-year service term and can be reappointed. In practice, most of the judges are reappointed after 10 years.

For centuries the Supreme Court has recruited most of its newly appointed judges from the group of young elite trainees at the JRTI. Some judges have been selected from the pool of practitioners but the number is small. Typically, approximately 100 judges are appointed annually. Their terms are usually renewed. During their careers, judges are transferred to different courts on a regular basis. They usually serve in one area for a certain period of time, ranging from two to three years. This is due to the judicial hierarchy, in which a newly appointed judge starts as an associate judge in the three-judge panel of the District Court, and then gradually moves up the hierarchy, as a single judge in the District Court, an associate judge in the High Court, a presiding judge in the three-judge panel of the District Court, a presiding judge in the three-judge panel of the High

Court, and then to higher positions such as the Chief Judge of the District or High Court, or most desirably, a Supreme Court Justice. This hierarchy makes judges transfer their positions and workplaces on a regular basis. Another factor is the preference of judges to serve in bigger cities, where they have better access to better education for their children and more amenities for a higher quality of life. For this reason, the Supreme Court deploys judges in a way that secures even opportunity to each and every judge.

Because of a heavy workload, Korean judges are extremely hardworking. There are 2352 judges in the nation’s judiciary. An average Korean judge handles approximately 1000 cases a year. It is not unusual to see judges working until late at night nearly every week day, and on either Saturday or Sunday. The young and motivated judges are accustomed to dedicating their time and energy to work from the early stages of their career. However, it is rare to see judges working through their retirement age of 63. Most of them retire before they reach their retirement age and work as private attorneys. This may seem odd to Western lawyers, where the opposite happens. This early retirement may be attributed to two reasons. In the strict judicial hierarchy, it has been commonplace for those who failed to go to the next step of the hierarchy to resign from their posts. Further, many are attracted by the higher income they can make as private attorney after they retire. Yet with fundamental legal reform recently introduced (in particular, the implementation of the law school system), the judiciary is likely to go through radical changes in the future. Though it is not clear at this point, the Supreme Court is likely to recruit most of its newly appointed judges from the pool of practitioners instead of recent graduates from the JRTI. The judicial hierarchy, as it exists now, is likely to be softened.

The most significant issue facing Korea’s judges is the attainment of full independence of the judiciary. There is now a high level judicial independence. Yet there was a time when the independence and impartiality of the judges and the courts were severely hampered. During the military dictatorship regimes of the 1960s, 1970s and 1980s, the judiciary had to struggle to protect threats to its independence from the executive branch. On and off, the Government would react in a retaliatory way when the courts ruled in disfavour of the regime. For example, there was a ruling by the Supreme Court where it had found unconstitutional a statutory measure by the Government to exclude military personnel from suing the Government for tort liability. The Court declared the provision for the statute was incompatible with the equal-protection-of-law clause. However, this provoked the military regime, and in the aftermath of the decision, legal and non-legal measures were used to retaliate against the judiciary. As

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64 This statistic is as of 1 August 2008, and it has been derived from Supreme Prosecution Service of the Republic of Korea. <http://www.spo.go.kr/user.tdf?a=user.renewal.main.MainApp&lang=eng>.
66 ibid., p. 50.
67 Supreme Court Decision, 22 June 1971, 70Da1010.
68 D Choi, op. cit., p. 91.
the Fourth (Yushin) Republic was launched, the power of constitutional review that was once in the hand of the judiciary was removed from the courts. After Korea’s political democratisation progressed during the late 1980s, judicial independence is now in full blossom.

5.3 Public prosecutors

At the outset of building its modern judicial system, Korea enacted the Public Prosecutors’ Office Act, in 1949. Since then, public prosecutors have played an important role in the criminal system. The main responsibilities of public prosecutors are threefold; investigation, prosecution, and execution of sentence. Public prosecutors, as the defenders of the public interest, also carry out responsibilities as government counsel and as the protectors of human rights. As of February 2009, there were in total 1724 prosecutors, 318 of whom were female.

Police comprise another body of investigative authorities. Inevitably, the relationship between public prosecutors and the police has often been a subject of controversy. However, at least for now, the police service is the secondary investigative body since it is subject to the direction and supervision of prosecutors. Prosecutors oversee the investigative activity of the police and have the sole authority to make a final decision whether to close or indict the case. However, this does not mean that prosecutors step in at every stage of the investigation in every case. Prosecutors direct police officers in important matters pertaining to human right issues such as the detention of suspects or in cases that are of great importance. Once the case is indicted, prosecutors are responsible for presenting the case at trial. At the closing of the trial, they provide an advisory opinion on sentencing, but it remains at the court’s discretion to decide its own sentence. In criminal proceedings, prosecutors are theoretically the party opposing the defendant. However, prosecutors have been considered not merely participants in the criminal process, but as semi-judicial agents or defenders of public interest. Thus prosecutors in Korea have enjoyed superior status to those in most of common-law countries.

Yet in the past public trust in prosecutors was not as high as their prestige. Authoritarian governments were suspected of trying to use the prosecution’s power to favour their own political interests. For this reason, the political neutrality of the public prosecutor’s office was often questioned. Some questioned whether public prosecutors were reluctant to investigate corruption cases involving politicians or high-rank government officials. This aggravated the public distrust of prosecutors and led to the adoption of the special prosecutor system. Fearing lack of impartiality on the part of prosecutors because they are part of government, the National Assembly passed legislation appointing lawyers from outside government to investigate certain cases in place of prosecutors. As of

70 Article 196 of the Criminal Procedure Code provides that police officers shall investigate crimes with the direction of prosecutors.
September 2009, there have been seven Acts for the appointment of special prosecutors.

However, the role of the public prosecutor in building up and maintaining the legal order should not be underestimated. On average a single prosecutor meets 10 suspects every day. Out of the total number of cases, the ratio of instituting prosecution is roughly 50 per cent, and approximately 99.9 per cent of the accused are found guilty. Moreover, although highly political cases have eroded public trust towards prosecutors, the anti-corruption movement in Korea and the achievements of the prosecutors are in general quite notable when compared with other countries including France, Japan and the United States, and are thus worthy of praise.

5.4 Attorneys

The first article of Korea’s Attorney-at-Law Act is highly symbolic in relation to the social status of attorneys in the country. According to that article, the mission of an attorney is to protect the fundamental human rights and realise social justice. The second article of the Act goes on to say that an attorney is a semi-public legal professional. This mission statement and self-definition from a public perspective suggests that the Korean image of an attorney is quite different from the Western perception of an attorney.

The attorney dedicated to advocating a public cause was not foreign in the history of Korea. In particular, there were attorneys who played a dominant role in the independence movement within legal proceedings. The first Chief Justice of the Supreme Court, Kim Byoungro who held the position from 1948 until 1957, is a representative figure. Although he studied law in Japan during the colonial period, he began to be involved in the independence movement by advocating for Korean independence activists in Japanese courts free of charge. After the liberation of Korea from Japan, he played a key role as the Chief Justice by vigorously paving the way for the independence of judiciary despite many obstacles.

In the period that followed, there were public interest lawyers who played a significant role when Korea was under authoritarian rule. They stood against authoritarian government by defending political prisoners who fought for democracy. After the beginning of the transition to democracy in 1987, a number of lawyers formed a professional affiliation called Lawyers for a Democratic Society (Minbyun). They began to be involved in various social issues such as women’s rights, environmental protection, anti-corruption and economic

71 These statistics are derived from the official website of the Supreme Prosecutor’s Office. See <http://www.spo.go.kr/user.tdf?a=user.renewal.main.MainApp&lang=eng>.
74 ibid, p. 63.
justice. This affiliation received even higher attention when one of the members, Roh Moo-hyun, was elected President of the country. He was the first lawyer ever in that position in the history of Korea. Although some might argue that the primary responsibility of attorneys is to better serve their clients, their contribution to the democratisation of Korean society deserves some credit in the context of the political turmoil that swept Korea for several decades.

The efforts of attorneys were not only in the public interest sector, but also in the private sector in support of the growing industrial economy in Korea. The emergence of law firms is noteworthy in this respect. The first law firm, Kim, Chang & Lee, was founded in 1958. Ever since, a great number of law firms have been established, providing comprehensive legal services in all areas of law. Individual lawyers opening and operating their respective law offices used to be the dominant form of legal practice in the past, but that has now widely changed. The total number of law firms has continued to increase. Further, there has been a remarkable tendency for judges to participate in law firms after several years of public service.75 As of September 2009, there are 459 law firms in Korea, and about 41.4 per cent of all the attorneys belong to law firms. Yet, Korean law firms are small in size compared to UK or US law firms. For example, the biggest law firm in Korea, Kim & Chang, has 347 Korean attorneys (as of 1 April 2009),76 whereas the biggest law firm in the United States has several thousands.77

However, the public image of attorney is also linked with excessive prestige and high legal fees. This has to do with the number of attorneys. One needs to pass the highly competitive NJE and be trained at the JRTI for two years in order to qualify as an attorney. As of 9 September 2009, the total number of attorneys is 10,989.78 Due to the small size of the profession, attorneys have enjoyed high social status and prestige. However, this has meant a high barrier to legal service. It is not only the total size of the profession but also the concentration of attorneys in a certain geographic area that aggravates the problem. Approximately 72 per cent of the attorneys are registered with the Seoul Bar. Including the Uijeongbu, Suwon and Incheon Bars, which are geographically adjacent to Seoul, 82 per cent of attorneys are practising either in Seoul or the adjacent cities. This geographical concentration of attorneys makes it very difficult for people in rural areas to access legal services. This has been one of the main arguments for increasing the number of attorneys.

Another negative public perception has to do with the alleged practice of providing preferential favours to recently retired judges during litigation (known as jeonkwanweorwu).79 A retired judge, who until recently may have been working in the judiciary, can register as a private attorney. People tend to think that

78 See Korean Bar Association <http://www.koreanbar.or.kr>.
79 See J Kim, op. cit., p. 51.
incumbent judges might favour these attorneys during the litigation process. This belief extends to the idea that incumbent judges, some of whom might retire to private practice in the future, have more incentive to adhere to this custom since they can expect the same favourable treatment from the younger judges after their retirement. The same can be said of public prosecutors. There is a widespread belief that one will have a higher chance of a favourable outcome at the investigation or prosecution stage if one hires a former high-ranking prosecutor as his or her counsel in a criminal case. There is no clear evidence that incumbent judges or prosecutors actually deliver a more favourable outcome exceeding their scope of discretion. However, the fact that people in legal disputes are willing to pay higher fees for those former judges or prosecutors based not only on their experience and expertise but also on the better chance of a promising outcome shows at least that this kind of assumption or belief exists.

5.4 Legal education

Legal education has been the most controversial topic in recent legal reform discussions. Fundamental legal education reform began to be discussed by the Commission for Judicial System Development and the Globalization Committee in 1993. Further, the Judicial Reform Promotion Committee, organised in May 1999, also discussed legal education reform in depth. Although there were no significant changes made following these efforts, the reform movement was finally accelerated when the Presidential Committee on Judicial Reform was launched in 2005 to implement judicial reform including legal education reform. As a result, a law school Bill that introduces a US-style law school model was finally passed in July 2007. This epochal, yet controversial, new legal education system commenced implementation in March 2009.

Some background on this reform needs to be provided. The past system of legal education was modelled on the continental European system. Legal education was pursued at the undergraduate level for four years. Usually, law students spent the first year gaining a general education in the social sciences and literary arts, and then spent the rest of their college years engaged in legal studies. Unlike the United States, most of the students entering the law college did not end up becoming lawyers. Theoretically speaking, obtaining a licence to practise law was open to everybody, even to those who had not majored in law, as long as they passed the NJE. Yet, this three-stage examination was notorious for its extreme competitiveness. Very limited numbers of selected applicants, usually around 1 to 5 per cent of the total applicants, finally passed the examination. For example, 290 out of 16 390 passed the national judicial examination in 1994, resulting in a pass rate of 1.7 per cent. In 1995 the total number of people passing the exam rose to over 300, when 308 out of 16 789 passed, resulting in a pass rate of 1.8 per cent. The competitiveness has gradually eased since then. The

80 The three stages are, in order: multiple choice questions, an essay and a personal interview.
81 The statistics are from Ministry of Justice <http://www.moj.go.kr/barexam>.
total number first rose over 1000 in 2004, when 1009 out of 15 446 passed, the
pass rate reaching 6.5 per cent. In 2008, 1005 out of 17 829 passed, resulting in
a pass rate of 5.6 per cent.

As the statistics show, the extreme difficulty and competitiveness of the exam
has resulted in the unbalanced portfolio of successful applicants. For exam-
ple, the 2008 statistics show that 561 out of 1005 successful applicants, about
55.8 per cent, are from the so-called SKY universities (Seoul National University,
Korea University and Yonsei University). From 2002 to 2007, 3065 SKY students
(Seoul 1685, Korea 832 and Yonsei 548) accounted for more than 62 per cent
of the total number of successful applicants, 4908. Consequently, the alumni
structure of the JRTI created widespread suspicion among people that strong
interpersonal relationships might influence judicial justice. 82

Another problem was that legal education was undermined by the existence
of the NJE. 83 Overwhelmed by its extreme competitiveness, students hesitated to
take courses that were not related to the JRTI exam. Further, they would throng
to courses in private institutes where commercial preparation courses customised
for the NJE (comparable to BARBRI or Kaplan in the United States) were offered.
In the meantime, creative, diverse and interactive legal education was being
stifled. In addition, Korean society was calling for more lawyers from diverse
backgrounds. Adhering to the NJE system was not providing an appropriate
solution.

Against this backdrop, a new system has been introduced. This new education
system has the key features of the US law school model – three-year training at a
graduate-level professional school. A total of 25 law schools opened in 2009, and
admitted approximately 2500 students with varying undergraduate majors and
work backgrounds. Law colleges at the undergraduate level are to be abolished
in principle, but universities with no law school can continue to offer general
legal education at undergraduate level. Prospective lawyers will no longer be
attending the JRTI as long as they complete the professional education at law
school and pass the Bar Examination. The JRTI is likely to be reduced to become a
judge-training centre, instead of a comprehensive training institute for all would-
be lawyers. The NJE will still be held until 2017 despite the implementation of the
new education system, in order to protect the reliance interest of those remaining
law college students.

Now at law schools, more diverse courses including interdisciplinary courses,
foreign law classes (some in foreign languages) and clinical programs in which
students have exposure to actual clients and cases will be offered. The aim of the
new system is to foster more global-oriented and versatile individuals who are
ready to spread through every corner of Korean society and overseas, instead of
lawyers who spent most of their time studying law and preparing for NJE and
JRTI tests, with no outside-of-law experience.

Whether or not this ambitious plan of legal reforms will help overcome past drawbacks and create a new type of lawyer remains an open question. Along with the rosy prospects of this bold experiment, many concerns exist as well. There is an ongoing argument regarding the cap on the number of law schools and legal professionals. The Government has capped the number of law schools and the total enrolment numbers. The high cost of education and the longer period required to become licensed legal professionals, especially in a country where all the males are obliged to serve in the military for at least 20 months, are some other factors that could undermine the new system. Above all, the quality of the lawyers produced by this new system will be determinative in this debate. Educating students with no legal knowledge and experience for three years, and sending them out to the legal market where adequate post-law school training system is lacking will be immensely challenging for law faculties.

6 Legal culture

6.1 Still litigation-averse? – Korean attitudes towards litigation

Past authoritative accounts of Korean legal culture have portrayed Korean legal culture as litigation-averse. According to this stance, Korean people tend to solve disputes by resorting to informal mediators, like elder members of the community or family, which is in keeping with their Confucian heritage, rather than making their way to court to assert their legal rights. Yet there have been criticisms of this stereotyped view.

Looking at the current statistics, Korean society is by no means non-litigious. Here is an interesting comparison with Japanese judicial statistics. The total number of the cases filed in Korea during the year 2008 totals 18,402,098 (6,345,561 of which are litigation cases, meaning that there are adversarial parties), whereas the number for Japan in the same period totals 2,252,438 (547,017 of which are litigation cases), a little higher than just 10 per cent of the Korean figure. Considering that, as of 2008, the population in Japan was 127,288,419, al vol. 2, most three times higher than the Korean figure of 48,379,392, the high number of litigation cases in Korea must be quite astonishing to people.

88 Japanese judicial statistics are available at Supreme Court of Japan <http://www.courts.go.jp/english/> and Korean judicial statistics are available at Supreme Court of Korea <http://eng.scourt.go.kr/eng/main/Main.work>.
89 This figure has been retrieved from international data held by the US Census Bureau, available at US Census Bureau, International Data Base (IDB) <http://www.census.gov/ipc/www/idb/ranks.php>.
who believe that East Asian countries generally share a non-litigious culture. On average, more than one in three Koreans has been involved in some form of court-filed case, with more than one in eight involved in litigation.

Once proceeding with litigation, Koreans show a tendency to bring the case all the way up to the Supreme Court. The phenomenal figure of 34,137, which is the number of cases filed in the Supreme Court in the year 2008, clearly reflects this general tendency. Devoid of *certiorari* as in the US court system, parties can bring the case to the highest court freely without obtaining any approval from the court. Although one has to have certain legal grounds to file an appeal to the Supreme Court (as explained above in section 4.2 in the discussion on legal institutions) there is no way of stopping parties from filing an appeal. When this number of cases is divided by the number of Supreme Court Justices (13, excluding the Minister of the National Court Administration who does not adjudicate actual cases) it reaches the astounding number of 2625, which clearly shows the workload per Justice every year.

However, this can be seen as evidence that law is gaining ground in Korean society as a central mechanism of dispute resolution. More individuals are willing to sacrifice their time and energy to bring their disputes to court and consequently more disputes are resolved by virtue of law, instead of informal reconciliation. This may be a further justification for needing more lawyers in Korea. But it may also be a ground for fearing that more lawyers will aggravate the ongoing litigiousness in Korea. At any rate, the alleged abhorrence of Koreans towards litigation on the basis of a harmony-oriented, conflict-averse legal culture might be a misapprehension, based at least on these statistics.

**6.2 The uneasy position of Confucianism**

As mentioned earlier in the discussion of the historical context, Confucianism was the central ideology of the Joseon Dynasty, but its continuous influence in Korea seems to have diminished during the modernisation period. Traditional values which were not in line with Western legal ideas were excluded from the legal framework. However, some Confucian traditions were transplanted into statutory laws or customary laws. Confucian perspectives especially inspired many elements of Korean family law. Concepts such as *chinjok* (relatives), *cho* (a unit for counting the degrees between relatives) and *hoju* (head of the family) were introduced in the *Civil Code*. The *hoju* inherited the permanent position as head of the family, and women were prohibited from being appointed as a *hoju*. There were also statutes prohibiting marriage between those with the

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90 In a 2009 survey of adults aged 20 to 40 in Korea, Japan, China, India, Singapore, Malaysia, Australia and Hong Kong by Swiss Re, a reinsurance firm in Switzerland, 94 per cent of respondents in China and 92 per cent in India said they would support their aged parents. But a mere 46 per cent in Korea, 44 per cent in Australia and 32 per cent in Japan said the same. The media release for this survey is at [http://www.swissre.com/media/media_information/new_asia_pacific_survey_finds_smes_still_willing_to_take_risks.html](http://www.swissre.com/media/media_information/new_asia_pacific_survey_finds_smes_still_willing_to_take_risks.html).


same surname and family origin, called dongseong dongbon. Although Confucian patriarchy was upheld for decades, some of the old rules began to be dismissed either by legislation or court rulings. The Civil Code amendment for abolishing the hoju system passed the National Assembly in March 2005, and was totally replaced by new family relation registration system in July 2007. Art 809(1) of the Civil Code prohibiting marriage between dongseong dongbon was declared unconstitutional by the Constitutional Court in July 1997, for the reason that it ‘broadly restricts sexual self-determination which originates from the right to pursue happiness and especially the right to choose the spouse in marriage and . . . is nonconforming to the Constitution.’

However, there are other arguments concentrating on the bright side of the Confucian legal culture. Although the current stance of the public towards Confucianism is tilted to the negative side, there are also claims that Confucianism contributed to the development of modern Korea. According to this view, Confucianism was purported to be compatible with economic development, and even accelerated economic growth. Also, a relatively low frequency of violent crimes in Korea may be attributed to Confucianism. There are cases where traditional moral norms have been considered in court adjudications. For example, in a Supreme Court case in 1998, it was held that the owner of an apartment unit could not evict the tenants for failure to pay rent, where the tenants were the owner’s own elderly father and ailing brother who were unable to find employment due to their poor health. In this case the moral obligation of filial piety was imposed, showing that the Korean reality still requires Confucian principles in order to determine the outcome of some legal disputes.

7 New directions and trends

7.1 Facing globalisation

The development of Korean law was greatly influenced by Western law. But this did not necessarily result in the internationalisation of the Korean legal system. In general, legal professionals were engaged in domestic legal issues, and there were not many foreign lawyers. Legal education, the province of the NJE, did not extend to international legal issues. But as the Korean economy has become increasingly important in the global market, the Korean legal system has also come to embrace globalisation. Annually, the Supreme Court and the Public Prosecutor’s Office send a great number of judges and prosecutors abroad for

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95 C Hahm, op. cit., p. 277.
96 ibid.
97 Supreme Court Decision, 12 June 1998, 96Da52670.
98 See C Hahm, op. cit., p. 278.
further research and training. Major law firms are now involved with an increasing number of cross-border issues. The introduction of the law school system is likely to provide further momentum for the globalisation of legal academia and education.

The opening-up of the Korean legal service market can only accelerate this trend. In March 2004 the Korean Government submitted a proposal to the World Trade Organization that allows foreign law firms to open representative offices in Korea to consult on international and foreign law problems. Since then, the Korean Government has prepared for a gradual opening-up of the legal market. The turning point was the **Free Trade Agreement** (FTA) with the United States, signed by both Governments in June 2007. According to this agreement, the Korean legal market will open up in three steps. The first step is to allow US lawyers to provide counsel on US laws, and US law firms to open branch offices in Korea. But at this stage they are not allowed to hire or partner with Korean legal professionals. The second step, which should be taken within two years of the effective date of the FTA, is to allow US law firms to join with Korean law firms in order to deal with cases with both Korean and American issues. The third step, which should be taken within five years of the effective date of the FTA, is to allow US law firms to form partnerships with Korean law firms. US law firms may even hire Korean lawyers under certain conditions. The Korea–United States FTA is still pending in the legislative branches of both nations for approval. It is uncertain whether it will be finally approved by both countries but if it is, its impact on Korea’s legal market will be immense.

The initial step to open the legal market has already been taken. On 25 March 2009 the **Foreign Legal Consultant Act** (FCLA) was passed by the National Assembly, and became effective as of 26 September 2009. This was in response to ongoing demand for the opening-up of the Korean legal market. However, it helps open up the legal market only slowly. Instead of giving foreign lawyers and firms full access to Korea immediately, the FCLA permits foreign lawyers who have at least three years’ work experience in their foreign jurisdiction to provide consulting services on foreign law once they obtain approval from the Minister of Justice and register with the Korean Bar Association as a foreign legal consultant. The FCLA also allows a foreign legal consultant to establish a foreign legal consulting office in Korea. Although there were a quite number of foreign attorneys, mainly US lawyers, hired by Korean law firms to provide a foreign legal consulting service, there has been no registration system for these lawyers. They were technically not considered ‘lawyers’ under the past regime, since the **Attorney-at-Law Act** required that all lawyers be licensed and registered under the Act in order to practise, a requirements that not be met by foreign lawyers. The FCLA aims to bring foreign lawyers into the framework of the Korean legal system by giving them an official, yet different, status. It also has the goal of allowing foreign legal consultants to offer more accurate information to their client on where they are licensed and the scope of their service.

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However, it can be argued that this measure is directed at increasing regulation over foreign lawyers. Still, the FCLA is concerned with the mere initial stage of the opening-up of the legal market and may have no substantial impact on the legal market. Further steps are likely to be taken in the form of a treaty with other individual countries.

7.2 Tearing down the great wall of the judiciary

Pursuant to Confucian tradition, people have held the public sector, as opposed to the private sector, in high regard. This partly explains the throng of would-be lawyers wanting to become judges. Even private practitioners were more respected when they had public careers. The traditional attitude has contributed to the high prestige surrounding the Korean judiciary.

However, as mentioned earlier, the Korean judiciary has failed to sufficiently maintain the confidence of the general public. This had to do with the personnel structure of the judiciary. It was customary to select new judges from those who just had finished their training at the JRTI without undertaking other legal careers. After they were appointed as judges, many of them left the judiciary to become private practitioners, which often happened when they failed to be promoted to the next position in the judicial hierarchy. 100 Consequently, the judiciary was looking like a pyramid with plenty of young judges at the bottom and a few elderly Supreme Court Justices at the top. Especially in a society where elderly people are more respected, people felt uneasy about being tried by relative young judges. 101 It is not certain at this point how the Supreme Court will plan the judicial appointment system in the future. However, it is very likely that the Court will move towards enlarging and diversifying the selection pool, and strive to recruit more experienced lawyers.

The Supreme Court has also made efforts to enhance oral communication between judges and parties to litigation. 102 In the past, documents were at the centre of the Court's procedure. Judges were more focused on reviewing documents to understand the case than on listening to the oral arguments. Now the Court has become more dedicated to the oral proceedings, and to enhancing communication with the parties. The Court even encourages judges to film their own trials and review them, with the help of communication experts where necessary, in order to improve their communication skills.

The introduction of a modified jury system within criminal proceedings is also a symbolic movement toward judicial democracy. 103 The change was introduced in 2008 as part of reform measures aimed at promoting greater trust in the judicial

100 The average length of service period for retiring judges is only eight years and one month as of January 2009. See <http://www.thenews.com/view?ra=Sent0801m_View&corp=fnnews&arcid=0000921541805 &cDateYear=2009&cDateMonth=01&cDateDay=14> (in Korean).
101 The average age of Korean judges is 38.7, and 52.46 per cent of them are aged between 31 and 40 (as of January 2009), ibid.
system. This modified jury system is only applicable at the request of defendants who are being tried on charges of certain felonies, including murder, attempted murder, rape, kidnapping, or bribery over certain amount. The jury consists of five, seven or nine randomly selected citizens who are 20 years or older.\textsuperscript{104} The jury will hear a case, make a judgment and set a sentence. The most significant difference from the US jury system is that the jury's ruling is non-binding. Thus the final verdict still rests in the hands of a judge as it did in the past. However, the judge's ruling is likely to be respected by professional judges. It needs to be understood that Korea is at the experimental stage. The modified jury system will operate on trial for five years, after which a specially designated committee will reexamine its feasibility and desirability within the judicial system. Although the success of this new system remains to be seen, this reform is clearly a step forward in terms of enhancing citizen involvement as well as enhancing judicial awareness of the people involved in criminal procedures.

7.3 Coping with the information age

As in other countries, the advent of the internet has dramatically changed Korean society in multiple ways. Since the early stage of its development, Koreans have vigorously accepted the technology and the culture of the internet, and have an overwhelmingly positive attitude towards involvement with online activities. A highly homogeneous, dense population and a remarkably high broadband penetration rate have all contributed to the blossoming of the internet industry and the formation of various internet communities. While it is definitely benefiting people's lives, there is dark side to the internet revolution as well. With the increase in the flow of information online, copyright infringement and defamation within cyberspace are rife in Korea. From the policy aspect, there is a heated and controversial debate as to how far the government can step in to regulate these wrongdoings. Underlying the debate is a conflict of values, such as freedom of expression versus protection of morals and honour, or sharing of information versus protection of intellectual property. There are also legal battles concerning such internet-related disputes. At least at the Supreme Court level, the focus has been on the liability of internet service providers (ISPs) for wrongdoings committed by individual users. Two Supreme Court cases are noteworthy in this respect.

The first case, known as the 'Soribada case', is analogous to the Napster case in the United States.\textsuperscript{105} Soribada is the name of p2p software and a website that allows internet users to share music mp3 files. A civil suit was filed by the Recording Industry Association of Korea (RIAK) against Soribada administrators. This case was accepted by the lower courts and finally approved by the Supreme Court.

\textsuperscript{104} The number of jurors depends on the case. In a very serious case where capital punishment or life imprisonment is available, nine jurors sit as the jury.

Court. The Supreme Court found that the administrators of Soribada aided and abetted copyright infringements by failing to cautiously avoid assisting copyright infringers.\footnote{106}{Supreme Court Decision, 25 January 2007, 2005Da11626.} Criminal prosecution was also instigated, and the administrators were punished for the reason that they knowingly abetted copyright infringement by users.

The second case concerns online defamation.\footnote{107}{See generally Y Kwon, ‘Tortious Liability of Internet Service Provider for Defamation: A Korean Perspective’, Journal of Korean Law, vol. 5, no. 2, 2006, p. 121.} Since most ISPs have deeper pockets than defamers, who are hard to track down and may be judgment-proof even when they are identified, victims of online defamation have brought suits against ISPs instead of against defamers themselves.\footnote{108}{Ibid, pp. 121–2.} Thus there have been a number of cases concerning the liability of ISPs for online defamation.\footnote{109}{Ibid, pp. 128–30.} A recent Supreme Court decision,\footnote{110}{Supreme Court Decision, 16 April 2009, 2008Da53812.} the first of its kind to be handed down by the highest court, shows how the Justices agonised over balancing this clash between freedom of expression and freedom from defamation. In this case, where internet portals were sued for damages arising from defamation committed by individual users, the plaintiff argued that internet portals such as those owned by newspaper publishers and broadcasters should be held accountable for defamatory articles since the portals pick and post news items in their web pages to spread in cyberspace. In the case in question, the articles were about the plaintiff allegedly deceiving his girlfriend with a false promise of marriage, which led her to commit suicide after he broke his promise. The plaintiff asserted that he suffered grave mental distress by the articles and negative online comments. The Supreme Court issued a verdict in favour of the plaintiff by stating that a portal site that has engaged in actions similar to editing, such as actively choosing part of an article transmitted by media and positioning it in specific areas of the portal web page, has the duty of care to delete slanderous posts or block searches of the offending posts, even if not requested to do so by the victim. However, the concurring opinion pointed out that it is more reasonable to hold a ISP liable only if the ISP clearly knew of the existence of defamation by the request made by the victim and it was technically and economically feasible for it to take the relevant measures.\footnote{111}{Even though the concurring opinion asked for a stricter standard, it agreed with the majority that defendants should still be held liable in the case at issue.}

Another notable development is the criminalisation of internet users for their wrongdoings.\footnote{112}{See generally S Jong, ‘Criminalization of Netizens for their Access to On-Line Music’, Journal of Korean Law, vol. 4, no. 1, 2004, p. 58.} However, file-sharing and defamatory acts are still prevalent despite criminal sanctions against internet users. This phenomenon can be attributed to some aspects of Korean culture. Widespread file-sharing reflects the traditional Confucian perception of intangible academic or artistic works as public goods. Broad participation by laypeople in forming public opinion on
the internet, which often leads to online defamation, may be a counteraction to the offline taciturnity prevalent in Korean culture. In other words, people who were hesitant to speak out in public due to Korean cultural tradition are now expressing themselves somewhat excessively under the cloak of anonymity. But policy-makers and most people realise that the internet is no longer a new world where anybody can do anything they feel like without being curbed by offline laws. This issue became more serious when a renowned actress committed suicide in October 2008 following a large number of nasty and malicious comments on an internet bulletin board. This shocked all Koreans and politicians began raising their voices about reducing the effect of this dark side of the internet. How a balance between the competing values can be achieved is becoming one of the key issues confronting Korea's legal sector.

8 Conclusion

A recurring theme in the preceding description and analysis is the constant effort to bridge the gap between Korean substance and Western form. This tension has been severe in the past, and is ongoing, as shown by the law school and modified jury reforms, and the courts' continuing efforts to mediate the legal consciousness of the people and the norms adopted from the Western world. It is quite intriguing to see how this dynamic tension has played its role in the shaping of law and the legal system in Korea. It is hoped that this chapter will serve as a useful reference point for those wishing to further delve into Korean law.

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