Journal of Korean Law

Vol. 9, No. 1, December 2009

Law Research Institute
Seoul National University

Journal of Korean Law
Vol. 9, No. 1, December 2009

Published by
Law Research Institute
Seoul National University

Printed by
Seoul National University Press
Seoul, Korea

First Printing: December 31, 2009

INFORMATION ABOUT THE JOURNAL OF KOREAN LAW

The Journal of Korean Law is published twice annually, on June 30 and December 31, by Law Research Institute of Seoul National University. Please address all correspondence to:

Journal of Korean Law
School of Law
Seoul National University
599 Gwanak-ro, Gwanak-gu
Seoul 151-743, Korea
Phone: +82-(0)2-880-6867
FAX: +82-(0)2-876-2160
E-mail: jkl@snu.ac.kr
Homepage: http://www.snujkl.org

Subscriptions. Annual subscriptions to the *Journal of Korean Law* are available for ₩40,000 for domestic subscribers and US$50.00 for foreign subscribers. Price includes surface shipping costs, and is subject to change without notice. Subscriptions are automatically renewed unless notification to the contrary is received. Prepayment is required. Please send payment to the address above. Checks should be made payable to Seoul National University.
Copies of the *Journal of Korean Law* may also be purchased or subscribed for from the following:

Kyobo Book Centre
1-1, Jongno, Jongno-gu,
Seoul 110-714,
Korea
homepage: <http://www.kyobobook.co.kr>

William S. Hein & Co., Inc.
1285 Main Street,
Buffalo, NY 14209-1987
U.S.A.
homepage: <http://www.wshein.com>

Postmaster. Please send address changes to the *Journal of Korean Law*, School of Law, Seoul National University, 599 Gwanak-ro, Gwanak-gu, Seoul 151-743, Korea.

EDITORIAL POLICY

MANUSCRIPT SUBMISSION

The *Journal of Korean Law* assumes that all authors listed in a manuscript have agreed with the following policy on submission of manuscripts.

Except for renegotiated secondary publication, manuscripts submitted to the Journal must be previously unpublished and not be under consideration for publication elsewhere. The *Journal of Korean Law* invites the submission of unsolicited manuscripts. Please address manuscripts to the Editor-in-Chief, Journal of Korean Law. Articles of less than 10,000 words are preferred. All submissions should be accompanied by a cover letter and a brief abstract. The abstract should be concise, less than 200 words, and describe concisely the purpose, methods, and argument of the study. Up to ten keywords should be listed at the bottom of the abstract to be used as index terms. All necessary contact information should also be included. The *Journal* strongly encourages contributors to email their manuscripts in Microsoft Word format to jkl@snu.ac.kr. We regret that manuscripts cannot be returned.

MANUSCRIPT FORMATTING

The manuscripts should be written in typical law journal style. They must be analytic and well-supported with citations to authority. Articles published in the *Journal* are generally twenty to forty pages in length. Citations in manuscripts should appear in footnotes, not endnotes, and follow The Bluebook: A Uniform System of Citations (18th ed. 2005). The *Journal* also encourages the use of gender-neutral language.

PEER REVIEW PROCESS

The *Journal of Korean Law* reviews all the received materials. Manuscripts are sent to three most relevant investigators for review of the contents. The editor selects peer referees by recommendation of the Editorial Board members or from the specialist database owned by the Editorial Board. For review, names and the affiliations of the authors are blinded. Under any circumstances, the identities of the referees will not be revealed. Acceptance of the manuscript is decided, based on the critiques and recommended decision of the referees. If the manuscript passes through the peer review process, it is still subject to editing, cite-checking, and formatting by the editors of the *Journal* prior to publication. Authors are expected to provide copies of sources as needed and to respond to editing requests promptly. Once accepted, original articles will be published within six months.

COPYRIGHT

ISSN 1598-1681

Journal of Korean Law

Vol. 9, No. 1, December 2009

|CONTENTS|

Journal of Korean Law | Vol. 9, 1-25, December 2009

Monitoring of Corporate Groups by Independent Directors

*A.C. Pritchard**

Abstract

Both the United States and Korea have reformed their corporate governance in recent years to put increasing responsibilities on independent directors. Independent directors have been found to be an important force protecting the interests of shareholders when it comes time to make certain highly salient decisions, such as firing a CEO or selling the company. This article compares the role of independent directors in the US and Korean systems. I argue that the US may have placed regulatory burdens on independent directors that they are unlikely to be able to satisfy, given their part-time status. By contrast, in the chaebol *system of Korea, independent directors may have a critical role to play in limiting self dealing by controlling shareholders. Given the dominance of these controlling shareholders in the Korean economy, independent directors will need strong backing to be effective in protecting the interests of public shareholders.*

Independent directors have become a popular "cure-all" in the United States for whatever the latest malady ailing the modern corporation happens to be. Whenever a corporation has found its way into the headlines as the subject of the scandal *du jour*, it is overwhelmingly the case that it is the managers who are caught with their fingers in the till, having manipulated the numbers, rolling the dice with the shareholders' money, or otherwise abusing the trust of shareholders and other corporate constituencies. They are, after all, the ones in charge of the day-to-day operations of the company. All too frequently the managers, who have charged some outrageous perk to the corporation's bill, or who have relabeled an expense as a capital expenditure, are at the very top levels of the corporate hierarchy, perhaps even serving on

* Frances and George Skestos Professor of Law, University of Michigan. I would like to thank the Korea Development Institute for financial support and participants at the Korea Development Institute Conference on the Corporate Governance of Group Companies, in particular Joon Park, for helpful comments on an earlier draft of this article. Wonjin Choi provided very helpful research assistance. Any remaining mistakes are mine alone.

the board. Immunity from greed, fear, and other weaknesses of character are apparently not required to advance to the top of the corporate hierarchy.

It is the venality at the very top that most offends. Given the lofty levels of compensation that CEOs in the United States typically receive, it is hard for the average person (or more importantly, the average politician) to understand the desire for further aggrandizement and reluctance to accept responsibility for poor performance. One suspects that sense of outrage at the abuse of trust is mirrored, and perhaps magnified, inside the boardrooms of the corporations caught up in the wrongdoing. The directors who have placed their confidence, and to some extent their reputations, in the hands of the CEO (who generally will also serve as chairman of the board) are likely to feel a sense of betrayal as well as outrage. The outside directors are probably not the last to know, but they may take the most personal offense at the abuse.

How natural, then, is the instinct of policymakers confronted by corporate wrongdoing to want to harness that sense of betrayal and outrage inside the boardroom to make better citizens out of corporations and their officers. If only we could shift power from the inside directors to the outside directors, all would be well. The insiders, most offensively the CEO/Chair, may have been complicit in the wrongdoing. But as for the outside directors, generally the worst that can be said is that they did not know of the accounting shenanigans or outsized bet. Perhaps shifting power to the latter, relatively innocent group, we could thwart the wrongdoing before it even gets started, or at least root it out before it begins to snowball into a major scandal. Conflict of interest is the problem, goes the story, so shifting authority to individuals whose judgment is unclouded by conflict will greatly reduce the embarrassing problems that keep appearing in the headlines. Agency costs will be kept in check by recruiting faithful agents as independent directors to monitor the insiders; politicians and bureaucrats will avoid the awkward questions that inevitably arise out of corporate scandal: "Why didn't you catch this sooner? Why wasn't there a law to prevent this? What are you going to do to help these investors who have lost all this money?"

The American faith in independent directors appears to have attracted adherents globally — the long-term trend has been toward greater director independence around the world. I will focus here, however, on two countries: Korea and the United States. Both countries have turned to corporate governance reform in the wake of crises. For Korea, the impetus was an

economy-wide financial crisis that led to the intervention of the IMF in 1998. Weaknesses of corporate governance were widely perceived as exacerbating the financial shock to the Korean economy.[1)]

In this regard, the recent Korean experience echoed the American experience with the market crash of October 1929, which was popularly blamed for the subsequent widespread economic hardship that accompanied the Great Depression. That episode led to the first federal securities laws in the United States, the Securities Act of 1933 and the Securities Exchange Act of 1934. Those laws created the essential framework of the securities regime that still governs in the U.S. In adopting those laws, however, the 1930's Congress generally avoided wholesale incursions into the internal governance of corporations, leaving that area generally for the states (with the limited exception of disclosure relating to proxies). For the United States, the impetus to corporate governance reform was the collapse of high-tech bubble, which saw the tech-laden Nasdaq index plunge from nearly 5000 to 2000 in a year's time.[2)] That collapse was accompanied by a salient scandal which fueled the drive to reform. A series of high-profile accounting imbroglios (e.g., Enron, Worldcom, Healthsouth, etc.), reflected any number of violations of existing disclosure and anti-fraud requirements. As a result, the U.S. has witnessed a number of criminal indictments and convictions for those disclosure violations. Prosecution, however, was not deemed a sufficient response (except perhaps by those indicted), so the accounting scandals have also produced a number of governance reforms which apply to the guilty and innocent alike. None of these reforms seem to have helped with the next crisis, which stemmed from inadequate risk management, perhaps fueled by poorly structured incentive compensation that rewarded executives of financial institutions for placing enormous wagers on the direction of the housing market.

Korea is further along from its motivating financial crisis. It has made great strides during the intervening period in bringing its corporate governance requirements up to international standards. Korea, infected like other

---

1) Hwa-Jin Kim, *Living with the IMF: A New Approach to Corporate Governance and Regulation of Financial Institutions in Korea*, 17 BERKELEY J. INT'L L. 61, 69 (1999).

2) The Nasdaq closed at 5,048.62 on March 10, 2000 and 1,923.38 on March 12, 2001, *available at* http://finance.yahoo.com.

countries by the crisis in the U.S., must now face the question of whether it has renewed its appetite for governance reform. Are further reforms needed? If the answer is yes, does Korea have the political will to finish the job of reforming its governance standards? Has Korea done enough to prevent the fraud next time?

The United States by contrast, already boasted governance standards — arising from a combination of state corporate law, exchange listing standards, and best practices — that were among the most stringent in the world when it faced its spate of the accounting scandals. Nonetheless, those governance controls proved inadequate to prevent the sort of attention-getting frauds that typically lead to corporate and securities fraud reform. The regulatory backlash in the United States has led to the enactment of best practices as a matter of federal law in the hope that doing so will help prevent fraud in the future. Were those toughened standards needed, or were they overkill? Will the United States' rigorous new standards prevent the fraud next time?

Obviously these two countries' reform drives have significantly raised governance standards in both countries. More interesting, perhaps, is the fact that the gap between the two has narrowed. Korean governance standards — at least on paper — have many similarities to the standards now in place in the United States. This facial similarity between the governance regimes in the two countries overlooks one critical fact — the corporate environment varies dramatically between Korea and the United States. Although the Korean economy continues to be dominated by the *chaebol* groups of affiliated companies, the American economy is dominated by publicly-held companies with widely dispersed shareholders. One question raised by Korea's move to upgrade to international best practices is whether the practices appropriate for a country like the United States, which has very few controlling shareholders, can be translated into Korea's complex web of corporate groups. What implication does this wide divergence in the two countries' corporate environments have for determining the appropriate standards for corporate governance? Most importantly for purpose of looking at the role of outside directors, does independence have the same meaning and purpose in the context of a corporate group? Does the notion of independence need to be adjusted to fit into a group context? Should directors' independence be measured with respect to the group as a whole, or only with respect to the individual affiliated company within the group?

In Parts 1 and 2 of this paper, I discuss the current state of corporate governance in Korea and the United States and the recent changes to the two regimes. In Part 3, I compare the very different governance problems faced in those two countries and analyze whether the independent director is the answer to the problems faced in either country. I conclude that the independent director is unlikely to eliminate fraud and self-dealing from the American capital markets, as it proponents may have hoped. I also conclude, however, that the use of independent directors, if properly bolstered by other governance measures, could help mitigate the problems fostered by the *chaebol* system in Korea.

Part 1: Corporate Governance in Korea

1. The Dominance of the Chaebol

The defining characteristic of corporate governance in Korea is the predominance of *chaebols*, a group of affiliated firms, which although they are legally independent, are nonetheless tied together by cross shareholdings.[3] The group is commonly dominated by a controlling shareholder or family. Although common shares carry one vote per share in Korea (dual class shares are prohibited for now[4]), the strategic use of cross ownership results in the controlling shareholder exercising voting power over the affiliated companies substantially greater than the controller's economic rights. Kim, Lim and Sung report a startling gap of median voting rights of 74.59 percent for controlling shareholders of *chaebol* firms, but only 12.95 percent median cash flow rights for those shareholders.[5]

---

3) Cross shareholding is not permitted between two firms, but this restriction is readily circumvented through the use of three or more firms. Sea Jin Chang, *Ownership Structure, Expropriation, and Performance of Group-Affiliated Companies in Korea*, 48 ACAD. MGMT. J. 238, 238 (2003).

4) SANGBEOP [KOREAN COMMERCIAL CODE] art. 369-1. The Ministry of Justice has drafted legislation that would allow dual-class stock.

5) Woochan Kim et al., *What Determines the Ownership Structure of Business Conglomerates?: On the Cash Flow Rights of Korea's Chaebol*, ECGI — FINANCE WORKING PAPER NO. 51/2004; KDI SCHOOL OF PUB POLICY & MANAGEMENT PAPER NO. 04-20 (2004), at 22, *available at* http://ssrn.com/abstract=594741.

In part to maintain this control, *chaebol* firms rely heavily on debt.[6] Indeed, this is the principal benefit afforded by affiliation with the *chaebol* group: affiliated firms have greater access to financing than non-*chaebol* firms, the result of cross-debt guarantees among *chaebol* member firms.[7] Moreover, the importance of the *chaebol* to the Korean economy means that they were historically "too big to fail," enjoying the implicit guarantee of a bailout from the government.[8] That guarantee now appears to have been withdrawn, as evidenced by the demise of the Daewoo group. Perhaps the recently enacted prohibition of loans and guarantees to specially-related persons will put pressure on the *chaebol* to reduce their debt levels.[9] The available evidence suggests that substantial improvement has been made already, with the debt load of the *chaebol* substantially reduced from where it stood at the time of the IMF crisis.[10]

2. Evidence on the Effect on Minority Shareholders

Unfortunately, the benefits afforded by greater access to debt carries with it substantial costs for equity holders. The "separation of ownership and control" enjoyed by the controlling shareholders of the *chaebol* has important implications for minority shareholders in Korean firms. Although this separation of cash flow rights from control rights may reduce the cost of debt (perhaps because it aligns the interests of default-averse creditors with the interests of under-diversified controlling shareholders), it may also leave

---

6) Jae-Seung Baek et al., *Corporate Governance and Firm Value: Evidence from the Korean Financial Crisis*, 71 J. FIN. ECON. 265, 267 (2004) (the average debt to total assets ratio in the top 30 *chaebol* firms was 77.18% in 1993-1998).

7) Hyun-Han Shin & Young S. Park, *Financing Constraints and Internal Capital Markets: Evidence from Korean 'Chaebols'*, 5 J. CORP. FIN. 169, 172-73, 190 (1999).

8) Curtis J. Milhaupt, *Privatization and Corporate Governance in a Unified Korea*, 26 J. CORP. L. 199, 207 (2000).

9) Cross-debt guarantees of *chaebol* group companies are tightly regulated by law. DOKJEOMGYUJE MIT GONGJEONGGEORAE E GWANHAN BEOPNYUL [KOREAN MONOPOLY REGULATION AND FAIR TRADE ACT], art. 10-2. I am indebted to Joon Park for this point.

10) According to the analysis of the Financial Supervisory Service, the largest five *chaebol* groups reduced their average total liabilities-to-equity ratio from 352% (December 31, 1998) to 125% (December 31, 2002); other *chaebol* groups reduced their average ratio from 427% (December 31, 1998) to 172% (December 31, 2002).

minority shareholders vulnerable to expropriation by controlling shareholders. The directors charged with protecting those minority shareholders are scant protection: "*chaebol* affiliates' boards of directors are generally filled with insiders and friends of *chaebol* families."[11] Thus, the discretion of the controlling shareholder is largely unchecked by the formal authority supposedly held by the board.

There is considerable evidence of that controlling shareholders use that discretion to appropriate wealth from the minority. For example, minority shareholders in *chaebol* firms typically lose out when the firm makes an acquisition, but the controlling shareholder benefits.[12] Controlling shareholders also appear to manipulate their ownership interests in group firms to concentrate their economic rights in the most profitable members of the group.[13] Conversely, controlling shareholders may reduce their equity exposure in group members firms that have provided debt guarantees to more risky firms within the group.[14] So the greater access to debt that *chaebol* firms enjoy may again come at the expense of minority shareholders.

This divergence between control and economic rights may also manifest itself in diminished profitability. Controlling shareholders in *chaebol* groups may be more concerned with avoiding losses to their under-diversified wealth than they are with maximizing the profits of the firms affiliated with the group. Minority shareholders, by contrast, are more likely to be fully diversified (and therefore effectively risk-neutral) and less likely to have equity holding in each of the members of the group. There is evidence that the ownership structure of the *chaebol* may hurt profitability. For example, Joh shows that *chaebol* firms experienced lower operating profits during the pre-crisis period.[15] Monitoring by the controlling shareholder appears to promote the interests of the group as a whole, not the firm for which the individual works. So top executive turnover in *chaebol* firms appears to be unrelated to

---

11) Chang, *supra* note 3, at 241.

12) Kee-Hong Bae et al., *Tunneling or Value Added? Evidence from Mergers by Korean Business Groups*, 57 J. FIN. 2695, 2737 (2002).

13) Kim et al., *supra* note 5, at 30; Chang, *supra* note 3, at 250.

14) Chang, *supra* note 3, at. 242.

15) Sung Wook Joh, *Corporate Governance and Firm Profitability: Evidence from Korea before the Economic Crisis*, 68 J. FIN. ECON. 287, 318-19 (2003); Terry L. Campbell & Phyllis Y. Keys, *Corporate Governance in South Korea: The Chaebol Experience*, 8 J. CORP. FIN. 373, 389 (2002).

firm-level performance, whereas it is significantly related for non-*chaebol* firms.[16] In addition, executive compensation correlates with stock-market returns and return on assets for non-*chaebol* firms, but there is no significant relation between these performance measures and executive compensation for *chaebol* firms, despite the fact that *chaebol* firms pay their executives more.[17]

Not surprisingly, the stock market appears to recognize this risk of abuse by the controlling shareholders of *chaebol* firms: Baek, Kang & Park find that firms in which the controlling shareholders' voting rights exceed his economic rights had significantly lower returns during Korea's financial crisis.[18] By contrast, firms with the largest non-managerial blockholder concentration experience significantly greater stock returns during the crisis.[19] These findings suggest that concentrated ownership is not the problem; it is the separation of control from cash flow entitlements. In addition, transparency helps mitigate the problem; firms with cross-listed ADRs (thereby subject to more stringent disclosure regimes) and firms with substantial foreign institutional investment also enjoyed significantly less negative returns.[20] Monitoring of management by large investors — without the risk of expropriation by the controlling shareholder — benefits *all* of the investors.

3. Reforming the Chaebols

Reforming the corporate governance of the *chaebol*s to discourage misappropriation from minority shareholders has been a principal focus of the government since the financial crisis of 1997-1998. The IMF and World Bank identified weak corporate governance as an important cause of the crisis.[21]

---

16) Campbell & Keys, *supra* note 15, at 390.

17) Takao Kato, Woochan Kim & Ju Ho Lee, *Executive Compensation, Firm Performance and Chaebols in Korea: Evidence from New Panel Data*, 15 PACIFIC-BASIN FIN. J. 36 (2007).

18) Baek et al., *supra* note 6, at 310. Interestingly, the lower stock market returns of the *chaebol* firms were not matched by lower accounting profitability during the crisis — *chaebol* firms had greater profits (although the difference is not statistically significant) than their non-*chaebol* counterparts. *Id.* at 307.

19) *Id.* at 302.

20) *Id.* This fact is noteworthy in light of the fact that the flight of foreign capital played an important role in exacerbating the effects of the financial crisis. Milhaupt, *supra* note 8, at 295, 297.

21) Joongi Kim, *Recent Amendments to the Korean Commercial Code and Their Effects on*

Prior to these reforms,

> Principal shareholders commanded all facets of corporate affairs, including board decisions, the selection of directors or auditors, and shareholder meetings. Principal shareholders single-handedly appointed directors and auditors. Candidates were selected from company employees, with one of the most important criteria being personal loyalty to the principal shareholders.[22)]

Now, directors owe an explicit fiduciary duty to the corporation.[23)] In addition, thresholds have been lowered for the bringing of derivative suits and removing directors.[24)] The former change has resulted in a significant increase in the number of derivative actions.[25)]

Large firms (i.e., those with assets greater than 2 trillion won) are singled out for especially stringent corporate governance requirements. Large firms must draw at least half of their directors from outside the firm, have an audit committee with at least two-thirds outside directors, and have a nominating committee for outside directors.[26)] Chaebol firms have also received special attention. Principal shareholders who act as de facto directors or otherwise influence company management now owe a fiduciary duty to the corporation, whether or not they serve formally as directors.[27)] Moreover, conflict of interest transactions involving the firms in the groups with more than 5 trillion of total assets must be approved by the board of directors.[28)] There is evidence that a similar provision adopted by the SK Group in its articles of incorporation has been effective in preventing at least some overreaching by the controlling shareholder.[29)] It is worth noting that the provision in question may have been adopted as a result of pressure from foreign investors.[30)]

International Competition, 21 U. PA. J. INT'L ECON. L. 273, 275(2000).

22) *Id.* at 279-80.

23) KOREAN COMMERCIAL CODE, art. 382-3.

24) *Id.*, art. 385 & 403.

25) Kim, *supra* note 21, at 295.

26) KOREAN COMMERCIAL CODE, art. 542-8 & 542-1.

27) *Id.*, art. 401-2.

28) KOREAN MONOPOLY REGULATION AND FAIR TRADE ACT, art. 11-2.

29) Kim, *supra* note 21, at 325.

30) *Id.*, at 324-25.

These requirements appear to have had some effect, as *chaebol* firms do not have significantly worse governance than other Korean firms.[31] There is evidence that improvements in corporate governance have a real payoff — Black, Jang, and Kim find that better corporate governance correlates with significantly greater market valuation.[32] For example, having a majority of outside directors correlates with a roughly 40% greater share price.[33]

To summarize, the main challenge facing the Korean system of corporate governance is the predominance of the *chaebol* system. Korea has made great strides over the last few years to try and bolster the protections afforded to minority shareholders, but more must be done. I will turn to that topic in Part 3.

Part 2: Corporate Governance in the United States

1. Dispersed Public Ownership

The pattern of corporate ownership in the United States differs substantially from the one found in Korea. Controlling shareholders, while not unheard of, are the exception rather than the rule. The typical ownership pattern in the United States is one of dispersed public ownership, with no single shareholder holding more than a small percentage of the company's shares. The need for diversification and certain regulatory restrictions ensure that even institutional investors will not ordinarily hold more than a small bloc of shares in any one company. Moreover, cross-ownership is relatively rare. American companies own shares in other companies, but they are typically a joint venture between companies. More typically, a parent corporation will own 100% of the shares of a subsidiary, essentially obviating conflict of interest concerns, or different businesses within a corporation will simply be operated as separate operating divisions, without the formality of separate incorporation. (The downside of

---

31) Bernard S. Black, Hasung Jang & Woochan Kim, *Predicting Firms' Corporate Governance Choices: Evidence from Korea*, 12 J. CORP. FIN. 660, 677 (2006).

32) Bernard S. Black, Hasung Jang & Woochan Kim, *Does Corporate Governance Predict Firms Market Values? Evidence from Korea*, 22 J. L. ECON. & ORG. 366 (2006).

33) *Id.*

the latter arrangement, of course, is that all of the company's assets will be placed at risk if one of the operating divisions sustains liabilities that it cannot satisfy on its own.)

In this system of dispersed public ownership, the principal concern for abuse of power by those in control is not the risk posed by controlling shareholders, but rather, the potential for overreaching by managers. Given the dispersion of ownership, the voting mechanism will only be a weak check on managerial abuse and incompetence. Managers (particularly CEOs) in practice have a great deal of say over who will be named to the company's board, so the ability of the shareholders to affect the company's direction through their power to elect directors will be diffuse at best. Recognizing these weaknesses in direct accountability to widely dispersed shareholders, the corporate governance regime in the United States aims to protect the interests of largely powerless shareholders from overreaching by managers. Controlling shareholders are a concern, but a secondary one. The principal role of independent directors in the corporate regime of the United States is to restrain the CEO and other managers.

2. Evidence on the Effect of Independent Directors

What does the available evidence from the United States show about the success of independent directors in restraining managers? Most notably, on the subject presumably of greatest interest to shareholders, there is no evidence to show that more independent boards correlate with better firm performance.[34] So shareholders cannot rely on independent directors to bolster the bottom line. This should hardly be surprising — if outside directors were a magic elixir, somehow boosting corporate performance, we would hardly need governance mandates to encourage greater board independence. Companies would bring more independent directors on board purely out of self-interest.

Independent directors do appear to have an effect, however, at certain critical junctures for the corporation. Those junctures arise when the board is

34) Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 259 (2001).

asked to make certain high stakes decisions. Being an outside director has historically been a part-time job, but at times it can capture the director's full-time attention. More independent boards are more likely to replace the CEO after a period of poor performance.[35] This finding suggests that independent directors take this paramount monitoring task seriously. Turning to other salient situations likely to capture the focus of independent directors, more independent boards generally extract higher takeover premia in takeovers.[36] Companies adopting "poison pill" shareholder rights plan experience a positive stock price reaction if their board is majority independent, but a negative reaction otherwise.[37] What explains these findings relating to takeovers? Perhaps more independent boards limit the ability of target company managers to extract side payments from potential acquirers, which the pill may facilitate. On the other side of the fence, acquiring companies announcing takeovers experience *less* of a drop in their stock price if they have a majority of independent directors.[38] Independent directors may check excessive managerial optimism and a penchant for empire building.

These findings that independent directors guide salient decisions are promising. The evidence on whether more independent directors contribute to more accurate financial reporting, however, is mixed. On the one hand, board independence does not appear to have any significant effect on a company's exposure to securities fraud class actions, one of the principal unfortunate consequences stemming from inaccurate financial reporting in the United States.[39] On the other, there is evidence that weak governance, including a lack of board independence, is associated with enforcement actions by the Securities and Exchange Commission.[40] This finding is

---

35) Michael S. Weisbach, *Outside Directors and CEO Turnover*, 20 J. FIN. ECON. 431, 458 (1988).

36) James F. Cotter et al., *Do Independent Directors Enhance Target Shareholder Wealth During Tender Offers?*, 43 J. FIN. ECON. 195, 216 (1997).

37) James A. Brickley et al., *Outside Directors and the Adoption of Poison Pills*, 35 J. FIN. ECON. 371, 388 (1994).

38) John W. Byrd & Kent A. Hickman, *Do Outside Directors Monitor Managers? Evidence from Tender Offer Bids*, 32 J. FIN. ECON. 195, 219 (1992).

39) Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J. L. ECON. & ORG. 627, 642 n.14 (2007).

40) Patricia M. Dechow et al., *Causes and Consequences of Earnings Manipulation: An Analysis of Firms Subject to Enforcement Actions by the SEC*, 13 CONTEMP. ACCT. RES. 1, 21-22 (1996); Mark S. Beasley, *An Empirical Analysis of the Relation Between the Board of Director Composition and*

confirmed in a study looking at a broader range of fraudulent behavior.[41] These studies, however, rely on data that may have little bearing on current practice because governance practices in the United States have considerably less variation today than they did ten to twenty years ago. Virtually all of the boards of American public companies are now "above average," at least when compared with the governance practices of a generation ago.

3. Reforming the Role of Independent Directors

The corporate governance reforms in the United States have not been directed toward areas in which independent directors have been shown to have a positive influence on shareholder returns. Instead, the reforms are pinned to the hope that independent directors can encourage more accurate financial reporting. That focus reflects the scandals that give rise to the impetus for reform. The reforms came in response to a series of accounting scandals at large public companies, most notably Enron, Worldcom, Adelphia and Tyco. Unlike Korean crisis of 1997-1998, the stock market decline that accompanied these headlines of scandal did not have any appreciable effect on the overall economy. Notwithstanding the limited economic impact of these scandals, the widespread wrongdoing at those prominent firms raised concerns that it might reflect a broader pattern of misleading financial statements and self-dealing. Among the concerns raised were: (1) the perception that managers focused too narrowly on showing earnings growth from quarter to quarter, which may have created a temptation to shade the numbers in order to show that growth; (2) the closely-related concern that incentive-based compensation, which was supposed to align managers' interests with those of shareholders, again may have tempted managers to play fast-and-loose with accounting-based measures of performance; and (3) a limited form of self-dealing involving not related-party transactions of the sort seen in the *chaebol*, but instead enormous pay packages to managers, seemingly unchecked by too quiescent independent directors.

Financial Statement Fraud, 71 THE ACCT. REV. 443, 463 (1996).

41) Hatice Uzun et al., *Board Composition and Corporate Fraud*, 60 FIN. ANALYSTS J. 33, 41 (2004).

Politicians quickly stepped in to exploit the opportunity created by this very public airing of corporate dirty laundry. The Sarbanes-Oxley Act of 2002 was the political response to the accounting crisis in the United States.[42] Not surprisingly, given that the impetus for legislation arose out of accounting problems, the governance reforms adopted in response to the accounting scandals revolve around the relation of public companies to their external auditors. Those external auditors were perceived to be lacking in the independence. A variety of restrictions were adopted to foster auditor independence; the reform involving the board was to make the external auditors solely accountable to independent directors.

Although anxious to be seen "doing something" about corporate misbehavior, Congress took pains to avoid responsibility for the details of the reforms to be adopted. Instead of requiring that audit committees be made up solely of independent directors, Congress instead directed national securities exchanges to adopt listing standards requiring wholly-independent audit committees.[43] The distinction between laws and listing standards is largely cosmetic, given that changes in listing standards are subject to approval by the Securities and Exchange Commission. In effect, the delegation of this task to the exchanges was a *de facto* takeover of an important aspect of corporate governance from state corporate law (its traditional domain in the American system). The takeover was done, however, with a self-regulatory veneer, useful because the exchanges have imposed governance standards, of varying degrees of intrusiveness, for decades.[44] Those listing standards now require not only that all members of the audit committee be independent (as directed by Congress), but also require that those members be "financially literate" or possess "financial sophistication."[45] Sarbanes-Oxley also requires that the independent audit committee have exclusive authority over the retention and compensation of auditors.[46] Auditors also must report to the audit committee material accounting decisions.[47] Finally, the law establishes "whistle-

42) Pub. L. No. 107-204, 116 Stat. 745 (2002).

43) Sarbanes-Oxley Act, Pub. L. No. 107-204, § 301, 116 Stat. 745 (2002).

44) Standards Relating to Listed Company Audit Committees, Exchange Act Release No. 34-47654 (April 25, 2003).

45) NYSE Listed Company Manual § 303A.07; Nasdaq Rule 4350(d)(2).

46) Sarbanes-Oxley Act, § 301, *supra* note 43.

blowing" procedures for employees to report concerns about accounting to the audit committee.[48)]

The requirement of the independent audit committee supplements the requirement that the board of directors have a majority of independent directors. Both the New York Stock Exchange and Nasdaq listing standards now mandate that independent directors predominate.[49)] In and of itself this requirement is uncontroversial, but the definition of independence is circumscribed by a number of relationships with the companies which are specified as inconsistent with independence.[50)]

A more direct challenge to the power of the CEO is reflected in changes in the selection of directors. Nomination of directors is placed in the hands of independent directors: the NYSE requires a nominating committee consisting solely of independent directors, while the Nasdaq allows a choice between such a committee and nomination by a majority of the independent directors serving on the board as a whole.[51)] The exchanges split similarly on the question of CEO compensation: the NYSE requires a compensation committee consisting solely of independent directors, while the Nasdaq again gives a choice between such a committee and allowing a majority of independent directors to determine compensation.[52)] The division between the NYSE and Nasdaq reflects the difficulty that some smaller companies, largely concentrated on the Nasdaq, may have in finding enough qualified independent directors to serve all the mandated committees. The requirements relating to CEO compensation probably codify, in large part, existing practice: CEO compensation would be subject to entire fairness review by the courts if not ratified by the independent directors.

All of these committee requirements have put substantial new responsibilities on independent directors; compliance with all of these new requirements has forced independent directors to work more. Not surprisingly, companies have been forced to pay correspondingly more for

47) *Id.*, § 204.
48) *Id.*, § 301.
49) NYSE Listed Company Manual § 303A.01; Nasdaq Rule 4350(c)(1).
50) NYSE Listed Company Manual § 303A.02(a); Nasdaq Rule 4200(a)(15).
51) NYSE Listed Company Manual § 303A.04(a); Nasdaq Rule 4350(c)(4)(a).
52) NYSE Listed Company Manual § 303A.05(a); Nasdaq Rule 4350(c)(3)(a).

independent directors' services.[53] The trend is unlikely to abate; the recent subprime crisis has brought calls for a greater role by independent directors in risk management.[54] Given these greater responsibilities, boards may have to expand to accommodate the greater work load. Expansion of the board, however, may be bad news for investors, as larger boards correlate with weaker firm performance.[55]

Part 3: The Role of Independent Director in Korea and the United States

1. Korean and United States' Independent Directors Compared

The table below summarizes the recent reforms relating to independent

	Korea	United States
Board	> 50% independent[56]	> 50% independent[57]
Audit Committee	Required 67% outside directors and non-outside director member must satisfy statutory independence test[58] Must have at least one finance or accounting expert[59]	Required 100% independent directors[60] Must possess "financial sophistication" or "financial literacy"[61] Auditors must report to audit committee[62]

53) Towers Perrin, *Compensation for Corporate Directors Rose Modestly in 2008*, *available at* http://www.towersperrin.com/tp/showdctmdoc.jsp?country=global&url=Master_Brand_2/USA/News/Monitor/2009/200910/mon_article_200910c.htm (reporting decline in director compensation in 2008 after yearly increases of 10%).

54) Press Release, National Association of Corporate Directors Launches Campaign to Strengthen Corporate Governance (Mar. 24, 2009), *available at* www.nacdonline.org/DirectorChallenge.

55) David Yermack, *Higher Market Valuation of Companies with a Small Board of Directors*, 40 J. FIN. ECON. 185, 209 (1996).

56) KOREAN COMMERCIAL CODE, art. 542-8.

57) NYSE Listed Company Manual § 303A.01; Nasdaq Rule 4350(c)(1).

58) KOREAN COMMERCIAL CODE, art. 542-11 & 415-2.

59) *Id.*, art. 542-11.

	Korea	United States
Nominating committee	Required for outside directors ≥ 50% independent[63]	Required 100% independent directors on committee or majority of independent directors[64]
Compensation committee	Not required	Required 100% independent directors or majority of independent directors[65]
Related-party transactions	Board approval required[66] Loans and guarantees prohibited (except for certain limited circumstances)	Independent directors' approval required (otherwise subject to legal challenge)[67] Loans to officers prohibited[68]
Cumulative voting	Required absent opt out in charter; many firms have opted out[69]	Permissible, but not required and not common[70]

directors for large, public firms in Korea and the United States discussed above.

Placing the two countries reforms side-by-side in the chart highlights the fact that Korea's corporate governance provisions, by and large, have more in common with the requirements in the United States than differences. One might conclude from this overall similarity, and given their relative states of capital market development, that both countries have adopted roughly appropriate models of corporate governance. I would argue, however, that the opposite conclusion is warranted: given their relative states of capital

60) NYSE Listed Company Manual § 303A.07(b); Nasdaq Rule 4350(d)(2).

61) *Id.*

62) NYSE Listed Company Manual § 303A.07(a).

63) KOREAN COMMERCIAL CODE, art. 542-8.

64) NYSE Listed Company Manual § 303A.04(a); Nasdaq Rule 4350(c)(4)(a).

65) NYSE Listed Company Manual § 303A.05(a); Nasdaq Rule 4350(c)(3)(a).

66) KOREAN COMMERCIAL CODE, art. 542-9.

67) NYSE Listed Company Manual § 307.00; DEL. CODE ANN. tit. 8, § 144; N. Y. BUS. CORP. LAW § 713; CAL. CORP. CODE § 310.

68) Sarbanes-Oxley Act § 402, *supra* note 43.

69) KOREAN COMMERCIAL CODE, art. 542-7.

70) See MODEL BUS. CORP. ACT § 7.28 comt. Statutory comparison (2008).

market development, Korea requires more stringent corporate governance mandates than does the United States. Korea cannot be content to follow the American lead in corporate governance if it hopes to attain the depth and liquidity of the American capital.

1. The Path Forward for Independent Directors in Korea

Korea's public companies continue to be dominated by the *chaebol*; that dominance is unlikely to end any time soon. As a result, the *chaebol* are the face of Korean companies for many potential investors. As the research discussed in Part 1 demonstrates minority shareholders in those firms face very substantial risks of expropriation by the controlling shareholder. They face an even more substantial risk that the *chaebol* group will be managed to minimize the losses to the controlling shareholder. Potential investors have good grounds to be wary of placing their money in the hands of the controlling shareholders.

The combination of *chaebol* dominance and controlling shareholder abuses means that the *chaebol* present a difficult "chicken-and-egg" problem for Korean reformers. On the one hand, the available evidence suggests that the shareholders of the *chaebol* companies would benefit the most from improvements in corporate governance. Korea cannot encourage a culture of investor confidence in Korean companies (with the attendant benefits that this would create for economic growth) without taming the power of the controlling shareholders of the *chaebol* and protecting minority shareholders from their overreaching. *Chaebol* shareholders, as a group, would be better off if governance were improved, but the benefits would accrue primarily to minority shareholders at the expense of controlling shareholders. Thus, controlling shareholders, anxious to preserve their substantial discretion, are likely to pose a substantial obstacle to further reform. As a result of their wealth and central role of their businesses in the Korean economy, the controlling shareholders exercise tremendous influence in policy discussions. Slicing this Gordian knot to promote a system that facilitates the confidence of minority investors is the central challenge facing Korean regulators today.

Can the knot be cut? Unfortunately, the answer to this critical question is: "Not overnight." Moreover, the task will take considerable political will. The hope is that independent directors may be the "camel's nose under the tent"

that eventually brings true transparency and accountability in Korea's corporate boardrooms. The power of independent directors will need to be bolstered, however, to achieve this end. But any increase in the power of independent directors is likely to draw opposition from the controlling shareholders of the *chaebol*. To overcome that opposition, Korean reformers must strategically take advantage of the periodic opportunities for reform — created by financial crisis and scandal — to press for further power in the hands of boards dominated by independent directors. Every incident in which a controlling shareholder is publicly disgraced is an opportunity for further reform.

The governance reforms already adopted in Korea are critical first steps. Much reliance is placed, however, on independent directors to ensure that these reforms translate into actual protection for minority shareholders. To achieve this goal, independent directors need to be independent in more than just name. At a minimum, independent directors need to be independent of other members of the *chaebol* group, in addition to independent of the company on whose board they serve. The current rule is that independent directors cannot be employees of affiliated companies of the *chaebol* group.[71] They are not barred, however, from service as directors for *chaebol* affiliates.[72] Service as a director might not be thought to be sufficient to compromise independence. The fees paid to directors are, after all, relatively modest when compared to the typical directors' wealth and income. So one might perhaps conclude that service as a director of an affiliated company should not be deemed to compromise independence. On the other hand, directors owe a duty to each of the companies on whose boards they serve, and in the *chaebol*, these duties are likely to come into conflict.

The problem, however, may go deeper than a conflict of interest or legal duty, either perceived or real. What is needed is a counter to controlling shareholders' manipulation of transactions among the *chaebol* affiliated companies. From this perspective, an independent director loyal to the group, rather than the individual company, is not likely to help. The independent director must be independent from the group in order to be fully independent

71) KOREAN COMMERCIAL CODE, art. 382.
72) *Id.*

from the controlling shareholder. To be sure, this will impose costs on group cohesiveness, but that is the point. If the controlling shareholder wants a free hand to transfer assets among affiliated companies, the companies should be merged, or the minority shareholders should be bought out and the structure changed to a parent/subsidiary one with 100% ownership. Requiring independent directors for all members of the group imposes a tax on an interlocking corporate structure that has been shown to harm minority shareholders. Controlling shareholders can avoid this tax by moving to a holding company structure, which would carry with it substantially improved transparency.[73)]

Finding enough independent directors for all group companies will not be easy. A more daunting challenge for reformers, however, is cultural rather than legal. It will take time for Korea to develop a culture of independence necessary for outside directors to have the desired effect on management. The institution of independent directors is starting from a very low level:

> Korea has no tradition of active discussion within the Board of Directors, and experience with independent directors has been limited. Most have been lawyers, accountants, academics and retired government officials. Concerns have been expressed about the effective independence of many independent directors and about their lack of business experience. Newly-appointed directors often complain about lack of access to the information they consider necessary for informed decision-making.[74)]

This cultural weakness suggests that reformers must take stronger formal steps to ensure that independent directors are tough-minded defenders of the interests of *all* shareholders. It is worth considering whether the roles of CEO and Chairman should be separated to provide a stronger voice for the independent directors in the boardroom.

Another mechanism to bolster independent directors as monitors is to

---

73) Hwa-Jin Kim, *The Case for Market for Corporate Control in Korea*, 8 J. KOREAN L. 227, 248 (2009) (discussing reorganization of SK Corporation in response to a hostile takeover attempt).

74) Bernard S. Black et al., C*orporate Governance in Korea at the Millennium: Enhancing International Competitiveness*, 26 J. CORP. L. 537, 557 (2001).

strengthen the role of institutional investors. The role of independent directors could be greatly enhanced if shareholders were to take advantage of the provision allowing shareholders holding at least one percent of the company's shares to nominate candidates for director.[75] Unfortunately, one weakness currently limiting the effectiveness of institutional investors in Korean corporate governance is that many Korean institutions are affiliated with the *chaebol* and as a result provide little in the way of independent monitoring.[76] One avenue for overcoming this problem is to encourage foreign institutions to take larger positions in Korean companies. Such institutions are accustomed to standards of corporate transparency substantially greater than those currently practiced in most Korean companies. To be effective in demanding transparency, however, these institutions will want some assurance of representation in the boardroom. For this reason, restrictions on share ownership for outside directors should be repealed.[77] Ownership of shares — if less than a controlling stake — is a powerful incentive to work hard on behalf of minority shareholders. In addition, the provision of the Korean Commercial Code [Sangbeop] allowing companies to remove cumulative voting through their charter provision should be repealed.[78] Many companies have taken advantage of this position to eliminate the threat posed to the controlling shareholder's power by institutional investors, thus rendering the cumulative voting provision ineffective.[79] There are now limits on controlling shareholders voting their shares to remove cumulative voting.[80] These limits also apply to undoing the charter provisions that already restrict cumulative voting.[81] But who will initiate such a change? For outside investors to have an effective voice in the direction of the company, cumulative voting should be mandatory for the foreseeable future.

Cumulative voting would give institutions real clout in determining *who*

---

75) KOREAN COMMERCIAL CODE, art. 542-6.

76) Black et al., *supra* note 74, at 552.

77) KOREAN COMMERCIAL CODE, art. 542-8; SANGBEOP SIHAENGRYUNG [KOREAN COMMERCIAL CODE PRESIDENTIAL DECREE], art. 13.

78) KOREAN COMMERCIAL CODE, art. 382-2.

79) Bernard S. Black, *The Role of Self-Regulation in Supporting Korea's Securities Markets*, 3 J. KOREAN L. 17, 27 n.9 (2003).

80) KOREAN COMMERCIAL CODE, art. 542-7.

81) *Id.*

the independent directors will be. Setting the agenda for voting is also important. Although (as I discuss below) it is difficult to justify the inclusion of any inside directors on the audit committee, the inclusion of inside directors on the nominating committee raises a more problematic question. Including inside directors on this committee may help ensure that the outside directors chosen are a good "fit." But if insiders choose the outsiders, how closely will the board scrutinize the conduct of the insiders? Here the conflict between the board's role as a team decision-maker and its role as a monitor is particularly acute. I think, however, that in the context of Korea's controlling shareholder dominated corporate governance, the incremental independence that might result is worth the loss in board solidarity. As transparency and accountability increase, this question might need to be rethought.

The role of the audit committee also should be broadened and its independence bolstered. The requirement that boards approve related-party transactions over a certain size threshold is a step in the right direction.[82] The dynamics of the board room, however, and the desire to get along with one's fellow board members, make this provision less effective than is needed. Given the pervasiveness of related-party transactions among *chaebol* members and the evidence that such transactions are manipulated to benefit controlling shareholders, stronger medicine is needed. Related-party transactions should require approval of the company's audit committee, not the board. Moreover, the audit committee should be made up exclusively of independent directors. (Some firms have already taken an essentially equivalent step by creating related party transaction review committees consisting exclusively of outside directors.[83] This approach may be preferable if there are concerns with demanding too great a time commitment from outside directors.) The audit committee, if properly empowered and staffed by the right people, is potentially the single most effective mechanism for protecting the rights of minority shareholders against overreaching by controlling shareholders and managers. The internal auditor, as an employee of the firm, should report to the audit committee, but should not be part of that committee, particularly if the audit committee's responsibilities are expanded. Putting insiders in the

82) *Id.*, art. 542-9.

83) Kim, *supra* note 21, at 275.

audit committee's meeting room, even if they meet statutory tests for independence, can only dampen the vigorous independence that is needed there. Giving the independent directors the separate space afforded by a relatively autonomous audit committee may well encourage a certain solidarity among them, and corresponding willingness to stand together to make tough decisions in the face of demands from strong-willed controlling shareholders. This monitoring role could be further enhanced by requiring that the company pay the reasonable expenses of advisors — accountants, lawyers, etc. — for the audit committee.[84)]

3. Independent Directors in the United States: The Path Forward?

If Korea would be well served by giving independent directors more power, does it necessarily follow that the United States is equally well served? The new independence requirements for boards that have been adopted in the United States put the tension between the two roles of corporate boards in stark contrast. One vision of the role of the board — call it the "cooperative" model — sees independent directors as part of a team that helps devise business strategy, offer the CEO and other managers useful advice based on extensive business experience, and provides useful business contacts that help promote the firm's profitability. The cooperative model sees outside directors as useful because they broaden the range of expertise and experience available to firm decision-making. The other vision of the role of the board — call it the "adversarial" model — sees directors, particularly those independent of management, as monitors of management, charged with uncovering self-dealing, fraud, other forms of malfeasance, and now, excessive risk taking. The adversarial model sees outside directors as useful because they bring vigilant suspicion to bear on management's activities. One suspects that the vigilant "monitor" is not much of a "team" player. Moreover, one can have doubts about who is benefiting from the monitoring. Is it the shareholders of the firm, disabled by collective action problems from monitoring on their own? Or is it the regulators, attempting to leverage their enforcement resources by conscripting agents inside the firm to ensure that the corporation

84) Black et al., *supra* note 74, at 563.

lives up to its social responsibilities? If shareholder voting does not suffice to ensure that directors will monitor on behalf of shareholders in the way that government regulators believe that they should, the theory goes, perhaps other (more intrusive) mechanisms can help ensure that directors do their job.

The tension between the independent director's twin roles — advisor and monitor — is inevitable. In the fervor of reform frenzy, it is easy to lose sight of the important role that independent directors can play in making the business more profitable. No one expects the board of directors to actively manage the company, but the directors may have an important (non-monitoring) role to play in developing an overall strategy and vision for the corporation. Despite the emphasis that regulators put on the role of directors in ensuring the corporation's managers comply with the law, independent directors typically are chosen on the basis of their business expertise, not their monitoring capabilities. So CEOs of other companies are several times more likely than lawyers to serve on the boards of public companies.[85] One assumes that it is not because the CEOs are more vigilant monitors. The experience of top-level management is apparently more valuable in devising business strategy than the instruction provided in law school. Deputizing independent directors as corporate cops inside the boardroom may have very real costs in the ability of the board to help guide the business. The United States needs to worry about how it may be undermining board effectiveness by fostering too much of an adversarial relationship between independent directors and management; Korea has far to go before this will be a concern.

These costs might be worth paying in the United States if enhanced independence was likely to substantially reduce the incidence of fraud and self-dealing, as it may do in Korea. But the United States is starting from a much lower incidence of fraud and self-dealing than Korea (and most other countries in which controlling shareholders dominate public companies). Dispersed share ownership — and the corporate disclosure that promotes such ownership — is the norm in the United States. There is a culture of accountability by corporate managers to the market, as well as the board, that serves as the background for policy efforts to discourage fraud and self-dealing. Fraud and greed will always be with us; closing off one avenue

85) Stephen P. Ferris et al., *Too Busy To Mind the Business? Monitoring by Directors with Multiple Board Appointments*, 58 J. FIN. 1087, 1094 (2003).

simply pushes the fraudsters and the greedy to find another weakness in the system. The quest for regulatory perfection is illusory, but the costs of that quest — which ultimately will be paid by the shareholders who are supposed to benefit from regulation — will be all too real.

Part 4: Conclusion

My focus in this paper has been on the convergence between Korea and the United States on the role of independent directors in corporate governance. Korea has come a long way toward the United States model in the last few years as it responded to a devastating financial crisis, even as the United States raised the bar still higher in response to a corporate crisis of its own. For this effort, Korean reformers are to be congratulated.

Unfortunately, there is still work to be done in Korea. The self-dealing and lack of transparency of the *chaebol* are the principal impediments to a culture of investor confidence in Korea. Independent directors — preferably selected by institutional investors — can play an important role in making the changes that are needed. To do so, however, their independence must be further strengthened.

The United States, by contrast, now risks overdosing on independence. Independence facilitates monitoring, but it discourages the trust and candor that are essential to building an effective team. Independence, therefore, should be deployed with caution, and not as the cure-all for the latest scandal to catch the attention of politicians. Time will tell whether the United States has used the appropriate caution in adopting its latest governance reforms.

KEY WORDS: corporate governance

Manuscript received: Oct. 10, 2009; review completed: Dec. 1, 2009; accepted: Dec. 10, 2009.

Journal of Korean Law | Vol. 9, 27-51, December 2009

Piercing of the Corporate Veil in Korea: Case Commentary

Eun Young Shin and In Yeung J. Cho***

Abstract

The purpose of this Commentary is to critically appraise the jurisprudence of Korea on the doctrine of corporate veil piercing with a special emphasis on the Korean Supreme Court's decision in 2004Da26119. *In* 2004Da26119, *the Supreme Court of Korea delineated the criteria for disregarding the corporate entity under Korean corporate law, particularly in the parent-subsidiary context. As part of its purported aim, the Commentary will analyze the constitutive elements of veil piercing as understood by Korean courts and attempt to survey the evolution of jurisprudence on veil piercing leading up to* 2004Da26119. *The Commentary will argue that a showing of parental motive and/or purpose, which the Supreme Court required in* 2004Da26119 *as part of* prima facie *proof for veil piercing, may well dampen the overall efficacy of veil piercing in Korea, due to the evidentiary hardship it will pose in practice.*

I. Introduction

Today's corporations set up subsidiaries for a variety of reasons including optimal corporate governance and diversification of business. In the context of a parent-subsidiary relationship, there may be situations where, from a legal

* Eun Young Shin, Esq. is an associate at Lee & Ko and a member of the Korean Bar Association (email: eys@leeko.com). She received an LL.B. in 1999 from Seoul National University, and an LL.M. in 2001 from Graduate School of Law, Seoul National University. Ms. Shin's areas of practice include corporate governance and M&A.

** In Yeung J. Cho, Esq. is General Counsel at Samsung Thales Co., Ltd. (email: inyeungj_cho@yahoo.com). He received a B.A. in 1997 from the University of Toronto, an LL.B. in 2000 from Osgoode Hall Law School of York University, and an LL.M. in 2006 from the University of London; was Legal Counsel to the Ministry of Foreign Affairs and Trade in Seoul, Korea (2003-2004); and a Visiting Scholar, the University of British Columbia Faculty of Law (2006).

The authors wish to extend genuine gratitude to Mr. Hyeong Gun Lee, Esq., a partner at Lee & Ko, for his insightful comments on an earlier draft. The views and opinions expressed herein are solely those of the authors.

standpoint, each constituent company exists as a separate entity, whereas, from an economic viewpoint, the subsidiary in effect operates under uniform control of the parent. In situations involving such a corporate group, treating the parent company and its subsidiary as distinct legal entities may result in an outcome that, depending on the facts involved, defies the principle of justice and equity. The utility of piercing the corporate veil[1] has been debated in Korea in an ongoing bid to redress such possible inequity. Arguably, while the concept of veil piercing[2] is not confined to the realm of parent company-subsidiaries, cases involving a single economic unit would, in general, be more prone to veil piercing than others. In fact, the doctrine of veil piercing is likely to foment more issues and controversies in the parent-subsidiary context than any other.

In the case at hand,[3] the plaintiff put forward the allegation that the defendant's denial of liability behind the façade of a subsidiary controlled by him, amounted to an abuse of corporate personality in contravention to the principle of good faith,[4] but the Supreme Court of Korea held that the facts of the case did not warrant the corporate veil to be lifted. In so holding, the Court spelled out the criteria for disregarding the corporate entity under Korean corporate law.

In what follows, we will first examine the existing case laws in Korea on veil piercing followed by an appraisal of *2004Da26119* from the perspective of bringing veil piercing into play in the parent company-subsidiary context.

---

1) *See* Black's Law Dictionary 1168 (7th ed. 1999) (defining "piercing the corporate veil: the judicial act of imposing liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts. Also termed disregarding the corporate entity.").

2) In Korea, the term "*Beop-in-kyuk-bu-in*" (disregarding the corporate entity) is used to describe this judicial action.

3) Judgment of Aug. 25, 2006, *2004Da26119* (Supreme Court of Korea) [hereinafter *2004Da26119*].

4) In *2004Da26119*, the plaintiff also alleged the presence of a guaranty and of an intent to create an agency at the end of the defendant, ratification of acts of an agent with no authority, issuance of work direction in violation of Article 401(2) of the SANGBEOP [KOREAN COMMERCIAL CODE], and establishment of joint torts as the grounds of appeal, and the Supreme Court ruled thereon. Such rulings, however, are beyond the scope of this Commentary.

II. Existing Case Laws in Korea on Corporate Veil Piercing[5)]

1. Judgment of Sept. 13, 1977, 74Da954 (Supreme Court of Korea)

1) Facts of 74Da954

The facts of this case are as follows. Origin Co., Ltd. ("Origin") was a limited liability company incorporated by defendant *Bong-Gil Kim*,[6)] his wife, brother-in-law, other close relatives, and law clerk on July 10, 1967. The business name of Origin later changed to *Taewon* Co., Ltd. ("*Taewon*") as of November 12, 1968. From its inception as Origin, *Taewon* was incorporated as a shelf company through arbitrary use by the defendant of the names of his wife, next of kin, and law clerk. The defendant appointed himself as the Representative Director of *Taewon* with virtually all of the working capital personally financed by him. As a consequence, the defendant could readily position himself as the controlling shareholder, and the allotment of shares to the name-only equity holders including his wife, next of kin and law clerk was made at the whim of the defendant in the form of gift or contributory stocks. Also, the capital of KRW[7)] 5 million at the time of incorporation (later increased to KRW 10 million) was relatively small for the volume of overseas exports *Taewon* was engaging in (amounting to $10,000). Further, the basic assets of *Taewon* consisted of only a few parcels of industrial land at *Hwa-yong Dong*, *Sung-dong* District in Seoul. On account of its unsound financial conditions, *Taewon* evidently relied on outside credit facilities for management purposes including those from the plaintiff.

In addition, the business office of *Taewon* was located inside the defendant's law office, and the company was effectively run as the defendant's privately owned business with the requisite legal formalities either kept to a bare minimum or ignored outright. Further, the assets of *Taewon* and the defendant's personal assets were improperly mixed. As such, when there was a pressing

---

5) It is noted that there is no express statutory basis in Korea for corporate veil piercing. Pertinent case laws seem to have based veil piercing on the principle of good faith as codified in the MINBEOP [CIVIL CODE] (Korean); see *infra* note 9.

6) Bong-Gil Kim was an attorney-at-law by profession.

7) Refers to Korean Won, the official currency of the Republic of Korea.

need to settle the accounts of *Taewon*, the defendant's personal assets were used towards that end, and as the liabilities of *Taewon* mounted resulting in increased risk of attachment against certain assets of the company, the defendant effected the provisional registration of such assets under his name and subsequently disposed of the same, thereby siphoning off corporate assets and leaving creditors with little or no recourse.

As the company drifted further into doldrums, the defendant ran *Taewon* like a sole proprietorship by turning a blind eye to corporate formalities including those on shareholders meetings, board of directors' resolutions, and invocation of right to auditing. In effect, *Taewon* was nothing but a sham sugarcoated with the appearance of a limited liability corporation.

In the meanwhile, *Taewon* issued several promissory notes to the plaintiff from June 3, 1969 to August 26, 1969 for a total of KRW 8,240,000. When these promissory notes were not honored as they became due, the plaintiff instituted an *in personam* proceeding against the defendant to enforce its creditor rights.

2) Judicial holdings of 74Da954 and comments

At the appellate level, the Seoul High Court affirmed abuse by the defendant of the corporate personality of *Taewon* from the facts that: i) the defendant used *Taewon* as a façade; ii) the company was in effect operated as the defendant's personal enterprise; iii) *Taewon* was undercapitalized; iv) the defendant ignored corporate formalities and protocols; and v) the defendant siphoned off corporate assets for the purpose of preempting creditor claims and enforcement actions against *Taewon*.[8] The court held that the foregoing acts of abuse would not only render the very purpose of corporate entity, a legal fiction concocted to acclimate societal and economic impacts of the corporation, meaningless, but also dispel substantive justice and the principle of good faith.[9] As such, the high court ruled in favor of the plaintiff regarding his creditor claims involving the liabilities of *Taewon*.[10]

---

8) Judgment of May 8, 1974, *72Na2582* (Seoul High Ct.).

9) *Id.* The principle of good faith is codified in Article 2(1) of the CIVIL CODE, which provides: "The exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith."

10) *Id.*

Subsequently, the Supreme Court overturned the high court judgment with a brief ratio that the company was not a mere façade and did not further articulate on the contours of veil piercing that had been adopted in the affirmative at the appellate level.[11)]

In respect of the Supreme Court ruling, legal commentators critiqued the Court as having erred in refusing to lift the corporate veil for the reason that *Taewon* was a legitimate one man company, for such refusal stemmed from a mischaracterization of veil piercing.[12)]

2. Judgment of Nov. 22, 1988, 87Daka1671 *(Supreme Court of Korea)*

1) Facts of 87Daka1671

The facts of this decision are as follows. Defendants *Hyundai Mipo* Dockyard ("HMD") and Samsung Aerial Services provisionally attached a commercial vessel (the "Subject Vessel") to preserve the enforcement of their individual monetary claims against Chipstead Co., Ltd ("Chipstead"). Plaintiff Grand Harmony Inc., the owner of the Subject Vessel, commenced a third party action challenging the validity of the provisional attachment. Chipstead was not privy to the suit.

The plaintiff was a Liberian company with its main offices at 80 Monrovia Broad Street.[13)] On April 1, 1981, the plaintiff and Touchest Shipping Ltd., a Liberian company with the same main office as plaintiff ("Touchest"), entered into a maintenance contract in respect of the Subject Vessel.[14)] The signatories to this contract were Daniel Puchieh Lee on behalf of the plaintiff and Denis Puping Lee on behalf of Touchest, respectively.[15)] On the same day, Touchest signed off a sub-agency contract with Chipstead whose main office was at Kennedy Road, Hong Kong, for maintenance of the Subject Vessel. The signatories to this sub-agency contract were Denis Puping Lee on behalf of Touchest and Daniel Puchieh Lee on behalf of Chipstead, respectively.[16)]

---

11) *74Da954*.

12) Jae-Hyeong Chang, *Panryeeh natanan beopinkyeokbuin* [*The Doctrine of Corporate Veil Piercing in Case Law*], 15-1 SEOUL BAR ASSOCIATION CASE LAW STUDY 147, 154 (2001).

13) *87Daka1671*, at 64.

14) *Id.*

15) *Id.*

16) *Id.*

The de facto address of Touchest was identical to that of Chipstead, and they shared phone and facsimile numbers.[17] The chairman of Touchest was Dennis Puping Lee, who served as the president of the plaintiff company, and Touchest's president was Daniel Puchieh Lee, who was also the executive director of the plaintiff.[18] The directors of Chipstead consisted of Daniel Puchieh Lee and Denis Puping Lee, who were siblings.[19] Upon a direction to get the Subject Vessel fixed at HMD, the vessel was arranged to enter the port of Ulsan on April 1, 1985; at the time of the entry, Chipstead Hong Kong was recorded in as the owner of the vessel.[20] Later, when Suk-Lock Lee, who served as Head of the Tokyo Branch of Chipstead, signed off a service contract with HMD on June 10, 1985 in consideration of repair services to be dispensed by HMD, Mr. Lee put Chipstead on the contract as the vessel owner.[21] As such, HMD undertook repairs with the knowledge that the Subject Vessel legitimately belonged to Chipstead.[22]

The Court also noted that it is customary in the international shipping industry for a ship owner to set up a shelf company in such places as Panama or Liberia, as opposed to the country of the owner's nationality or of the corporate origin, register the ship under the name of such shelf company, hoist the flag of the country of registry, and so sail.[23] Following or concurrently with the registration process, the actual owner enters into a maintenance contract with the shelf company and purports to merely act as a managing corporation.[24] This practice enables ship owners to perform jurisdiction shopping and benefit from variances in finance, labor and regulatory regime between the owner's country of origin and the country of registry, for ease and maximal efficacy in management.[25] In light of this trade practice, it is customary for dockyards and related businesses to sign off contractual arrangements with the managing corporation who is the actual owner of the

17) *Id.* at 65.
18) *Id.*
19) *Id.*
20) *Id.*
21) *Id.*
22) *Id.*
23) *Id.*
24) *Id.*
25) *Id.* at 65-66.

ship, as opposed to the registered owner, and get remunerated as such.[26)]

2) Judicial rulings of 87Daka1671

Affirming the appellate court ruling, the Supreme Court noted that even though Touchest and Chipstead were disparate entities outwardly, Chipstead had in fact incorporated the plaintiff and Touchest, both of which shared the same corporate office and management, for managerial convenience.[27)] In view of this finding, the Court denied the plaintiff its plea alleging the distinct legal entity of Touchest and Chipstead, as such claim was aimed at avoidance of obligations and hence counter to the principle of good faith.[28)]

The majority of Korean jurists touted this judgment as squarely affirming the principle of veil piercing.[29)] The decision, however, was subject to criticism as it merely adumbrated the principle without defining its four corners.[30)] That is, some scholars suggested that the Court in *87Daka1671* had failed to ascertain a sufficient factual basis for finding an abuse of the corporate entity, other than the sharing of the same office and management as between Touchest and Chipstead.[31)] Other jurists suggest that *87Daka1671* was not a case about veil piercing per se, but an attempt at analogizing veil piercing with violation of the principle of good faith and trust.[32)] Accordingly, there is a lingering doubt as to whether *87Daka1671* embodies a landmark decision

---

26) *Id.* at 66.

27) *Id.*

28) *Id.*

29) Although the facts of *87Daka1671* do not fit the mould of the typical veil piercing case, in which liability is usually sought against the company's shareholders or officers, the Court appears to have affirmed veil piercing in this case following the enterprise liability doctrine developed in the U.S. Under this doctrine, U.S. courts sometimes disregard "multiple incorporations of the same business under common ownership," especially where a business is divided into several affiliate or sister entities owned by the same investor(s). *See* Alan R. Palmiter *Corporations* 556 (5th ed. 2006). For the representative case under the doctrine, *see Walkovsky v. Carlton*, 223 N.E. 2d 6 (N.Y. 1966). Since, as surveyed above, *87Daka1671* involved multiple incorporations (i.e. Touchest and Chipstead) under common ownership, it might have proved an apt occasion for the Court to adopt the enterprise liability doctrine in the affirmative.

30) *See, e.g.*, Chan-Hyung Jung, *Beopinkyeok buinron* [*Doctrine of Corporate Veil Piercing*], 226 CASE LAW MONTHLY 29, 35-36 (Jul. 1989).

31) *See*, Dong-yun Chung, *Beopinkyeok buinroneh kwanhan daebeopwonpanryeui chueui* [*Trend of Supreme Court Cases on Veil Piercing*] 20 LAWYER (Jan. 1990).

32) Jung, *supra* note 30, at 35-6.

affirming veil piercing for the first time at the Court level. *87Daka1671* is nevertheless meaningful in that it served as the judicial vehicle for igniting scholarly debates in Korea on the contours of veil piercing.

3. Judgment of Jan. 19, 2001, 97Da21604 *(Supreme Court of Korea)*

1) Facts of 97Da21604

The facts of this decision are as follows. Defendant *Samjin* Co., Ltd. ("*Samjin*") whose Representative Director was *Jung-Su Lee* who was also a co-defendant in the case, was in the business of selling units of a commercial high-rise (a seventeen-story building with a five-story basement) to be constructed by *Kunyoung* Co., Ltd. ("*Kunyoung*"). On June 19, 1991, the plaintiff entered into a sale and purchase contract with *Samjin* for the purchase of a unit (Unit No. 502) of the high-rise.[33] Thereafter, the plaintiff made a down payment and two interim payments up until March 30, 1992.[34] *Samjin*'s original plan was to finance the high-rise project with the sale proceeds. Yet as *Samjin*'s sale of the high-rise went sour, payments to *Kunyoung* were delayed, and *Kunyoung* eventually halted construction as of August, 1992.[35]

In the meanwhile, defendant *Jung-Su Lee* was carrying on the business of selling commercial premises and offices in his own name or under the names of entities over which he exerted de facto control.[36] As part of this business, Mr. Lee purchased the shares of *Samjin* on May 3, 1991 from the company's then Representative Director *Il-Hyoung Choi* and became thereby *Samjin*'s new Representative Director.[37]

The number of *Samjin*'s issued shares was five thousand which, for recordkeeping purposes, was divided among four equity holders including *Jung-Su Lee* (*Jung-Su Lee* owned two thousands of these shares with the rest equally divvied up among the remaining shareholders who were all related to Lee).[38] In fact, however, the vast majority of *Samjin*'s issued shares were in the

33) *97Da21604*, at 485.
34) *Id.*
35) *Id.* at 486.
36) *Id.* at 487.
37) *Id.*
38) *Id.*

hands of *Jung-Su Lee*.[39] In addition, Lee practically made all managerial decisions of *Samjin* without observing corporate formalities.[40] By the time plaintiff took its suit against the defendants, the offices of *Samjin* had been permanently shut down.[41]

From the sale proceeds of the high-rise amounting to KRW 7.8 billion, defendant *Jung-Su Lee* used approximately KRW 3 billion to purchase the land for the high-rise in his name and arranged for the levying of provisional registration thereon in the name of a third party and had the same terminated subsequently in anticipation of creditor claims.[42] For the remaining proceeds, *Jung-Su Lee* put them to use for untraceable purposes.[43] As evidenced by the foregoing, the corporate assets of *Samjin* and the personal assets of *Jung-Su Lee* were improperly intermingled. In addition, despite the large-scale of the high-rise project, *Samjin* was heavily undercapitalized with its capital amounting to a meager KRW 50 million. At the end of the day, *Samjin* was in effect insolvent.[44]

2) Rulings of 97Da21604*/comments*

The Supreme Court held that the plaintiff would be entitled to demand the sale proceeds back from either *Samjin* or *Jung-Su Lee* who wielded de facto control over *Samjin* behind the corporate veil.[45] Specifically in relation to the issue of veil piercing, the Supreme Court enunciated in the following vein.

When a company maintains the public appearance of a corporation, but such appearance is merely a sham and the company, in essence, is reduced down to a private enterprise of the principal behind the corporate veil or to an instrument for staving off legal effects at the helm of the principal, it would be egregious to impute liability arising from what is ostensibly an act of the company to the company alone, and not to the principal, based on the former's separate legal persona.[46] Such imputation of liability, if accepted by

39) *Id.* at 488.
40) *Id.*
41) *Id.*
42) *Id.*
43) *Id.*
44) *Id.*
45) *Id.*
46) *Id.* at 487.

courts, would constitute an abuse of corporate personality in violation of the principle of good faith and be singularly contrary to justice and equity. From this analysis, it would be sensible to hold both the company and the principal jointly liable for the corporate act at issue.[47)]

In the case at hand, in view of the relevant facts including the backdrop against which the defendant had acquired the ownership of *Samjin*, the form and extent of *Jung-Su Lee*'s control over *Samjin*, the degree of asset intermingling between *Jung-Su Lee* and the company, the state of *Samjin*'s business operation and usage of the sale proceeds, the size of *Samjin*'s commercial real estate business, and overall status of corporate asset and solvency, it was incontrovertible to the Court that, while *Samjin* took on the form of a limited liability company, it, in essence, was no more than *Jung-Su Lee*'s sole proprietorship.[48)] Therefore, even though *Samjin* became the party who sold the high-rise in this case, it was nothing more than just an external appearance and, in substance, the business of selling the high-rise was conducted by *Jung-Su Lee* as his private business.[49)]

In this account, trial records indisputably indicated that *Jung-Su Lee* was relying on the distinct legal entity of *Samjin* in denying liability in his personal capacity. Such denial, in the Court's view, would be at loggerheads with the precepts of justice and equity.[50)]

In this case, the Supreme Court typified veil piercing into the following two broad categories: i) abuse of corporate personality (i.e. where the corporation is used by the principal as an arbitrary instrument for escaping legal liability); and ii) formalization of corporate personality (i.e. even with the formalities of a corporation, such form is but a cloak, and the corporation, in effect, amounts to a private business of the principal lurking behind the corporate veil).

The Court further delineated the criteria for the formalization of corporate personality on a showing of de facto governance by shareholders of the company, comingling of assets, lack of separate accounting apparatus, intermingling of business status and corporate transactions, undercapitalization,

47) *Id.*
48) *Id.* at 488.
49) *Id.*
50) *Id.*

and failure to observe corporate protocols mandated by law.[51] The decision was lauded as the first case in Korea ushering the concept of veil piercing into an actual case setting.[52]

4. Judgment of Nov. 12, 2004, 2002Da66892 *(Supreme Court of Korea)*

1) Facts of 2002Da66892

The facts of this case are as follows. The plaintiffs leased portions of a building owned by *Angunsa* Co., Ltd. ("*Angunsa*") in Sinsa-Dong, Eunpyung District, Seoul and completed the registration of *jeonse-kwon*[53] on their respective leases. *Angunsa* went bankrupt shortly thereafter, and the above building was auctioned off to a third party at the request of Korea Exchange

---

51) Of recent, however, the Supreme Court denied lifting of the corporate veil in a case involving a similar set of facts. In Judgment of Sep. 11, 2008, *2007Da90982* (Supreme Court of Korea), the defendant held de facto control over Company I. Later on, the defendant wound up Company I on the brink of its bankruptcy, while setting up Company 2 that took over both the goodwill and personnel of Company I. The defendant also took control of Company 2. The defendant subsequently dissolved Company 2 and incorporated in its place Company 6 in the name of a third party. Against this backdrop, the Daegu High Court ruled that the defendant's denial of payment obligations vis-à-vis the plaintiff on account of the separate personhood of Company 2 would embody an abuse of corporate personality in violation of the principle of good faith, as well as justice and equity. The Supreme Court, however, overturned the High Court by noting that: i) there had been no substantial mix of assets between Company 2 and the defendant to the point of stripping Company 2 of its separate legal entity. Even when considering all the factors probed by the High Court, the Court could not ascertain that Company 2 had somehow amounted to a private business of the defendant in that the defendant was simply borrowing the corporate form of Company 2 in carrying on legitimate private business; and ii) under the principle of limited liability, there is nothing illicit about winding up a corporation that is no longer a going concern, and subsequently setting up and managing a new corporation via fresh injection of capital in so far as such sequential measures are not aimed at harming creditors. In light of the extent to which the assets of Company 2 and the defendant were commingled, which was far from substantial, the Court was unable to identify any abuse by the defendant of the corporate personality of Company 2 and, as a result, remanded the case back to the High Court.

52) Han-sung Cha, *Beopinkyeok buinron* [*Doctrine of Disregard of the Corporate Entity*], STUDY OF CIVIL CASE LAWS Vol. XXIV 568, 597 (Bak-young-sa 2002).

53) In Korea, there is a unique way of renting a house called *Jeonse*, in which a tenant makes a lump-sum deposit on a rental space, instead of paying monthly rents, and gets back the entire deposit when the tenancy comes to an end. *Jeonse-kwon* (權) refers to a tenant's right to such leasehold machination. *See* http://en.wikipedia.org/wiki/Real_estate_in_South_Korea (last visited Aug. 31, 2009).

Bank, a secured creditor with a higher ranking than the plaintiffs, and, in the process, the plaintiffs' respective *jeonse-kwon* were invalidated. As a result, the plaintiffs could not secure their rental deposits back from *Angunsa*. In the midst of this imbroglio, the plaintiffs commenced an action at the Western District Office of the Seoul District Court against *Angunsa* for return of the rental deposits, and *Angunsa* was ordered to pay them back to the plaintiffs.

In the meanwhile, following the bankruptcy of *Angunsa*, the defendant company came into existence. *Angunsa* and the defendant were identical or akin to each other in trade name, commercial emblems, objects of operation, address of the main office, and composition of overseas affiliates.[54] Also, the two companies were similar when it came to the makeup of executives and shareholders in that they mainly consisted of close relatives or employees of *Yong-Sik An* who assumed the dual roles of the controlling shareholder-Representative Director at *Angunsa*.[55] In terms of the actual management, the defendant held itself out to be synonymous with *Angunsa* since *Yong-Sik An* assumed the Representative Directorship at the defendant company. As such, *Angunsa* and the defendant were treated equal by outsiders, and the defendant won certain projects on that basis.[56]

2) Judicial rulings of 2002Da66892

On the issue of veiling piercing, the Supreme Court reasoned as follows in ruling in favor of the plaintiffs. If an existing company has set up a new company that is identical in substance and form to itself for the purpose of eluding legal obligations, such act of incorporation amounts to an abuse of the corporate law system in furtherance of illicit objectives.[57] In such context, therefore, allowing a claim asserting the separate legal entity of two putatively distinct companies vis-à-vis the creditors of the existing company cannot be accepted, since such claim vitiates the principle of good faith and trust.[58] Thus, a creditor of the existing company may demand the fulfillment of financial obligations against either of the two companies.[59]

---

54) *2002Da66892*, at 2015.
55) *Id.*
56) *Id.*
57) *Id.* at 2014.
58) *Id.*

In the present case, the defendant company was identical or akin to *Angunsa* in trade name, commercial emblem, objects of operation, location of the main office, and constitution of overseas affiliates. The vast majority of directors and shareholders of the defendant were either *Yong-Sik An*'s close relatives or his former employees at *Angunsa* where *Yong-Sik An* had held the Representative Directorship in his capacity as the controlling shareholder. The defendant held out itself as equal with *Angunsa* in carrying out marketing and sales activities. In the eyes of outsiders, therefore, the defendant was viewed as the alter ego of *Angunsa*, and defendant captured projects as such. In addition, *Yong-Sik An* continued to carry out his roles and responsibilities as the Chairman of the defendant.[60] Moreover, faced with a judicial order forcing the defendant to assume the obligations of *Angunsa*, *Yong-Sik An*'s son and others set up a company named Mutech Korea and won projects related to the defendant.[61] Further, on October 20, 1999, *Angunsa* transferred its interior construction business to the defendant.[62] In light of these evidentiary elements, the Court found it sufficient to hold that *Angunsa* had incorporated the defendant, which was substantially identical to *Angunsa* in corporate form and substance, for the purpose of jettisoning its own financial obligations.[63] As such, the Court could not allow the defendant to hide behind *Angunsa*'s separate personhood. Holding otherwise, the Court opined, would not comport with the principle of good faith.[64], [65]

In this judgment, the Supreme Court imputed liability to the defendant company, which was set up in a way effectively identical to *Angunsa* in corporate form and substance for the purpose of avoiding away the pecuniary liabilities of *Angunsa*. It is submitted that this case is factually distinguishable

---

59) *Id.*

60) *Id.* at 2015.

61) *Id.*

62) *Id.*

63) *Id.*

64) *Id.*

65) It appears that the Supreme Court affirmed the principle of corporate veil piercing in this case based on the unity of ownership and financial stakes, and presence of illicit purposes as exemplified by evasion of pecuniary obligations. In addition, albeit not explicitly stated, the Court here appears to have applied the enterprise liability doctrine in that, not unlike *87Daka1671*, the facts of *2002Da66892* also involved multiple incorporations (namely, *Angunsa* and defendant company) under common ownership. *See supra* note 29.

from other cases in that there was no direct shareholding relationship between the defendant and *Angunsa*, both of which were controlled by a single shareholder.

Typically, the principle of veil piercing comes handy where a creditor seeks to hold shareholders of a company personally accountable for the company's obligations. Yet, with time, abuse of the corporate entity has taken on a variety of forms, one of which is sequential incorporations of the same business under common ownership. As a matter of principle, there is nothing illicit about winding up a corporation that is no longer a going concern, and subsequently setting up and managing a new corporation via fresh injection of capital in so far as such successive measures are not aimed at harming creditors. In a context involving sequential incorporations, a question nevertheless arises as to whether the successor company may assert the separate legal entity of both its own and of its predecessor against the creditors of the predecessor corporation. It hence becomes increasingly important for courts to set out under what circumstances and specific criteria the successor's assertion can make a viable claim.

Beginning with *2002Da66892*, in cases involving sequential incorporations by a common owner, the Court has probed whether the principal possessed an intent to evade legal obligations in deciding whether to pierce the veil or not. Specifically in *2002Da66892*, the Court listed an identity of corporate form and substance between the predecessor and successor as the key element for proving the principal's intent.[66] The Court in *2006Da24438*[67] further refined *2002Da66892* by requiring an appraisal of the totality of pertinent circumstances including the overall state of managerial affairs at the time of the predecessor's dissolution and the payment of arms length dues regarding transfer of assets, if any, from the predecessor to the successor.

In this respect, certain jurists may balk at extending the veil piercing to sequential incorporations since such extension may result in dilution of limited liability. Despite such concern, judicial expansion of the outer

66) For a criticism that the Court's ratio here is unclear and vague, *see* Young-ae Kwon, *Chaemumyeontalmokjeokeuro sullipdwen daechaehwesaeui beopinkyeok buin* [*Veil Piercing of Alternate Companies Established for Liability Evasion*], 8 Com. Case L. Rev. 1, 14 (Mar. 2005).

67) Judgment of Aug. 21, 2008, *2006Da24438* (Supreme Court of Korea).

boundaries of veil piercing is welcome and seems warranted in that rapid changes in commercial practice will inevitably diversify ways in which abuse of corporate entity are carried through. As such, courts will need to reckon with this commercial reality by proactively adopting veil piercing, where appropriate, on a case specific basis, in accord with the principles of justice and equity.

III. Analysis of *2004Da26119*

1. Basic Facts

Korea Telecom Philippines Inc. ("KTPI"), a wholly owned subsidiary of defendant in the Philippines, entered into two separate Contracts for Project Management, Supply and Installation of Outside Plant Facilities (collectively "OSP Agreement") with Philippine Telegraph and Telephone Corporation ("PT&T") on October 11, 1995 and November 12, 1996, respectively, for communication network extension projects near Manila (collectively the "Project").[68] In connection with the Project, KTPI acted as the project manager and subcontracted portions related to the supply of materials, provision of services, and installation of communication lines to certain Korean companies including the plaintiff.[69] The plaintiff signed off two agreements with KTPI, one on October 13, 1995 and the other on November 12, 1996 pertaining to communication line installation and supply of raw materials, respectively ("Subject Contracts").[70]

Pursuant to the OSP Agreement and Subject Contracts, PT&T was to pay twenty percent of the total contract price directly to plaintiff.[71] As for the remaining portions, PT&T was obliged to pay KTPI by installed re-payment over seven years with a three year grace period, and KTPI, in turn, was obliged to pay the plaintiff via installed repayment over two years with a

68) *2004Da26119*, at 1602.
69) *Id.*
70) *Id.*
71) *Id.*

grace period of three years.[72)]

The size of KTPI's capital was approximately KRW 1.6 billion, whereas the total volume of the OSP Agreement amounted to $87 million (later increased to $95 million through contractual amendments).[73)] For financing purposes, KTPI signed off a credit agreement with The Chase Manhattan Bank ("CMB") on July 24, 1996 with a credit ceiling capped at $40 million ("Credit Agreement").[74)]

Prior to the Credit Agreement, defendant entered into a guarantee agreement with CMB in relation to the financing to be provided under the Credit Agreement (the "Chase Loan") following an affirmative resolution of defendant's management advisory committee. Under the Credit Agreement, KTPI took out the Chase Loan on demand and paid the plaintiff contract monies and interests thereon in accordance with the Subject Contracts.[75)]

In the meanwhile, in the wake of an Asian financial crisis in 1997, PT&T declared a debt moratorium around June 30, 1998.[76)] In response, the defendant directed KTPI to minimize withdrawal of what was left of the Chase Loan and consult in advance with the defendant thereby blocking in effect further drawing out by KTPI of the Chase Loan.[77)] KTPI, in turn, stopped payments to the plaintiff under the Subject Contracts. The plaintiff also halted what remained outstanding of their material supplies to PT&T.[78)]

On or about October 26, 2000, the plaintiff and KTPI confirmed the balance of account payables under the Subject Contracts at $20,978,488.23. Subsequently, on or about March 6, 2001, KTPI paid out to the plaintiff $1,956,998.44 in partial fulfillment of said account payables.[79)] The plaintiff instituted a suit on September 12, 2001 for the purpose of claiming the balance.[80)]

---

72) *Id.*
73) *Id.*
74) *Id.* at 1603.
75) *Id.*
76) *Id.*
77) *Id.*
78) *Id.*
79) *Id.*
80) *Id.*

2. Court Rulings

1) Judgment of Apr. 30, 2004, 2003Na11891 *(Seoul High Court)*[81]

In general, when a company takes on the appearance of a corporation but such appearance is but a façade, and the company, in essence, amounts to no more than a sole proprietorship of the equity holder behind the corporate veil or to a tool for circumventing contractual obligations, exempting the principal from the liability of what is ostensibly an act of the company, under the pretext of the company's distinct legal persona, would dispel not only the principle of good faith, but justice and equity.[82] In such a context, therefore, both the company and the principal alike ought to be rendered answerable to the corporate act in question (in this regard, refer to *97Da21604*[83]).[84]

In particular, in order for the principle of veil piercing to apply in a parent -subsidiary relationship, the following criteria must be found present: i) a mere fact of the parent company holding sway over the subsidiary by virtue of wholly owning the subsidiary with attendant power to appoint directors and officers by exercise of shareholder rights, will not pass muster. It is necessary that the subsidiary has lost independent volition or existence, with the parent exerting complete control to the point of operating the subsidiary as part of its own business clan; ii) there should be comingling of assets, business operation, and/or external corporate transactions between the parent and the subsidiary; iii) consolidation of accounts ought to be put in place between the two entities in tandem with disregard by the subsidiary of corporate formalities and protocols; iv) the size of the subsidiary's capital must be

---

81) At the high court level, the plaintiff specifically alleged that: i) KTPI lacked independent payment and overall fiscal abilities; ii) the defendant exerted complete dominion over KTPI by way of shareholders meetings and board of directors meetings, with authority to issue business related directions, plan budgets, pay out salaries and implement human resources policies; iii) the defendant's direction caused KTPI to stop drawing out the Chase Loan; and iv) since KTPI had been dissolved and hence rendered insolvent, absolving the defendant of contractual liabilities under the Subject Contracts on account of KTPI being a separate legal entity, would be at odds with the principle of good faith.

82) *2003Na11891*, at 3, Da, (1), (Ga).

83) *See supra* II. 3.

84) *supra* note 82.

conspicuously small for the overall tenor and volume of business it carries on; v) the corporate entity of the subsidiary must have been misused as an instrument to evade liability at the end of the parent.[85)]

In addition, the high court added the caveat that, as an exception to limited corporate liability, the remedy of veil piercing will be granted only when the corporate personality in question is put to use for illicit objectives, or in violation of public policy, or as an instrument for rationalizing what is otherwise illegal, or to perpetrate fraud or aid and abet a crime, with the aim of stalling or making good such wrongs in line with the principles of equity.[86)] As such, courts will not lift the corporate veil when: i) the other party in a transaction could distinguish the parent from the subsidiary and was clearly aware of which entity it was dealing with; or ii) such other party was cognizant of the subsidiary being undercapitalized and still proceeded with the transaction without precautionary measures; or iii) there is no clear and convincing proof of illegality in the underlying transaction.[87)]

In the case at hand, the Seoul High Court found that: i) there were clear divides in organization, assets, accounting, and details of business flow between the defendant, a domestic Korean corporation, and KTPI, an offshore Philippines corporation; ii) the size of KTPI's capital was approximately KRW 1.6 billion, which might have been a bit small in light of KTPI's obligations under the Subject Contracts. Yet given the fact that KTPI had taken the role of an intermediary between PT&T and the plaintiff, rather than the ultimate payer, to facilitate the flow of credit, the size of KTPI's capital was not deemed markedly diminutive; iii) based on its full ownership of KTPI, the defendant held strong leverage over KTPI in a broad spectrum of areas including convening of shareholders and board of directors meetings, and matters pertaining to human resources, business-related decisions, and remuneration policy. The directors of KTPI were all on secondment from the defendant, and KPTI underwent thorough advance consultation with the defendant before proceeding with each transaction. In the eyes of the court, such working relationship between the defendant and KTPI was not atypical for an overseas subsidiary, and taking on orders or directives from the sole shareholder, as in

85) *Id.* at 3, Da, (1), (Na).
86) *Id.* at 3, Da, (1), (Da).
87) *Id.*

the case of KTPI, was in proper alignment with the quintessence of a limited liability corporation. In the meanwhile, KTPI crafted on its own accord the planning, contract execution and performance for each underlying transaction. KTPI also requested the defendant to guaranty the drawing out of project funds while endorsing a debt restructuring plan following the autonomous resolution of KTPI's own Board of Directors despite the defendant's objection. In light of the foregoing, the court was unable to ascertain complete domination over KPTI by the defendant to the point of divesting KPTI of independent volition or corporate existence; iv) further, as noted previously, at the time of entering into the Subject Contracts, the plaintiff was clearly aware that KTPI was privy to the Subject Contracts, not the plaintiff itself; v) the defendant authorized KTPI to make independent calls on withdrawal of the Chase Loan in consideration of KTPI's own pecuniary resources; vi) above all, the high court was unable to spot elements of unfairness in the Subject Contracts to pierce the corporate veil for any abuse of corporate entity. Nor could the court ascertain that the defendant had put KTPI to use for illicit objectives, or against the public good or as an instrument for justifying what is otherwise prohibited at law, and/or to perpetrate fraud or aid and abet a crime.[88] Accordingly, the high court dismissed with prejudice the plaintiff's claim that the defendant's refusal to pay out contract monies by virtue of the distinct legal entity of KTPI would bring the principle of good faith into disrepute.[89]

*2) Supreme Court Decision (*2004Da26119*)*

At the outset, the Supreme Court noted that it would be natural for certain degrees of labor and financial interplay to be in place between a parent company and its subsidiaries.[90] As such, the facts that: i) certain officers or employees of the subsidiary are dually employed by the parent; ii) the parent holds sway over the subsidiary through entire ownership of the subsidiary with appurtenant rights to appoint directors, executives or officers; and iii) in spite of an upward spiral in the overall magnitude of the subsidiary's corporate operation, there was no proportional increase in the subsidiary's

88) *Id.* at 3, Da, (2), (Ga).
89) *Id.* at 3, Da, (3).
90) *2004Da26119*, at 1606.

capital, will be, in and of themselves, insufficient to render the parent's assertion of the subsidiary's own legal persona an abuse of corporate personality vis-à-vis creditors of the subsidiary.[91] To trigger threshold, the Court will require a showing of the parent company's complete domination over the subsidiary to the point of stripping independent volition or existence with the result that the subsidiary is made part of the parent's corporate clan.[92] Specifically, there should be objective indicia of assets, businesses and external transactional activities not being clearly distinguished between the parent and the subsidiary but mixed with each other. Above all, the court should be able to pinpoint the subjective motive or purpose with which the parent company arbitrarily abused the subsidiary's independent legal entity for dodging legal or pecuniary obligations.[93]

In this regard, the court below noted that: i) at the time of entering into the Subject Contracts, the defendant was a public corporation, and KTPI, a company incorporated under the law of the Philippines, was carrying on telecommunications business in the Philippines subject to periodic external audits; ii) as an overseas subsidiary of the defendant, KTPI was capable of mapping out independent management objectives and corresponding budgets; and iii) in light of the universe of facts mused on by the high court including KTPI's assessment and performance of the Subject Contracts on its own accord and request by KTPI of a guarantee from the defendant in relation to the provision of bank credit, the Supreme Court upheld the Seoul High Court's finding that there were clear divides between KTPI and the defendant in organization, assets, accounting, and business details.[94] Also, the Court was unable to ascertain any element of illegality from the defendant's use of KTPI in relation to the Subject Contracts. In the final analysis, the Court upheld the high court holding that the defendant could rightfully assert the separate legal entity of KTPI in denying the defendant's contractual liabilities under the Subject Contracts vis-à-vis the plaintiff.[95]

---

91) *Id.*
92) *Id.* at 1606-1607.
93) *Id.* at 1607.
94) *Id.*
95) *Id.* at 1607-1608.

IV. Commentary[96)]

1. The criterion of subjective intent/purpose

As the objective indicia for applying veil piercing in a parent company-subsidiary setting, *2004Da26119* required complete parental control of the subsidiary, coupled with intermingling of assets, business and external corporate activities between the two entities.[97)] The Court also mandated a showing of the subjective motive or purpose with which the parent had abused the legal entity of the subsidiary for pursuit of illicit objectives such as dodging contractual obligations.

In this regard, the Supreme Court's decision is in line with the jurisprudence on the doctrine of *aemulatio vicini* or abuse of rights in that both require proof on the element of subjective motive or purpose.[98)] Under this doctrine, which is codified in Article 2(2) of *Min Beop* [the Civil Code],[99)] abuse of rights can be sustained on a showing of, inter alia, conscious exercise by the right holder of what is otherwise a lawful right for the sole purpose of inflicting affliction on a neighbor even in the absence of any lawful gain to be derived from such act.

Also, *2004Da26119* appears to be in line with and influenced by the

---

96) In respect of *2004Da26119*, a commentator noted that since the case involved a plea for lifting the corporate veil of an offshore (i.e. Pilipino) subsidiary of the defendant, a Korean corporation, the Supreme Court should have ascertained the appropriate governing law by applying conflicts of law principles in determining whether to lift the veil of such overseas subsidiary or not, and resolved the case in light of the governing law. Yet the Court erred in failing to consider this governing law issue at all. This observation is with merit, but beyond the scope of this piece. *See* Kwang-Hyun Suk, *Oegukhwesaeui beopinkyeok buin* [*Piercing the Corporate Veil of an Offshore Corporation*], LEGAL TIMES, Sep. 8, 2008. For further details in this regard, *see* Tae-Jin Kim, *Beopinkyeok buine kwanhan gukjesabeopjeok geomto* [*Review of Veil Piercing from a Private International Law Perspective*], Presentation before the Korean Society of Private International Law (Aug. 29, 2008).

97) The high court required as the objective criteria such factors as the absence of separate accounting machination between a mother company and her subsidiary, disregard of corporate protocols, undercapitalization of the subsidiary, and misuse of the subsidiary's legal entity.

98) For instance, in Judgment of Feb. 14, 2003, *2002Da62319&62326* (Supreme Court of Korea), the Court required as prima facie proof of an abuse of right that the right holder exercise its right solely for the subjective purpose of inflicting pain and suffering on another party.

99) Article 2(2) provides: "Rights shall not be abused."

prevailing theory among Japanese legal academics on the requirements of veil piercing. In Japan, the majority of jurists hold the position that extending the application of veil piercing in an indiscriminate manner will run counter to the maintenance of legal certainty.[100] As such, the element of illicit or unjust purpose is usually required before any disregard of corporate entity may be attempted.[101]

In the meanwhile, the majority of Korean jurists take the view that difficulties in substantiating the parental purpose or motive may dampen the overall efficacy of veil piercing.[102] In addition, there may be situations where foisting personal liability on the sole shareholder, despite lack of any mala fide on such person's part, would be consistent with the mandates of justice (for instance, when the subsidiary is all but solvent), hence rendering the criterion of subjective purpose/intent dubious at best.

In particular, the Court in *2004Da26119* refused to read or otherwise infer an illegal or unjust motive of the parent from a pre-determined set of facts.[103] This set of facts mostly pertained to the other party to the underlying transaction(s). However, the logical outworking of this decision leaves open the possibility that knowledge or (in)action of such other party may well override or obviate the illicit purpose, if any, of the parent. By way of example, there may be situations where the other party in a transaction proceeded with the transaction without cautionary measures despite her awareness of the subsidiary being undercapitalized compared to the risk intrinsic in the transaction, while, all along, the parent did harbor an illicit motive in its relationship with the subsidiary. In such situation, the other party would be barred from asserting abuse of corporate entity by the parent under a theory of the assumption of risk, not based on a piercing theory involving parental purpose or motive.

---

100) For a similar view in Korea, *see* Sang-Hyun Song, *Bojeungchaemugeum deung* (*Seoul Godeungbeopwon 74Na2582 pangyulpyeongseok*) [*Guarantee Liability, etc, Case Commentary on Judgment of Seoul High Court, 74 Na 2582*], LEGAL TIMES, 8, May 27, 1974.

101) *See* Chang-Woo Nam, *Hwesa beopinkyeok musieui beopli* [Legal Theory of Corporate Veil Piercing] (1995), (unpublished Ph.D. dissertation, Korea University) (on file with Korea University).

102) *See Id.*; *see also* CHUL-SONG LEE, HWESABEOP GANGEUI (LECTURES ON CORPORATE LAW) 51-52, (Bak-young-sa 16th ed. 2009).

103) *See supra* III. 2. 2).

Needless to say, lifting the corporate veil should be understood and carved out as an exception to limited liability. However, this normative issue might be more efficiently dealt with by tightening the prerequisites for the "objective indicia" without necessarily importing the murky element of parental motive or intent into the overall conceptual schema.

Even assuming, *arguendo*,[104] the need for parental motive or intent is a valid one, courts will still need to rely on certain fact patterns of recurrence or with general applicability for sorting out such motive or intent. In this regard, it may be a prudent move for the Court to delineate what such factual elements are in an effort to ease the inordinate evidentiary burden on plaintiff in proving the purpose/motive at issue. It is anticipated that the criteria set forth in *2006Da24438*[105] will serve as a useful guidepost in ongoing judicial efforts in this respect.

2. The criteria for disregarding the corporate entity in a parent-subsidiary corporate group

Corporate law, which provides for the separate personality of a legal person, has been traditionally premised on autonomous corporate management accompanied by individual assumption of liability arising there from. Yet with the advance of capitalism, a sizable number of corporations have set up subsidiaries that operate under their tutelage. These corporate groups often act as a single economic unit and evade liability by tinkering with the legal fiction of corporate entity. As a product of this trend, the likelihood for minority stockholders or creditors of the subsidiary to suffer detriment is ever increasing. This state of affairs, in turn, heightens the need for proactive recourse to veil piercing for these stakeholders' protection.

Apart from the foregoing, albeit varying in degree, a subsidiary is in general under control of the parent with substantial ties in respect of, among others, labor and finance. As such, readily lifting the corporate veil on such nexus alone may well enervate the very backbone of corporate law as encapsulated in limited liability. In case of Korean conglomerates, it is the

104) Means 'for the sake of argument.'

105) *See supra* note 69.

norm that the parent exerts dominant control over the subsidiary only in relation to significant matters with day-to-day business largely entrusted to the subsidiary. In this type of business milieu, just because the parent exerts certain degrees of domination should not mean that the corporate veil of the subsidiary is to be readily pierced through. While a circle of legal scholars and commentators espouses the view that when the doctrine of corporate veil piercing is applied to *Konzern* or a corporate group, it should be within the overall framework of dominance and control without regard to abuse or formalization of the corporate entity,[106] such view leaves open a loophole that disregarding corporate entity on control alone may lead to abuse of veil piercing since there is invariably a chain of control in any given *Konzern*.

2004Da26119 took it for granted the presence of ties between the parent and the subsidiary in human resources and finance. As such, the Supreme Court found it insufficient to find an abuse of corporate personality vis-à-vis creditors of the subsidiary, from the pertinent facts of the case evincing some semblance of parental control. This judicial pronouncement is welcome in that it limits the likelihood of lifting the corporate veil for the reason of parental control alone and consequently hampering overall legal certainty.

In the meanwhile, the existence of complete parental control, which the Court required as a quid pro quo to veil piercing, may be ascertained in each case by such objective indicia as comingling of assets, business, and/or external corporate activities,[107] and this objective requirement appears reasonable. It is hoped that specifically when these indicia can be found present will flesh out through evolution of jurisprudence in the future.

V. Conclusion

2004Da26119 was a landmark setting out the criteria for veil piercing in a parent company-subsidiary setting. The Court's holding in this case was balanced in that the facts of the case did not warrant lifting the corporate veil

106) Dae-Youn Kim, *Jibaejongsoklwesae daehan yeongu (2) – Gyeolhapeseoeui beopinkyeok buinron* [*Second Study on the Parent-Subsidiary Corporation – Veil Piercing in the Context of Merged Corporations*], 44-1 Busan U. L. R. 347, 367(2003).

107) *See supra* note 87.

as evidenced by distinct divides between the defendant and its subsidiary KTPI in respect of organization, assets, accounting, and business practices. On the other hand, the aspect of the decision mandating the subjective motive of the parent as a pre-condition for veil piercing is a cause for concern in that such proposition would in effect bring the doctrine of veil piercing to a standstill on account of the evidentiary difficulties it will invariably pose in practice.

Since the Court's decision in *2004Da26119*, the number of judicial decisions in Korea probing the prerequisites for veil piercing has been on an incremental increase.[108] Even though it may be ardent to systemize such criteria due to their general nature and applicability, the remedy of veil piercing will remain at the active disposal of claimants provided that the judiciary continues to hand down more trailblazing cases supplemented by enriching input from the legal academia.

KEY WORDS: Corporate Entity, Piercing of Corporate Veil, Principle of Good Faith, Corporate Governance, Corporate Law, Korean Supreme Court

Manuscript received: Oct. 5, 2009; review completed: Dec. 1, 2009; accepted: Dec. 10, 2009.

108) *See, e.g.*, Judgment of Jul. 13, 2006, *2004Da36130* (Supreme Court) and Judgment of Aug. 21, 2008, *2006Da24438* (Supreme Court).

Journal of Korean Law | Vol. 9, 53-81, December 2009

Judicial Appointment in the Republic of Korea from Democracy Perspectives

*Woo-young Rhee**

Abstract

This paper discusses the symbolic and actual role of the judiciary of the Republic of Korea in the nation's separation of powers structure from the perspective of constitutional democracy, by primarily analyzing the law and the system pertaining to the judicial appointment. The issue of judicial appointment has been discussed continuously and extensively both inside and outside the judiciary, due to its far-reaching constitutional ramifications in the representative democracy. In this vein, this paper first reviews the law and the system pertaining to the appointment of judges to the judicial courts at various levels in the Republic of Korea, with a focus on the appointment mechanism applicable to the Supreme Court. This paper then proceeds to analyze the judicial appointment mechanism particularly in light of the anticipated role of the judiciary in the current state of democracy in the nation. In this regard, the paper discusses some of the issues critically relevant to the judicial appointment mechanism, including the qualifications expected for the judges and the education therefor, the amount of workload and the size of the docket at the Supreme Court, and the appeals mechanism. The main part of the paper analyzes some of the reform measures as currently proposed and discussed, particularly in light of the role of the judiciary and the Supreme Court in a representative democracy.

I. Introduction

This paper discusses the symbolic and actual role of the judiciary of the Republic of Korea in the nation's separation of powers structure from the perspective of constitutional democracy, by primarily analyzing the law and the system pertaining to the judicial appointment. The issue of judicial appointment bears a particular significance from democracy perspectives in terms of the trust of and from the public in the judicial system and justice administration as a whole, which in turn is grounded upon fairness, expertise

* Associate Professor of Public Law, Seoul National University School of Law. The research project for this article was funded by the Seoul National University Law Foundation in 2009.

and independence of the judiciary both in actuality and as perceived. In this vein, this paper first reviews the law and the system pertaining to the appointment of judges to the judicial courts at various levels in the Republic of Korea, with a focus on the appointment mechanism applicable to the Supreme Court. This paper then proceeds to analyze the judicial appointment mechanism particularly in light of the anticipated role of the judiciary in the current state of democracy in the nation. In this regard, the paper discusses some of the issues critically relevant to the judicial appointment mechanism, including the qualifications expected for the judges and the education therefor, the amount of workload and the size of docket at the Supreme Court, and the appeals mechanism. The main part of the paper analyzes the current reform measures proposed from both inside and outside the court. These reform measures focus on democracy perspectives, particularly the role of the judiciary and the Supreme Court in a representative democracy.

South Korea's modern judicial system, initially established with the enactment of the Court Organization Act of 1895 (Law No. 1), has evolved over time reacting to various changes and challenges in the South Korean society. Facing increasing demand for reform for democratization from various sectors of the society including NGOs, the South Korean judiciary has made efforts to improve the judicial system since as early as 1960s. Notably, the establishment of the office of the Deputy Director General for Judicial Policy Research under that of the Minister of National Court Administration in March of 1990 initiated the system-wide consolidation and integration of the judicial policy studies.[1)]

More recently, the Judicial Reform Committee, which was in operation from 2003 to 2004, comprehensively integrated the reform efforts over challenges to the judiciary and the judicial system. The Judicial Reform Committee consisted of twenty-one members representing various interest groups, such as the legal profession, politics, legislature, media, labor unions,

1) Such an effort on the Supreme Court's initiative and, in some cases, on the presidential initiative has continued through various committees established within the Supreme Court. The Commission for Judicial System Development and Globalization Committee (1993-1995), the Judicial Reform Promotion Committee (1999-2000), the Judiciary Development Plans for the Twenty-First Century (1999-2000), the Judicial Reform Committee (2003-2004), and the Presidential Committee on Judicial Reform (2005-2006) are representative examples.

business and NGO groups, and it presented specific reform proposals on five of the main issues as follows: (a) organization and function of the Supreme Court, for enhancing the authority of the Supreme Court as the nation's highest court; (b) judicial appointment system, for the institution of a system to appoint the judges among the attorneys with substantial work experience in order to meet the public's demand for trial by judges with broader understanding on the society; (c) legal education and attorney licensing system, for further heightened expertise and competitiveness at the global caliber; (d) citizen's participation in the judicial process, for lay participation in the trial process and particularly in the criminal adjudication process; and (e) public legal service and criminal procedure reform, for an efficient and fair legal system readily accessible to the public that would enable the protection of both the rights of the accused and the victims through criminal proceedings.[2)]

The issue of judicial appointment has been discussed continuously and extensively both inside and outside the judiciary, due to its far-reaching constitutional ramifications in the representative democracy. Especially subsequent to the appointment of five Justices to the Supreme Court in 2005, various organizations in the private sector have proactively been discussing publicly the issue of appropriate qualifications for the justices and the chief justice of the Supreme Court and seeking out diverse public opinions, while the South Korean judiciary has simultaneously made a continuing reform effort in this vein, as will be analyzed in the following parts of this article.

---

2) The Act on Establishment and Operation of the Professional Graduate School of Law (Law No. 8852) or so-called "Law School Act" was promulgated in 2007 and came into effect in 2008, under which the new graduate-level professional law schools are now in operation as of 2009. The ensuing legislation for the new system for the qualifications to obtain license to practice law in South Korea is currently on the way. Also, the Civil Participation in Criminal Trials Act (Law No. 8495) on lay participation in selected types of criminal cases was enacted in 2007 and came into effect in 2008.

II. Law and Practice of Judicial Appointment in the Republic of Korea

1. Brief History of the South Korean Judiciary and the Judicial Appointment System

The foundation for the Republic of Korea's judiciary was established when the Supreme Court replaced the *Chosun* High Court on October 11, 1945 under the USAMGIK (United States Army Military Government in Korea). The official history of the judiciary of the Republic of Korea is traced back to the appointment of Mr. Byung-Ro Kim as the inaugural Chief Justice and of five other Justices pursuant to the Constitution of the First Republic of Korea that came into effect on July 17, 1948. Whereas the judiciary as of 1948 consisted of the Supreme Court and three District Courts, the judiciary as of 2009 of the Republic of Korea consists of the Supreme Court, five High Courts, one Patent Court, eighteen District Courts, one Administrative Court, and one Family Court.[3),4)] The basic three-tier system is composed of the District Courts, the High Courts and the Supreme Court. Other courts exercise specialized functions with the Patent Court positioned at the level of the High Court, and the Family Court and the Administrative Court positioned at the

3) The current constitution, i.e., the Constitution of the Sixth Republic of Korea, provides in Article 101, Section 2, that "[t]he courts comprise the Supreme Court, which is the highest court of the State, and the courts established at lower levels," and, in Article 102, Section 3, that "[t]he organization of the Supreme Court and lower courts shall be determined by law," thereby delegating the specific aspects of the court organization to the statutes. The Court Organization Act (Law No. 8794) in this vein establishes five types of lower courts under the Supreme Court, which are the High Court, the Patent Court, the District Court, the Family Court and the Administrative Court. The Act also provides that the branch courts and/or the municipal courts may be established under the District Courts as necessary.

4) In South Korea, there exists the Constitutional Court established by and under the Constitution as an independent constitutional institution. The Constitutional Court retains jurisdiction over such constitutional issues as the constitutionality of the statute, impeachment, dissolution of a political party, constitutional petitions filed directly to the Constitutional Court, and jurisdictional conflicts involving State agencies and/or local governments. Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by National Assembly, and three are designated by the Chief Justice of the Supreme Court.

level of the District Court.[5] Except in military courts, the adjudication proceedings including hearings and judgment-rendering are presided by the judges qualified and appointed by and under the Constitution and the relevant statute. A trial is presided either by a single judge or a panel of three judges. For certain categories of relatively serious criminal offenses, trial by way of lay participation was introduced on a pilot program basis in January of 2008.[6] As of 2009, the number of judges in the Republic of Korea including the Chief Justice and the Justices of the Supreme Court and those in special service as, for example, the professors of the Judicial Research and Training Institute is approximately 2,300.

2. Qualifications Required for the Judges and the Justices

The Constitution of the Republic of Korea provides that the qualifications for judges shall be prescribed by the applicable statute. In accordance, the Court Organization Act (Law No. 8794, as most recently revised in 2007) currently mandates that the judges shall be appointed among those who have passed the national judicial examination and completed the two-year training program at the Judicial Research and Training Institute, or those who have obtained qualifications as attorneys-at-law (Article 42, Section 2, of the Act).

The Chief Justice and the Justices of the Supreme Court are appointed among those who are judges, public prosecutors, attorneys-at-law, licensed attorneys who are engaged in legal affairs at the state organs, local governments, public enterprises, state-financed institutions or other juristic persons, or licensed attorneys who serve as professors in the field of law at an

---

5) There is also other special court such as the martial court. The difference between martial court and non-martial court is that military officers who are not qualified as judges hear cases in martial court, whereas in non-martial court only judges may adjudicate cases under the Constitution and the Court Organization Act. However, the Supreme Court has the final appellate jurisdiction over all cases including those adjudicated in military trials.

6) As a means for citizen participation in the nation's judicial process, South Korea adopted a system of jury trial in 2008 for a limited type of criminal cases. The Civil Participation in Criminal Trials Act (Law No. 8495) that came into effect in January 2008 provides the statutory grounds for South Korea's unique jury system. The eligible defendant may request for a jury trial, however, the court may decide for a bench trial. In a jury trial, both the jury and the judge take part both in finding of facts and in determining legal issues.

accredited college or university (Article 42, Section 1, of the Act). The Justices and the Chief Justice should be of 40 years of age or older, and have an experience of 15 years or longer in one or more of the capacities mentioned above (Article 42, Section 1, of the Act). Former Chief Justices and other Justices predominantly served as judges at the lower courts prior to their appointment to the respective positions.

3. Court Organization and the Appointment of the Chief Justice, the Justices and other Judges in the Republic of Korea

The Supreme Court of the Republic of Korea is comprised of the Chief Justice and thirteen Justices including the Minister of National Court Administration (Article 102 of the Constitution, Articles 13 and 68 of the Court Organization Act). As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases (Articles 11 and 14 of the Court Organization Act).[7] Under special circumstances, the Supreme Court hears appeals from the judgments rendered by the trial court

7) The jurisdiction of the Supreme Court is exercised at the Grand Bench or at the Petty Benches. The Grand Bench is convened with more than two-thirds of the Justices present, with the Chief Justice presiding. A Petty Bench is convened with four Justices. Currently, there are three Petty Benches at the Supreme Court. All judgments rendered by a Petty Bench should be made unanimously. For the case deliberated by the Grand Bench, the decisions are made on a majority basis. The Supreme Court cannot reverse the judgment of the lower court should the members of the Grand Bench be unable to reach a majority opinion. The Petty Benches rule most of the cases that are appealed to the Supreme Court. However, a case is referred to the Grand Bench in the event that a Petty Bench fails to reach a consensus of the decisions to be rendered or if the case falls under one of the following categories: (i) where it is deemed that any order, rule or regulation is in contravention of the Constitution; (ii) where it is deemed that any order, rule or regulation is contrary to the statute; (iii) where it is deemed necessary to modify the previous opinion of the Supreme Court on the interpretation and implementation of the Constitution, statutes, orders, rules or regulations; and (iv) where it is deemed that adjudication by a Petty Bench is not appropriate. When the grounds for appeal to the Supreme Court submitted by the appellant do not fall under such categories as are enumerated by the law, the Supreme Court is to dismiss the appeal without further examining the case. The reasons for dismissal need not to be stated. This is called discontinuation of adjudication. This is not applicable to criminal appeals.

of first instance. The Supreme Court also has the authority to review rulings rendered by the Korean Maritime Safety Tribunal, and has exclusive jurisdiction over the validity of the presidential or parliamentary election. The Supreme Court has the final authority to review and determine the constitutionality and the legality of executive orders, rules, regulations, and actions taken by administrative entities and agencies, although such authority is subject to possible changes under the currently deliberated constitutional reform. The Chief Justice of the Supreme Court exercises general control over judicial administrative affairs, and directs and supervises the officials concerned in regard thereof (Article 13 of the Court Organization Act). Judicial administration pertains to administrative management affairs including organization, human resources, budgets, accounting and facilities, which are necessary in operating the judiciary. The Chief Justice may delegate part of such authority to the Minister of National Court Administration (Articles 19 and 67 of the Court Organization Act).

The High Courts are currently located in five cities in Korea — Seoul, Busan, Daegu, Gwangu and Daejeon. Each High Court consists of a chief judge and other judges. As of 2009, approximately 290 judges serve at the high court level. In each High Court, there is an administration bureau for internal management and supervision of the court officials. High Courts hear appeals from judgments or rulings rendered either by a panel of three judges of the District Court or the Family Court, or by the Administrative Court; High Courts also hear appeals from judgments or rulings in civil cases rendered by a single judge of the District Court or its branch court when the amount in controversy exceeds 50 million Korean Won (appx. 54,000USD) (Articles 26-28 of the Court Organization Act). The jurisdiction of High Courts is exercised by a panel of three judges.

Supporting the court organization at the bottom of the triangle are 18 District Courts currently in operation across the nation (Articles 29-36 of the Court Organization Act). Each District Court consists of a chief judge and other judges. In each District Court, there is an administration bureau to handle administrative affairs. Branch court(s), family branch court(s) and/or municipal court(s)[8] may be established under the District Court. The District

8) The municipal courts exercise original jurisdiction over minor cases. There are currently

Courts or branch courts thereof retain original jurisdiction over civil and criminal cases. A single judge presides over a trial in general, whereas a panel of three judges sits for cases that are deemed of greater significance.[9] In addition, the District Courts have jurisdiction over appeals from the judgments or rulings rendered by a single judge of the District Court, the branch court or the municipal court, except for those which fall under the jurisdiction of the High Courts. This appellate jurisdiction is exercised by a panel of three judges, which is called an appellate panel and is distinguished from a trial panel of three judges.

The Chief Justice and the Justices of the Supreme Court are appointed by the President of the Republic and must be confirmed by National Assembly through the confirmation hearing (Article 104 of the Constitution, Article 41 of the Court Organization Act). For the appointment of the Justices, an Ad Hoc Advisory Committee for Nomination of Justices, which consists of six to eight persons from various disciplines mostly of law, is established within the Supreme Court. Currently, the applicable Supreme Court Rule (Rule No. 295; issued July 25, 2003) mandates that the above Advisory Committee should include the Chief Justice of the preceding term, the most senior Justice on the current bench at the Supreme Court, the Minister of the National Court Administration, the Minister of the Department of Justice, the chairperson of the Korean Bar Association, and the chairperson of the Korean Law Professors Association (Article 3 of the Rule), and vests the Chief Justice with discretion

---

101 municipal courts in South Korea (the Act on the Establishment and the Jurisdiction of the Judicial Courts, Law No. 8244). The municipal courts have jurisdiction over small claim cases in which the amount disputed does not exceed 20 million Korean Won (appx. 22,000USD) and misdemeanor cases in which the courts may impose penal detention for less than 30 days or a fine not exceeding 200,000 Korean Won (appx. 220USD) (the Rule on Limited Jurisdiction Case Adjudication, the Supreme Court Rule No. 1779).

9) A three-judge panel within the District Court hears cases that fall under the following: (i) in civil matters, cases involving the amount in controversy exceeding 100 million Korean Won (appx. 110,000USD) or incalculable, with the exception that the cases involving the claim for payment of checks or bills or the claim for repayment of loans are presided over by a single judge regardless of the amount in controversy; (ii) in criminal matters, cases with the possibility of sentences of death penalty, life imprisonment or imprisonment for a minimum of one year, with the exception that certain cases such as check counterfeiting and habitual use of violence are presided over by a single judge (the Rule on the Jurisdiction in Civil and Family Law Adjudication, the Supreme Court Rule No. 2163).

to appoint up to two additional members to the Committee as deemed necessary. Upon hearing the advisory opinion of the Committee, which is non-binding, the Chief Justice submits recommendations for the appointment of the Justices to the President. The confirmation hearing process at National Assembly for the appointment of the Justices as well as the Chief Justice was newly introduced in February 2002 under the National Assembly Act (Law No. 9129, as most recently revised in 2008) and the Confirmation Hearing Act (Law No. 8867, as most recently revised in 2008).

The judges other than the Chief Justice or the Justices of the Supreme Court are appointed by the Chief Justice with the consent of the Council of Supreme Court Justices (Article 104, Section 3, of the Constitution). The judges are assigned to their posts by the Chief Justice. The Judges Personnel Committee advises the Chief Justice in planning and coordinating personnel issues including the appointment of judges (Article 25-2 of the Court Organization Act). The Chief Justice may evaluate the performance of the individual judges and the outcome as such may be reflected in personnel management decisions (Article 44-2 of the Court Organization Act). When the Chief Justice is requested by another government agency to dispatch a judge, the Chief Justice may grant permission if it is deemed proper in light of the nature of service, should the judge consent to it (Article 50 of the Court Organization Act). Currently, judges are dispatched to National Assembly, the Constitutional Court, the Ministry of Unification, and the Ministry of Foreign Affairs and Trade.

The term of office of the Chief Justice is six years without the possibility of reappointment. The Justices of the Supreme Court also serve a six-year term and may serve multiple terms. Other judges have a ten-year term of service and, may be and mostly do get reappointed up to a certain point (Article 105 of the Constitution, Article 45 of the Court Organization Act). On the other hand, judges should leave office when they reach the retirement age, even if their terms of office are remaining. The Chief Justice is required to retire from office at the age of seventy, the Justices of the Supreme Court at sixty-five, and the judges of the lower courts at sixty-three (Article 45 of the Court Organization Act). Simultaneously, no judge shall be removed from office except either by impeachment or by a sentence of imprisonment or heavier, nor shall a judge be subject to suspension from office or to a reduction in remuneration or other unfavorable treatments except by disciplinary

measures (Article 106 of the Constitution). Should a Justice of the Supreme Court is unable to carry out the official duties due to grave mental disorder or physical impediment, the President of the Republic may order such a Justice to resign from office upon proposition as such of the Chief Justice; in the case of a judge of the lower court, the Chief Justice may order resignation from the office. The political activities of the judges, the Justices and the Chief Justice are restricted during their terms of office.[10] A judge is subject to disciplinary measures for a breach of duties or negligent performance of duties.[11] The Judges Disciplinary Committee established within the Supreme Court decides disciplinary actions regarding judges (Article 48 of the Court Organization Act). A resolution of the Committee requires the quorum of majority of all the members and the consent of a majority of the members present.

III. Judicial Appointment in the Republic of Korea from Democracy Perspectives

1. Role of the Judiciary in South Korea's Constitutional Democracy, and the Judicial Appointment

The Constitution of the Republic of Korea grants the Supreme Court the final authority to interpret and apply the law (Article 101 of the Constitution). Under the constitutional democracy of the Republic of Korea that adopts a model of representative democracy, the legislature enacts the law. However, it is the responsibility of the judiciary rendering the black-letter laws live by providing the meaning to specific provisions of law as applied in actual cases

10) The judges may not acquire or retain membership of any political parties (Article 22 of the Political Party Act, Law No. 8881, as most recently revised in 2008). The judges may not participate or be engaged in election campaigns at public elections (Article 60 of the Public Election Act, Law No. 9466, as most recently revised in 2009).

11) Disciplinary measures are divided into the following three types: suspension from office, reduction in remuneration and reprimand. If a judge is submitted to suspension from office, performing of respective duties shall be suspended for not less than a month and not more than a year. During such period, salary is subject to suspension. If a judge is submitted to a reduction in remuneration, it can be cut by one-third for not less than a month and not more than a year. A reprimand should be in writing.

and controversies. The Supreme Court, under the South Korean judicial system, has the final authority thereof. Recently, various empirical resources indicate that increasingly more disagreements and disputes are settled by resorting to the adjudicatory process and institutions, and the judgment by and of the judiciary has in turn incrementally greater effect upon policy decisions in integrating diverse values and preferences in a growingly pluralistic society.[12)]

In this context, the Supreme Court of the Republic of Korea assumes a markedly significant role both in protecting the rights of the members of the community including minorities and in presenting directions towards the community when facing long-term policy choices. How to constitute the judiciary and especially the Supreme Court has thus a critically important symbolic and actual meaning in South Korea's representative democracy.[13)] Specific issues directly concerned herewith include the qualifications for the judges, the Justices, and the Chief Justice, and the procedures applicable to the nomination and appointment of them. The key question addressed in South Korea in this regard pertains to whom to appoint as judges, Justices and Chief Justice who will represent and balance diverse values and perspectives of the pluralistic society, and how to design applicable systems so that this effort for diversity and balance can be institutionally guaranteed.

1) Judicial Appointment and Democracy

The Constitution of the Republic of Korea prescribes as one of the ultimate goals in the nation's separation of powers structure the political neutrality and independence of the judiciary. The Constitution in this vein has chosen a design under which democratic legitimacy of the judiciary is indirectly

12) Jong-Chul Kim, *Meaning and the Limits of Judicialization of Politics*, 33-3 KOREAN PUBLIC LAW RESEARCH (2005) [*available only in Korean*]; JUDICIAL STATISTICS, *available at* http://eng.scourt.go.kr/eng/resources/statistics.jsp.

13) *See, e.g.*, Beverley M. McLachlin, *The Charter: A New Role for the Judiciary?*, 29 ALTA. L. Rev. 540 (1991); Beverley M. McLachlin, *The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?*, 39 U.N.B. L.J. 43 (1990); Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301 (1990); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1 (1986); and Johan Steyn, *The Case for a Supreme Court*, 118 L. Q. REV. 382 (2002).

secured through the involvement of National Assembly and the President of the Republic, as opposed to a possible alternative of constituting the judiciary directly through public election. An institutional choice as such has remained unchanged since the inaugural constitution. The current Constitution mandates, however, in order to enhance democratic legitimacy in constituting the judiciary, that an advisory committee should be formed with individuals from various sectors of the society for the nomination of the Justices and the Chief Justice at the Supreme Court and other judges at lower courts.

Democratic legitimacy of a constitutional institution is not guaranteed merely by regularly held public elections. The indispensable role of the judiciary in constitutional democracy is assumed on the basis of fairness and expertise as well as constitutional legitimacy of the judiciary that ultimately heightens and intensifies trust and confidence of the public in the judiciary. However, in today's pluralistic society as observed in South Korea, disputes and controversies demanding judicial determination are becoming more complex and multifaceted as they concern such various issues as political power and social structure, religion and value choices, culture and environment. At the same time, a tendency to resort to judicial decisions for resolution of disputes and controversies is increasing. Such change further emphasizes the legitimacy aspect of the judiciary. Particularly, as the impact of the judicial decisions especially through the institution of constitutionality review upon political domain's policymaking governed by representation system based upon majority rule grows in South Korea, conventional criticisms on judicial appointment system in light of the role of the judiciary in a democracy are more pertinently raised in that judicial power lacking sufficient democratic legitimacy might abort the decisions reached through democratic political process under majority rule.[14)]

In light of such phenomenon in the current South Korean society that's becoming increasingly pluralistic where members of the community growingly tend to resort to the judicial system for the resolution of disputes caused by differences in values and perspectives, heightening expertise, fairness, neutrality, and independence of the court and the judiciary as a

14) For further discussion on this issue, refer to Jong-Chul Kim, M*eaning and the Limits of Judicialization of Politics*, 33-3 KOREAN PUB. L. RES. 237 (2005) [*available only in Korean*].

whole would not suffice, and democratic legitimacy in the organization and the operation of the judiciary is indispensably requested. Thus, some have suggested that the judges and Justices be selected through public election. However, as pointed out in many of the individual States in the United States where such electoral systems are in place, the election of the judges and justices might significantly impair political neutrality and independence of the judiciary vis-à-vis political branches of the government, thus ample caution is due before any such attempt is to be made.[15)]

Currently, as a means to fortify the non-direct vesting of democratic legitimacy in the judiciary, an ad hoc committee for nomination of Justices of the Supreme Court is formed for each such nomination with members of diverse backgrounds and qualifications, and a confirmation hearing at National Assembly is mandated for the appointment of the Chief Justice and the Justices of the Supreme Court (Article 104 of the Constitution). Some additional suggestions are being made in this regard, including the one for national referendum on the appointment of the members of the nation's highest court at the next general election immediately following such appointment, as in Japan. Other examples include providing more authority in the nomination process for the Chief Justice and the Justices at the Supreme Court for the advisory committee for nomination under the Supreme Court Rule. Also, some suggest that the representatives of the judges of the lower courts be included as the members of the above nomination committee, while others suggest that the qualifications and disciplines of the members of the nomination committee who are included on mandatory basis be further diversified.

The Judicial Reform Committee presented a comprehensive reform proposal for judicial appointment in February of 2004, for more substantial authority of the nomination committee, broader exchange of opinions between the nomination committee and the public, wider sharing of information through disclosure of nomination committee's decision-making process, and more balanced exercise of the authorities between the Chief Justice and the President through multiple nomination on the part of the Chief

15) On this issue, refer to Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

Justice. As part of the ongoing deliberation for a significant range of constitutional amendment within the political branches and across the public domain in South Korea, possible reform of the institutions pertaining to the judicial appointment is seriously discussed in the light of democracy and democratic legitimacy.

2) Communications between the Court and the Public, Public Participation in Judicial Proceedings, and Communications within the Judiciary

In order to secure and maintain democratic legitimacy in a representative democracy, an institution should have in place a method and channel of communication through which it hears the wills and wishes of the represented and the public may acquire pertinent information as to its activities beyond the phase of the institution's organization. In South Korea, especially since late 1980s, various citizen groups have been active in non-governmental sectors and the value of citizen participation in functions of the government sectors has been increasingly appreciated and emphasized. The rapid development of information technologies is also contributing to certain idiosyncratic aspects of South Korean democracy, underscoring citizen monitoring over governmental activities through disclosure of information and direct citizen participation in governmental activities. An effort to secure democratic legitimacy for the judiciary has also been made both inside and outside the judiciary.

In this vein, communications between the court and the public and communications within the courts are both important. The South Korean judiciary including the Supreme Court has been directly communicating with the public through various channels including the courts' official websites since 2005. The official URL of the Republic of Korea's Supreme Court currently has approximately 70,000 visitors every day. Also, courts at respective levels have operated a "Citizen Judicial Monitoring System" since 2003, and a system through which they offer policy information and hear opinions and reactions thereon called PCRM (Policy Customer Relationship Management) since 2006.

Such demand for continuous court-public communications and for public participation in judicial activities has started to affect the actual trial procedures of the court. Through the activities of the Judicial Reform Committee, the jury system started to be publicly discussed in South Korea,

and National Assembly enacted the Citizen Participation in Criminal Participation Act on June 2007 (Law No. 8495) based on the discussion over a long period of time. This so-called Korean-style jury system is in place as of January 2008 for the limited scope of criminal cases, and it is hard to meaningfully analyze its actual operation due to its very short history in operation.[16] However, direct citizen participation in trial procedures has contributed to refreshing the public of the effort for heightened democratic legitimacy of the activities of the judiciary, thereby raising public's trust and respect in and for the judiciary.

As communications between the court and the public and the citizen participation in judicial proceedings are to further democratize the judiciary from outside the court, fortifying democratic elements from within the judiciary is equally important towards the same goal. The South Korean judiciary has endeavored for institutional changes especially since early 1990s. In 1995, the Judicial Conference was initially organized at respective levels of courts under the Supreme Court Rule i.e., the "Rule on the Establishment and Operation of Judicial Conference" (Supreme Court Rule No. 1334). Subsequently, in July 1994, Article 9-2 of the Court Organization Act was added as a statutory ground for the Judicial Conference. The Judicial Conference serves as a forum where judges may exchange opinions and concerns and a channel to deliver such opinions and concerns to the decision-making process. Thus, the Judicial Conference assumes an advisory function or is given authority for resolution over the decision-making of the chief judge of the respective courts upon administrative policy matters. Also, development of information technologies has critically contributed to the democratization within the judiciary. An internal electronic communications system that was first established in 1998 and is currently called Court-Net has most effectively enabled sharing of information and timely discussions on important policies

16) During the one-year period of January 2008 through January 2009 since the inception of the jury system in South Korea, among approximately 2,500 of potential cases (i.e., those cases where the defense could request or could have requested jury trial), the defense requested jury trial in 249 cases or less than 10% of the possible cases. Among 249 cases where the defense requested jury trial during the above period of time, the court decided not to provide a jury trial in 61 cases (24.5% denial rate). *See* Judicial Statistics, the Supreme Court of the Republic of Korea (http://eng.scourt.go.kr/eng/resources/statistics.jsp).

of court-wide interest.

2. *Issues and Concerns Relevant to the Judicial Appointment from Democracy Perspectives, as Currently at Issue in South Korea*

1) Large Dockets of the Court

South Korean courts at practically all levels, including the Supreme Court, have an overwhelmingly large size of workload or are faced with excessive number of cases.[17] This in turn significantly weakens the role of the Supreme Court as the court of law and of last resort. At the appellate level, notwithstanding the requirements set for the appeal, appellate review over issues of facts has not been effectively demarcated from that over issues of law, and the Supreme Court's more than large docket has resulted in review over predominant majority of cases by the Petty Benches vis-à-vis the Grand Bench, which in turn has lead to lack of clarity and consistency in its constructions of law. Excessively large dockets considerably impair the function of the court and especially of the Supreme Court, regardless of the stance on the role of the highest court of a nation one may take of whether the Supreme Court is expected to focus on redressing and correcting the individual flaws in the lower courts' judgments for purposes of better individual remedies, or to focus on forming and building consistent precedents on statutory construction over matters of community-wide importance for purposes of presenting policies, for the ability to effectively manage and resolve as many cases as possible within a limited amount of time then gets unduly and excessively underscored as the essential qualities expected for the members of the Supreme Court as well as the lower courts.

Possible ways to cure this problem have been suggested in largely two directions: first by relieving the workload of the courts, for example, by

17) In 2008, the District Courts with 1,910 judges in eighteen facilities across the nation heard approximately 18,243,000 cases; the High Courts with 303 judges in five facilities across the nation heard approximately 43,000 cases; and the Supreme Court with the Chief Justice and thirteen Justices including the Minister of the Office of National Court Administration, and also with 80 research judges, heard approximately 31,000 cases. *See* Judicial Statistics, the Supreme Court of the Republic of Korea (http://eng.scourt.go.kr/eng/resources/statistics.jsp); The 2008 Introductory Book of the Supreme Court of Korea.pdf (*available at* http://eng.scourt.go.kr/eng/resources.jsp).

limiting the appeal to the Supreme Court; alternatively, although not in a mutually exclusive sense, by increasing the capacity of the institution in charge of the docket, for example, by creating a new appellate division at the High Court level or by increasing the number of the Supreme Court Justices.[18] As pointed out in the preceding paragraph, in a larger context of the role of the judiciary and especially of the nation's highest court from democracy perspectives, excessive workload prioritizes the function of effectively processing most number of cases as the major function of the Supreme Court, thus ultimately requiring that the Supreme Court be composed of efficient and experienced experts as opposed to those with expertise in various relevant fields or sectors of the community.

2) Hierarchically Career-Oriented Judicial Appointment System

In South Korea, judges are appointed without having to have any previous experience in the practice of law; instead, until now, judges are typically appointed among those who have passed the national bar examinations and have subsequently finished the two-year training period at the government institution of Judicial Training and Research Institute established under the Supreme Court (Article 42, Section 2, of the Court Organization Act). Thus, judges in South Korea begin to acquire and build their experiences and expertise in law subsequent to their appointment to the judicial position possibly and typically at relatively young age. This landscape is soon to be changed as South Korea adopted a graduate-level professional law school system in 2009 and the legislative process is on the way for a new examination system applicable to the graduates from such law schools in order to be licensed to practice law and to be appointed as the judges. Since the establishment of the South Korean judiciary under the first ROK Constitution over sixty years ago, the judges have been appointed to their initial position as such at the age of thirty or younger,[19] and then subsequently appointed to

18) For further explanation and discussions on this issue, refer to Korea Civil Procedure Law Association, JUDICIAL POLICY ON THE APPELLATE PROCEEDINGS REFORM (The Office of National Court Administration, 2009) [*available only in Korean*]; Moon-Hyuck Ho, *Purpose of Appeal to the Highest Court and the Measures to Reduce Workload of the Appellate Court*, CIV. PROC., Vol. 9, No. 2 (2005) [*available only in Korean*]; and Seok-Sun Lee, *Function of the Appellate Proceedings and the Issues accompanying Limits on Appeals*, 157 HUM. RTS. & JUST. 118 (1989) [*available only in Korean*].

various judgeship positions along the hierarchy. Along such hierarchy, a judge takes on the position initially as an associate judge on a three-judge panel at the District Court, then a single judge at the District Court, an associate judge on a three-judge panel at the High Court, a presiding judge on a three-judge panel at the District Court, a presiding judge on a three-judge panel at the High Court, the chief judge of the District Court, the chief judge of the High Court, and then the Justice of the Supreme Court. As the hierarchical continuum proceeds, the available positions decrease in number, thus the positions for the judges along the above hierarchy form a shape of the pyramid.

This system has been effective in resolving the exponentially increasing workload with limited human and financial resources. Also, this system provides benefits of stability and predictability to a certain extent for those both inside and outside the court. However, such a system has caused the serious phenomenon of involuntary early retirement of experienced judges as the number of available positions along the upward hierarchy diminishes: on average, a judge in South Korea retires from her or his judicial position in less than twenty years of service from the initial appointment. In addition to the loss of judicial expertise accompanying such early retirement, as these retired judges go into private practice, the seemingly close ties between such retired judges now in private practice and the judges remaining on the bench in the public's eyes have impaired the public's trust in the integrity and fairness of the judicial functions. Also, as judges are appointed at relatively young ages and begin to serve as associate judges on the three-judge panel with the presiding judge who is more experienced as well as at higher position along the judicial hierarchy, they tend to form at least seemingly a master-apprentice relationship, although the Court Organization Act through the revision of July 1994 does not acknowledge higher or lower ranks among the judges with the exception of the Supreme Court Justices and the Chief Justice vis-à-vis other judges at the lower courts. Such master-apprentice relationship might injure

19) As of 2008, the average age of newly appointed judges was 29.0 years of age; for a period from 1990 to present, the average age of newly appointed judges is approximately 30 years of age. The Office of National Court Administration, PAST, PRESENT AND FUTURE OF THE JUDICIARY, Judicial Development Fund Inc, December 2008, at 249 [*available only in Korean*].

the judicial independence especially in the eyes of the public. This tendency has been exacerbated under the current judicial appointment system along the hierarchical continuum that repeatedly penetrates different tiers of courts.

Beginning in 1998, the South Korean judiciary appoints some judges among the individuals with certain legal experiences, and the Office of National Court Administration has recently announced that up to fifty percent of the newly appointed judges will be appointed among the individuals with prior experiences in law by the year 2012. Such a change may entail changes in standards and requirements for judicial appointment, as diverse aspects related to a candidate's judicial work performance such as moral characters as well as legal expertise may be evaluated over the period of work experience prior to the individual's appointment as a judge. Such possible diversification of evaluation standards is and should be the essential characteristic should this change actually occur. On the other hand, an ample caution is due for the above suggested change, as South Korea lacks a rich pool of individuals with substantial legal experiences,[20] which is the most important prerequisite for the above system change to work.

3) Standards Applicable to Judges' Performance Evaluation and Judicial Personnel Decisions

All organizations need certain standards for personnel decisions applicable to their members. Standards for performance evaluation and personnel decisions are particularly important for the judiciary especially from democracy perspectives, as such standards have considerable symbolic and actual relevance on the independence of the judiciary and affect the stability and predictability internal to the institution. In a sense, should an established set of standards accurately and persuasively indicate the transfer from the current position to the next one, such standards may contribute to the independence of individual judges' performance of judicial responsibilities and hence the independence of the judiciary as a whole. In South Korea, as the

20) South Korea has 17.6 individuals who are licensed to practice law out of 100,000 as of 2008. The U.S. has 376.3 out of 100,000 as of 2006; Germany has 154.6 out of 100,000 as of 2004; and France has 72.8 out of 100,000 as of 2004. The Office of National Court Administration, *supra* note 19, at 251 [*available only in Korean*].

judges are rotated around various positions repeatedly through different tiers of courts along the structure of courts of first instance and courts of appeal, among those initially appointed as judges in the same year, part of them are rotated to higher positions sooner than others. Previously, through 1970s, such an order was determined by the respective ages of those individuals initially appointed as judges in the same year. In 1979, the order began to be set according to the individuals' performance at the national bar examinations, which remained unchanged throughout their legal career within the judiciary. This system was in place through 2005, although such system had been criticized for rigidity and unfairness and for the failure to reflect the actual performance of the individuals as judges. In 2005, a new system for performance evaluation and personnel decisions was introduced based on various opinions gathered between 2003 and 2005.

Under the current standard, the previous standard based on the performance at the bar examinations and during the judicial training course applies for the first ten years following the initial appointment, while personnel decisions subsequent thereto are based upon the evaluation of the individual judges in their performance of obligations and responsibilities at the bench by the judges superior to them in rank and position. The current performance evaluation system was first established through the revision of the Court Organization Act in July 1994 as the number of judges considerably increased. The system came to actual use in 1995 under the Supreme Court Rule of the "Rule on Judges' Judicial Performance Evaluation" (Supreme Court Rule No. 2244). Notwithstanding the merits in terms of fairness and predictability, there has been a long-standing criticism that such an evaluation system exacerbates the hierarchical relationship among the judges. Currently, other elements such as individuals' regional or geographical preferences and fairness among judges with approximately same experiences at the bench are simultaneously considered for various personnel decisions.

4) Context of Discussing South Korea's Judicial Appointment System from Democracy Perspectives

The judicial appointment system in South Korea as discussed above has evolved in bifurcated yet related directions: it has developed to increase stability and predictability internal to the judiciary, ultimately for the sake of independence of the judiciary; also, it has sought to optimize the efficiency in

managing and resolving an exponentially increasing number of cases with limited human and financial resources. The independence of the judiciary is one of the core values that set the foundation for the role of the judiciary in a representative democracy, and therefore should never be compromised to changing environments. The system of judicial appointment should likewise be analyzed and reformed ultimately to better maintain and heighten judicial independence. Efficiency in case management and dispute resolution, on the other hand, is one of the two pillars that support the trust of the public in the judiciary, while the other one is just and trustworthy decision-making on the part of the court both in form and substance.

As indicated above, the judicial appointment system in South Korea faces such challenges as the early retirement of judges whose positions are rotated along a continuum of hierarchy that penetrates different tiers of trial and appellate courts, potentially entailing waste of judicial resources and resulting in bureaucratization among the judges that undermines the trust of the public in judicial fairness and independence. Also, costly position changes and rotations in a large scale occurring each year are unavoidable under the current system. Based on the analysis of current issues and concerns as such, the Supreme Court of the Republic of Korea has taken on the mission to reform judicial appointment system. For such reform efforts, an evaluation of the current situations under the current system cannot suffice, however; much effort is also due for understanding the current and upcoming changes of environment where the judiciary will function. Such environmental changes as contextual changes include the following.

First, South Korea, in March 2009, launched a new legal education system of the graduate-level professional law school system. Now, the task of educating and rearing the future judges, prosecutors and attorneys will be primarily conducted in and by the private domain as opposed to the government domain, with ensuing changes in priorities in terms of qualifications expected for the judges. Also, under the new system, the number of individuals licensed to practice law will greatly increase which will dilute the perception of ranks within the legal community. Furthermore, judges, prosecutors and attorneys alike now have the educational backgrounds in more diverse disciplines than before, and the average age at which individuals become licensed to practice law will go up.

Second, the increase in the number of judges over recent years and over

the years to come should be taken into account seriously. As of August 2008, the number of judges across the nation was 2,352. The applicable law in this regard of the Act on the Number of Judges at Respective Courts (Law No. 8412, as enacted in 2007) and the applicable Rule (Supreme Court Rule No. 2222) provide that the number of judges will increase to 2,844 by the year 2010. The gradually increasing number of judges insinuates that the cost of repositioning or transferring judges each year in a large scale as conducted throughout South Korea's judicial history will become further burdensome. Also, mandating such numerous judges to handle all diverse types of cases regardless of their idiosyncratic qualifications or backgrounds would inevitably cause inefficiency. In such a context, a more efficient and perhaps fairer way would be allocating judges to the suitable cases pursuant to their qualifications and expertise for the resolution of such cases.

In addition, the qualifications expected for the judges and the judiciary as a whole expand, as the civil sector in South Korea matures and stabilizes, the technologies for communications and information-sharing rapidly develop, the disputes and controversies increasingly resort to judicial resolution under the value of rule of law, and the cases of transnational attribute increase. Such tendencies in turn require that the judiciary be capable of confronting and dealing with such challenges, by securing human resources with appropriate expertise and rich relevant experience.

3. *Constitutional Ramifications of the Judicial Appointment in the Republic of Korea and Current Reform Discussions in Democracy Perspectives*

In a representative democracy dedicated to fundamental rights protection for minority as well as majority members of the community that simultaneously is growingly becoming pluralistic, the government institution vested with judicial function vis-à-vis political branches of government that operates under the majority rule faces the following tasks. First, it should be able to strike balance among diverse values and preferences across the community and to reflect such balance in its judgment based upon fairness and legal expertise. Such quality and capability have increasing significance as the impact of the judicial decision-making on the community's policy choices continuously expands. Second, it should guarantee both in form and

substance the fundamental rights protection for all individuals including minorities. These tasks for the judiciary and especially for the nation's highest court in turn explain the core qualities and qualifications expected for its members.

First of all, the Supreme Court, along with the Constitutional Court, should be able to timely form and present through its judicial decision-making process such policies comprehensively balancing diverse values and perspectives that exist in the community. This does not merely require inclusion of the individuals from more diversified disciplines of law as its members; rather, this goal may be achieved by constituting the institution with those individuals actually capable of representing and balancing diverse values and preferences. Also, under the separation of powers structure of the Republic of Korea which is the key institutional mechanism for implementing its constitutional democracy, the members of the nation's highest court should be equipped with the expertise and courage for the check-and-control over the political branches of government. The checks and balances the South Korea's separation of powers structure seeks can be achieved only when the judiciary is capable of actively checking the legislative and executive branches by producing judgments based on a balance between diverse values including those held by minorities, as well as on legal expertise and fairness. In South Korea's representative democracy, the interests and preferences of the majority are reflected and protected through the legislation and the execution of policies of National Assembly and the executive branch, which are constituted through public elections under majority rule. This mandates the judiciary to guarantee the rights and the freedom of the minority members of the community as well as those of the majority under the separation of powers structure of the nation's Constitution. The demand as such is ubiquitous, yet particularly conspicuous in the areas of labor, environment, and protection of minorities including women.

With the above as an ultimate goal, an effort to reduce the workload of the Supreme Court by possibly limiting the appeal to the Supreme Court and by creating an appellate division within the High Court is also currently under discussion. Such an effort, if successful, will further increase the possibility that the Supreme Court, as the highest court of the nation, may assume more of balancing and policy-presenting function than that of correcting mistakes of the lower courts in individual cases. Furthermore, as a context of discussing

the reformation of judicial appointment system, the dissemination of currently much concentrated powers and the delegation of authorities within the judiciary, mostly from the Supreme Court or the Office of National Court Administration within the Supreme Court to the respective administrative bureaus or the chief judges of the High Courts, should also be noted.[21] Such dissemination and delegation of administrative authorities significantly considers (a) specific judicial proceedings, (b) personnel decisions,[22] and (c) budget-related matters,[23] within each of respective courts at respective levels.

1) Judicial Appointment System in General, from Democracy Perspectives

As discussed above, South Korea's current system of judicial appointment

---

21) The Office of National Court Administration established under the Supreme Court has continuously made an effort to disseminate and delegate administrative authorities previously concentrated in the Supreme Court. For example, audit on judicial performance relevant to court and judicial administration including the number of cases each judge adjudicates per year is now conducted at the level of High Court since 2006, while such audit was previously conducted by the Supreme Court until 2005. Further, the Office of National Court Administration is currently preparing a system change so that the Supreme Court will only present directions for the operation of judicial systems and proceedings while detailed rules applicable in specific cases will be formed and established at the level of each court through discussions among the judges and other members belonging to that specific court.

22) Currently, under Article 104, Section 3, of the Constitution and Article 41, Section 3, of the Court Organization Act (Law No. 8794), judges other than the Justices and the Chief Justice of the Supreme Court are appointed by the Chief Justice with the advice and consent of the Conference of the Supreme Court Justices. However, as the Supreme Court plans to recruit by 2010 up to fifty percent of newly appointed judges among those with previous legal experience including the prosecutors and the practicing attorneys, the opinions of the chief judges of the courts with applicable jurisdiction on the capability and moral character of such candidates may have a decisive impact on the appointment decisions. Also, authority to make personnel decisions on transfer to different positions or dispatch to non-court government institutions can be delegated to the level of respective High Courts from the Supreme Court even without constitutional or statutory revisions.

23) In terms of decision-making authority over budget-related matters, considerable delegation of authority has already been in place on the initiative of the Office of National Court Administration. However, in certain areas, for example, of asset procurement and facilities construction, 95% and 100%, respectively, of relevant decision-making authority is reserved by the Office of National Court Administration. The Office of National Court Administration, *supra* note 19, at 267-268 [*available only in Korean*]. Much caution is required in delegating authority relevant to judicial budget. However, to the extent the efficient yet strict management and control is practicable, further delegation of authority for budget-related decisions to the High Court level would be consistent to the effort for democratization within the judiciary.

can be summarily explained as the one under which the judges largely move along a continuum of positions as previously and conventionally set following their initial appointment at young ages with no previous legal experience. Such a system can be and has indeed been fairly efficient in managing and resolving a great and further increasing number of cases with limited human and financial resources. However, such a system causes an involuntary early retirement of judges with experience suitable for resolving complex and specialized disputes that have been further complicated recently due to differing values and preferences. Now a change is due for a system under which the judges at least in part are appointed among the individuals with expertise and experience and, once appointed, the judges continue to serve through retirement age. An institutional device to efficiently prevent involuntary early retirement of experienced judges will also contribute to judicial decision-making based on expertise, thereby increasing the trust of the public in the judiciary as a whole.

The above reform is not amenable to the system of positioning judges through a continuum of posts that penetrates different tiers of trial and appellate courts that as a whole forms the structure of a pyramid. Thus, through reform, we can perhaps appoint judges to the level of first instance court and to the appellate level separately, or we can enlarge the term of office for the judge at the court of first instance so that any judge will begin to serve at the appellate level close to the retirement age. Additionally, further financial resources should be secured in order to recruit individuals with appropriate expertise and experience. Also, in order to avoid bureaucratization of and among the judges and to prevent involuntary early retirement of experienced judges, some of the fundamental changes may precede, under which trials are presided by a single judge or by a panel of judges with equivalent judicial experiences to the extent possible, as opposed to a panel of multiple judges with vastly differing judicial experiences, as in the latter case it is prone to entail bureaucratization.

2) Standards and Requirements for the Appointment of the Justices and the Chief Justice of the Supreme Court in Democracy Perspectives

With respect to the standards and requirements for appointing the Justices and the Chief Justice of the Supreme Court, various citizen groups as well as the judiciary itself have actively been engaged in open discussions especially

since 2000. One of the good examples as such is the People's Solidarity for Participatory Democracy's proposal[24] in 2003 which suggested the applicable standards to the appointment of five Justices upcoming that year. The standards for appointment and qualifications for the members of the nation's highest court suggested and demanded by various citizen groups are as follows.

First of all, it has been most actively and constantly urged that the individual Justices and the Chief Justice represent diverse values and perspectives across the community. As democracy matures with accompanying expansion of liberty and equality, the South Korean society is rapidly becoming more pluralistic with increasing diversification of political, social, cultural and moral values. The impact of the decision of the Supreme Court and the Constitutional Court upon the policy decisions and choices within the community has considerably expanded. Such changes significantly direct the role of the nation's highest court in the South Korean democracy, which in turn mandates to institutionally require the ability and willingness to balance such diverse values and preferences as the essential qualities for the members of the highest court. In this vein, in light of the role of the judiciary in a representative democracy, the ability to understand and apply the perspectives of the minorities in matters concerning their rights and interests is particularly highly demanded under theories of representation.

Other important aspects requested by various civil sectors in appointing the members of the highest court include (a) diverse paths or disciplines the individual members of the highest court have experienced prior to the appointment to the Supreme Court, as, currently, the Supreme Court as well as the Constitutional Court consists of the individuals almost without exception who previously served as the judges within the court system; (b)

---

24) People's Solidarity for Participatory Democracy is one of the representative non-governmental organizations in South Korea with approximately 8,000 members pursuing citizen movements for participatory democracy and the expansion of human rights. Established in September of 1994 by approximately 200 citizens under the name of citizen solidarity for participatory democracy and human rights, PSPD has newly introduced various means of citizen activities such as legislative and judicial watchdog projects, i.e., systemized monitoring and analysis of legislative and judicial records from diversified perspectives under varied standards, which have enabled disclosure and oversight, thereby publicly stimulating changes through criticism, public discussion and participation.

willingness and courage to seek reform both inside the judiciary and towards the other branches of government; (c) fairness and creativity as well as expertise in law and various other fields for the resolution of complex disputes; and (d) moral character of each of the individual members at the highest court of the highest caliber for the public trust in the performance of their judicial affairs.

Discussions on the standards and qualifications for the members of the judiciary and especially of the highest court have gradually been reflected in the appointment of the members of the Supreme Court and the Constitutional Court, which has initiated changes in the tendency of such institutions particularly in those cases crucially concerning diverse values and perspectives especially on minority issues. The decision of the Supreme Court issued on July 21, 2005 (2002Da1178, 2002Da13850, as consolidated) that granted women as well as men the status as the members of traditional family clan indicates the effort of the Supreme Court to reflect the demand for gender equality from within the Korean society and such case may be seen as the example of the Supreme Court overcoming the conventional stance previously maintained by the judiciary.

IV. Concluding Remarks

The highest court of a nation should assume the role both of presenting to the public the balanced stance of the judiciary in such cases involving diverse values and preferences and particularly of those of minorities on one hand, and of correcting mistakes in lower court judgments on the other hand. However, the primary concern of the Supreme Court as the highest court of the nation in a democracy is more than correcting individual mistakes in lower court judgments. In South Korea, many of the recent judicial reform efforts have been geared toward reducing the docket or the caseload of the Supreme Court so that the Supreme Court can concentrate on its primary concern in a democracy of the system-wide corrective action. Such task or concern in turn has bifurcated issues of bridging the gap between law and society on one hand and protecting democracy on the other. The nation's highest court, including South Korea's Supreme Court, is charged with both of these jobs simultaneously, and, in most cases, they are complementary. In

light of the increasing recognition of judicial review of the constitutionality of statutes[25] and of minority rights protection from pluralistic stance, the role of the nation's highest court of preserving democracy has further grown in significance.

Viewing the issue of judicial appointment particularly from democracy perspectives, a key historical and empirical lesson from the past is that the people, even through their elected representatives, can destroy democracy and human rights. Especially since the experience of massacre and grave intrusion on human rights during and after World War II, all of us have learned that human rights are the core of substantive democracy.[26] Without proper protection for human rights, there can be no democracy and no justification for democracy. The protection of human rights, which should indispensably include the rights of every individual and every minority group, cannot be left solely in the hands of the legislature and the executive in the name of elected representatives, which, by their nature, reflect majority opinions choices. As a corollary, under the current government organization and separation of powers structure in the Republic of Korea, the question of the judicial branch's role in a democracy clearly arises. It is in this context that the issue of judicial appointment is taken seriously in this article as a way of determining how we constitute our judiciary, which in turn greatly affects what role the judiciary assumes and how it functions in our representative democracy.

Various empirical resources and statistics indicate that, in the current South Korean society with increasingly pluralistic characteristics, the phenomenon of legalizing political and value-choice questions incrementally becomes common. In this context, the question of how the judges should deal with such problems that contain and entail legal implications becomes critically important, for the answer thereto, as intertwined with the question of

---

25) Although South Korea has the Constitutional Court as an independent constitutional institution on par with the Supreme Court and the constitutionality review system through constitutional adjudication by the Constitutional Court, the judiciary serves a material role in the constitutionality review process, and the recent underscoring of the constitutionality review over the statute further emphasizes the role of the judiciary for protecting fundamental rights and democracy itself in a representative democracy.

26) *See also* AHARON BARAK, THE JUDGE IN A DEMOCRACY (2008).

qualifications for the judges and the appropriate criteria for evaluating the judges who write the judicial opinions, largely determines the criteria for developing the law and further provides a basis for formulating a system of interpretation of all legal texts. This question ultimately leads us to the issue of the appropriate role of the judiciary and especially the role of the nation's highest court in a representative democracy. Hence the issue of judicial appointment bears critical constitutional relevance and significance in democracy perspectives.

Representative democracy as the South Korean Constitution establishes presupposes and requires many elements, such as constitutionalism, legislative supremacy, and human rights. Also, there exist preconditions for realizing the judicial role discussed in preceding paragraphs, such as the independence of the judiciary, judicial impartiality, fairness and expertise, and public's trust in the judiciary and the operation of the judicial system. The effort to reform the system of judicial appointment currently ongoing inside and outside the court in the Republic of Korea will bring the nation's judiciary as a whole one step closer to the much anticipated role of the judiciary in the democracy that the nation's Constitution establishes.

KEY WORDS: judicial appointment, role of the judiciary in democracy, role of the Supreme Court in democracy

Manuscript received: Oct. 16, 2009; review completed: Dec. 2, 2009; accepted: Dec. 10, 2009.

Journal of Korean Law | Vol. 9, 83-108, December 2009

Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals

*John Leitner**

Abstract

In 2007, Korea implemented the world's only mandatory real name verification system for individuals wishing to post content on popular Korean internet portals. This system, which expanded in 2009 to include additional portals, has so far been relatively ineffective at its stated purpose of reducing instances of online libel. Together with Korea's censorship of certain internet sites, the real name verification system distinguishes Korea as regulating internet use more heavily than other democratic societies.

I argue that the real name verification system is unlikely to successfully deter future acts of cyber libel, but will rather hinder socially useful online activities, such as free expression on matters of social and political significance. Possible means for strengthening enforcement of the real name verification system would provide little promise of preventing defamation while further interfering with freedom of expression and personal privacy.

I propose that Korean law can more effectively balance protection of private reputations with individual liberty interests by changing the real name verification system from a mandatory requirement to an internet portal opt-in system. Korea might also consider an emphasis on civil remedies as a means for minimizing the occurrence and consequences of cyber libel while simultaneously preserving a free and collaborative internet.

I. Introduction

The widespread proliferation of internet access throughout many societies worldwide has facilitated not only socially positive practices, but also detrimental ones. The internet is a vehicle for access to vast stores of

* Full-time lecturer at the Seoul National University School of Law; J.D. received from Harvard Law School. This Article was funded by the Seoul National University Law Foundation in 2009. I would like to thank Ko Ya Choi and Sung-joong Kim for their excellent research and translation assistance. This article expresses my opinions and conclusions, and any errors in the article are entirely my own.

information, but also facilitates the circulation of misinformation.[1] While the internet provides unprecedented opportunities for physically disparate individuals to interact, collaborate, and express themselves,[2] it has also introduced opportunities for abusive self-expression, notably through online defamation ("Cyber Libel").[3] As the national population with the highest rate of high-speed internet access in the world,[4] the Republic of Korea ("Korea") has experienced both the blessings and curses of online social networking in an unusually large measure. In Korea, the debate over how to balance free online expression and the prevention and punishment of cyber-crime is intense and has thus far resulted in a legal regime for internet regulation that is more restrictive than that of many other democratic nations.[5]

Amongst Korea's most recent internet regulation measures, and arguably its most unique and controversial, is a mandatory procedure for real name verification (the "Real Name Verification System" or the "System"). The System, created by an amendment to the Act on Promotion of Information and Communications Network Utilization and Information Protection [Jeongbo tongsinmang iyong chokjin mit jeongbo boho deunge kwanhan beopryul] (the "Information and Communications Act"),[6] requires heavily

---

1) Significant in the case of Korean society were online rumors linking imported American beef with mad cow disease. *See* Jin-seo Cho, *Portals Turning Into Rumor Mills?*, KOREA TIMES, May 14, 2008, *available at* http://www.koreatimes.co.kr/www/news/biz/2008/05/123_24189. html.

2) *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6-9 (2004) (arguing that "[t]he digital revolution changes the factual assumptions underlying the social organization and social practices of freedom of speech …").

3) This phrase is apt because defamatory material presented online takes fixed form, such as text or recorded media.

4) *See* OpenNet Initiative: South Korea, http://opennet.net/research/profiles/south-korea (May 10, 2007). In recent years, Korea has consistently led the world in societal broadband internet access. *See S. Korea Tops OECD in Internet Penetration*, KOREA TIMES, June 17, 2008, *available at* http://www.koreatimes.co.kr/www/news/biz/2008/06/123_26007.html; Rob Frieden, *Lessons from Broadband Development in Canada, Japan, Korea and the United States*, 29 TELECOMM. POL'Y 595, 597 (2005).

5) For instance, Korea engages in some internet censorship. *See* OpenNet Initiative: South Korea, *supra* note 4. This issue is more fully discussed *infra* Section IV, "Comparison with Other Nations."

6) This law has the purpose of combating legal violations occurring on the internet and addresses collection and management of personal information of internet users.

trafficked internet portals[7] to direct users to verify their identities on a public institution website using their national identification numbers before the users are allowed to post content on the site.[8] This information is then retained for potential use in criminal investigations.[9] With two years of experience with the Real Name Verification System, reasonable concerns and criticism exist over the law's effectiveness at serving a legitimate social function within a democratic society.

This article examines the Real Name Verification System and argues that it has been and will continue to be not only ineffective at its stated purpose of preventing and punishing Cyber Libel, but also an unwarranted incursion on the liberties of Korean individuals. The System threatens to chill legitimate political and social activities in the online space, thus frustrating legitimate and socially generative[10] uses of the internet without achieving meaningful progress to prevent Cyber Libel.[11]

This article will first describe defamation law in Korea, especially as it relates to Cyber Libel,[12] and the law regarding the Real Name Verification

---

7) Under the law as it is presently enforced, internet portals with more than 100,000 users per day must comply with the Real Name Verification System. JEONGBO TONGSINMANG IYONG CHOKJIN MIT JEONGBO BOHO DEUNGE KWANHAN BEOPRYUL [ACT ON PROMOTION OF INFORMATION AND COMMUNICATIONS NETWORK UTILIZATION AND INFORMATION PROTECTION] Act No. 9637, Apr. 22, 2009, art. 44-5(1)2 [hereinafter INFORMATION AND COMMUNICATIONS NETWORK ACT]; JEONGBO TONGSINMANG IYONG CHOKJIN MIT JEONGBO BOHO DEUNGE KWANHAN BEOPRYUL SIHAENGRYEONG [Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT] Presidential Decree No. 21719, Sept. 9, 2009, art. 30.

8) Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 29.

9) *Id*.

10) The term "generativity" was applied by Professor Jonathan Zittrain to describe the power of the internet to facilitate creativity and collaboration through the unique degrees of interconnectivity that are possible on an open worldwide network. *See* Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1981-96 (2006). Zittrain himself defines generativity as "a system's capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences." JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET — AND HOW TO STOP IT 70 (2008).

11) *See* Jisuk Woo et al., *Internet kesipan silmyeongjaeui hyokwae daehan siljeung yeongu: Jaehanjeokboninhwakinjae sihaenge ttareun kesipan nae keulsseuki haengwi mit bibangkwa yokseolui byeonhwareul jungsimeuro* [*An Empirical Analysis of the Effect of Real-name System on Internet Bulletin Boards: Focusing on How the Real-name System and Users' Characteristics Influence the Use of Slanderous Comments and Swear Words*] 48 KOREAN J. OF PUB. ADMIN. (forthcoming 2010) (Korean).

12) Cyber Libel is specifically addressed in the INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 70.

System. The social background and context that helped propel a recent expansion of the Real Name Verification System will then be provided. In particular, the protests against Korea's importation of United States beef during the summer of 2008 and the suicide of popular Korean actress Jin-sil Choi merit description. I will briefly compare the Real Name Verification System with the internet regulation policies of other nations before analyzing the initial results and controversies that have stemmed from the implementation of the law and recent criminal prosecutions of internet activities. Two particular issues of note are the decision by Google Inc. ("Google") to prevent users of YouTube[13] in Korea from being prompted to register their personal identity information and the prosecution of "Minerva," a Korean economics blogger.

I will then pose several specific problems with the Real Name Verification System from a legal and social perspective.[14] In particular, the Real Name

---

13) YouTube is a streaming media website (www.youtube.com), owned by Google, that permits registered users to upload videos, which can then be searched and streamed by all those who access the site. Registered users can also post comments pertaining to particular uploaded videos.

14) I do not address possible constitutional law objections that might be made to the Real Name Verification System. The Korean Constitutional Court has grappled in the past with the issue of balancing internet freedom with efforts to regulate online activities. The Constitutional Court has stated, "If communication in the internet, which has now established itself as the largest and most important medium of expression, is regulated by order-centric notions, it will create a big impediment to the evolution of freedom of expression." 14(1) PANRYEJIP 616, 632 (99 Heonma 480) (Constitutional Court, June 27, 2002). For further discussion of this issue, see Kyu Ho Youm, *Defamation Law and the Internet in South Korea*, 9 MEDIA & ARTS L. REV. 141, 149-151 (2004) (*citing* Hae-won Lee, *Bulontongsin Kyujewa Pyohyeonui Jayu – Heonjae99Heonma480 Jeonkitongsinsaeopbeop Je53jo deung Wiheonhwakinkyeoljeong Sogo* [*The Government Regulations on "Improper Communication" and the Right to Free Speech*], 1 EONRONKWA BEOP [J. OF MEDIA L., ETHICS, AND POL'Y] 33, 52-65 (2002) (Korean)).

It has already been argued that, in fact, the Real Name Verification System has serious constitutional problems under Korean law, including interfering with anonymous free speech, free political speech, and the protection of personal data. Sung Gi Hwang, *Internet Silmyeongjee kwanhan Heonbeophakjeok Yeongu* [*A Constitutional Study on the Mandatory Personal Identification on the Internet*], 25 BEOPHAK NONCHONG [HANYANG L. REV.] 7, 36 (2008) (Korean). *See also* Yong-suk Hwang, *Internet Kesipan Silmyeongjee daehan Bipanjeok Yeongu* [*Critical Approach to the Implementation of Real-Name system on Bulletin Board of the Internet*], 15 EONRONKWA SAHWE [PRESS AND SOC'Y] 97, 129 (2007) (Korean). While these issues are important to my analysis, I do not analyze constitutionality as it might be assessed by the Korean Constitutional Court, but evaluate the Real Name Verification System on the basis of its efficacy and consequences.

Verification System has thus far proven ineffective at deterring Cyber Libel,[15] and the only mechanisms for improving effectiveness are too extreme to merit serious consideration. Furthermore, the Real Name Verification System interferes with the significant benefits of personal liberty and social and political dialogue achieved through widespread internet use. The law is overbroad and purports to defend "privacy"[16] by interfering with privacy in a different but also legitimate sense: the privacy of accessing and engaging in the exchange of information online, potentially of a legal but controversial nature, without fear of repercussion.[17] I then propose the possibility of changing the Real Name Verification System from a requirement to an internet portal opt-in program. I conclude with a short reflection on the benefits of emphasizing existing civil law for the redress of Cyber Libel and the avoidance of excessive government entanglement with online

---

15) Several studies have cast doubt on the effectiveness of the Real Name Verification System at preventing Cyber Libel. *See* Woo et al., *supra* note 11, at 20-21; Yong-suk Hwang, *supra* note 14, at 110-11.

16) It may be useful to briefly distinguish a number of meanings that may be attached to the term "privacy," each relating to the ability of the individual to control the revelation of information relating to her person. Used as the rationale for the Real Name Verification System, "privacy" refers to the interest in one's reputation and privacy of personal affairs that may reflect upon reputation. "Information privacy" is a subject that Korean courts have addressed in the realm of tort suits alleging psychological damages relating to the leaking of personal information. *See* Seong-Wook Heo, *Bulbeophaengwibeoplie Uihan Internetsangui Jeongbo Privacy Bohomunjee kwanhan Ilgo – Lineage II Game ID·Bimilbeonho Nochulsageoneul jungsimeuro –* [*Critical Thought on the Protection of Information Privacy on the Internet through the Legal Principles of Tort: In Relation to the Case Concerning the Disclosure of IDs and Passwords of Online Game Lineage II (Seoul Central District Court 2005Gadan240057)*], 30 MINSAPANRYEYEONGU [J. OF PRIVATE CASE LAW STUD.] 753, 756-61 (2008) (Korean). We should also distinguish "identity privacy," one's interest in controlling the expression and sharing of one's identity. *See* Jisuk Woo and Jae-Hyup Lee, *The Limitations of "Information Privacy" in the Network Environment*, 7 U. PITT. J. TECH. L. & POL'Y 2, 23-31 (2006) (arguing for "identity privacy" as a means of promoting social equality and more fully realized social and political freedoms).

17) The point has been made that while the detriments of anonymity in the online environment are much discussed (and prominently include Cyber Libel and copyright piracy), the benefits of anonymity, such as facilitating free speech and the avoidance of personal information profiling, are often ignored. *See* Jisuk Woo, *The Right Not to be Identified: Privacy and Anonymity in the Interactive Media Environment*, 8 NEW MEDIA & SOC'Y 949, 962-64 (2006) (*citing* A. Michael Froomkin, *Flood Control on the Information Ocean: Living With Anonymity, Digital Cash and Distributed Databases*, 15 J. OF L. AND COM. 395 (1996)). *See also* Woo and Lee, *supra* note 16, at 23-31.

communications.

II. Relevant Defamation Law

1. Korean Constitution

The most fundamental basis for Korean defamation law is arguably found not in statute, but in the Constitution of Korea (the "Constitution"). Under the Constitution, "Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics."[18] Protection of personal reputation is thus promoted by the language of the Constitution as well as expressly protected by statute (redressable by criminal penalty[19] and/or civil recovery[20]). The Constitution further provides that constitutional rights may be abridged as necessary "for national security, the maintenance of law and order, or for public welfare."[21]

While limitation on expression that violates the rights of others is hardly unique,[22] its inclusion in the language of a national constitution speaks to the sensitivity of issues such as defamation in Korean society.[23] Faced with difficult decisions and compromises between competing values, Korea has a substantial body of jurisprudence seeking to balance freedom of expression

---

18) DAEHANMINGUK HEONBEOP [CONSTITUTION OF KOREA], art. 21(4) (1987), *translated at* http://english.ccourt.go.kr/home/english/welcome/republic.jsp (last visited Nov. 13, 2009).

19) HYEONGBEOP [CRIMINAL CODE], arts. 307 and 309.

20) MINBEOP [CIVIL CODE], art. 751.

21) CONSTITUTION OF KOREA, art. 37(2). National security-related cases have been distinguished as being an area of freedom of expression-related jurisprudence where the Constitutional Court hesitates to interfere with legislative pronouncements. *See* Kyu Ho Youm, *The Constitutional Court and Freedom of Expression*, 1 J. KOREAN L. 37, 70 (2001).

22) For instance, the Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, Europ. T.S. No. 005, art. 10(2), states, "The exercise of [the freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the reputation or the rights of others … "

23) The language has been contrasted with the United States Constitution's First Amendment language, which protects freedom of speech without explicit qualification. *See, e.g.*, Youngjoon Kwon, *Tortious Liability of Internet Service Providers for Defamation: A Korean Perspective*, 5 J. KOREAN L. 121, 127 (2006).

against effective enforcement of laws.[24]

2. Korean Criminal Code

The Korean Criminal Code addresses defamation in Article 307[25]:

> 1) A person who defames another by publicly alleging facts shall be punished by imprisonment with or without prison labor for not more than 2 years or by a fine not exceeding 5 million won;
>
> 2) A person who defames another by publicly alleging false[26] facts shall be punished by imprisonment with prison labor for not more than 5 years, suspension of professional qualification for not more than 10 years, or a fine not exceeding 10 million won.

Cyber Libel is specifically addressed under the Information and Communications Act[27]:

> 1) Any person who has defamed any other person by publicly alleging facts through information and communications networks with the purpose of defaming him shall be punished by imprisonment with or without prison labor for not more than 3 years or by a fine not exceeding 20 million won;
>
> 2) Any person who has defamed any other person by publicly alleging false facts through information and communications networks

---

24) Though the Constitution defines freedom of expression as limited, this right is a particularly sensitive issue in Korea because of its recent history with an authoritarian government. "Demands for freedom of expression … were displayed more than anything else when Korea moved from an authoritarian rule to democracy. The Constitutional Court took an active attitude while drawing the boundaries for the constitutional guarantee of freedom of expression." Jong-Sup Chong, *Hangukui Minjuhwae Isseoseo Heonbeopjaepansowa Kibonkwonui Silhyeon* [*The Constitutional Court and the Attainment of Fundamental Rights in the Democratization of Korea: 1988-1998*], 40 SEOUL DAEHAKGYO BEOPHAK [SEOUL L. J.] 226, 241 (1999) (Korean).

25) CRIMINAL CODE, art. 307.

26) Under Korean law, the crime of defamation can be committed even where the underlying facts are true; falsity of the defamatory statement is not an essential element of the offense, but rather increases the maximum penalties.

27) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 70.

> with the purpose of defaming him shall be punished by imprisonment with prison labor for not more than 7 years, the suspension of professional qualification for not more than 10 years, or by a fine not exceeding 50 million won …

Cyber Libel is therefore punished with stronger penalties than libel expressed through other channels,[28] providing that the evidence establishes the perpetrator's intent to defame the victim.[29]

3. The Real Name Verification Requirement

In 2007, Korea became the first (and so far only) nation in the world to implement a national name verification requirement for online postings.[30] The measure was introduced as an amendment of the Information and Communications Act and passed on January 26, 2007.[31] The language of the statute provides that internet portals with more than 100,000 users per day must direct their users to a public institution-managed registration site where they confirm their identities using Korean national identification numbers;[32] the identifying data is preserved and can be matched in the future with particular posts.[33] However, the details of implementation were left to enforcement decrees.[34] Under the original enforcement decree, internet portals with more than 300,000 users per day and news sites with more than

---

28) Libel in general is distinguished from slander in article 309 of the CRIMINAL CODE, which provides for the same elements of the offense but includes higher maximum penalties for libel.

29) Note that articles 307 and 309 of the CRIMINAL CODE do not include intent to defame as an element of the defamation offense.

30) The only other locality with a comprehensive real name verification system is the city of Hangzhou, China. *See* Qiu Li Hua and Yue De Liang, *"Wang Luo shi ming zhi" wei he nan? – Hang zhou shi shi "wang luo an bao tiao li" diao cha* [*Internet real-name registration system: Why so difficult to implement? An Investigation into the implementation of the Hangzhou Regulations for Network Security Protection*], XINHUA NEWS AGENCY, May 19, 2009, *available at* http://news.xinhuanet.com/ newscenter/2009-05/19/content_11399392.htm (Chinese).

31) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-5.

32) *Id. See also* Hyung-eun Kim, *Do new Internet regulations curb free speech?*, JOONGANG DAILY, Aug. 13, 2008, *available at* http://joongangdaily.joins.com/article/view.asp?aid=2893577.

33) Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 29.

34) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-5(1), (2).

200,000 viewers per day were required to comply with the Real Name Verification System.[35] In early 2009, the enforcement decree was changed to expand the Real Name Verification System to include all internet portals with more than 100,000 users per day.[36] The Information and Communications Act provides that internet portals are to respond to complaints of allegedly defamatory content[37] by following certain takedown procedures.[38] Korean internet portals generally describe their responsive steps in online terms of use.[39]

III. Social Catalysts for Strengthening the Real Name Verification System

Understanding the impetus for the expansion of the Real Name Verification System[40] requires a brief explanation of several events which occurred in 2008. Cultural context is critical in understanding the appeal of this law, but the key cultural characteristics in question are issues of current events and the present condition of Korean society.[41]

---

35) Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT, Presidential Decree No. 20668, Feb. 29, 2008, art. 30.

Initially, the Real Name Verification System requirement applied to 37 internet portals and news sites. Tong-hyung Kim, *More Limits Planned on Internet Anonymity*, KOREA TIMES, Oct. 3, 2008, *available at* http://www.koreatimes.co.kr/www/news/biz/2008/10/123_32121.html.

36) Enforcement Decree of the INFORMATION AND COMMUNICATIONS NETWORK ACT, Presidential Decree No. 21278, Jan. 28, 2009, art. 30.

37) The scope of defamatory materials to be taken down is established in the INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-7(1), (2).

38) The INFORMATION AND COMMUNICATIONS NETWORK ACT prescribes that internet portals delete obviously offensive posts, while taking down posts of ambiguous legality for 30 days during a review period. INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-2(4).

39) *See, e.g.,* Naver Connect Center, http://help.naver.com/claim_main.asp (last visited Nov. 13, 2009) (Korean).

40) As discussed *supra* note 36, the law presently applies to all internet portals with more than 100,000 viewers per day.

41) Korean cultural attitudes, such as high regard for the importance of personal reputations and the protection of intellectual property interests, are often said to be shaped by Korea's Confucian tradition. *See, e.g.*, Sun-Je Sung, *Law of Defamation in Korea*, 30 KOREAN J. INT'L & COMP. L. 1, 6-7 (2002); YOUNG KIM, BACKGROUND READING MATERIAL ON THE INTELLECTUAL PROPERTY SYSTEM OF THE REPUBLIC OF KOREA 161 (1996); Sang-Hyun Song and Seong-Ki Kim, *The Impact of*

1. Beef Protests

Modern Korean society has included recurring instances of widespread public protests, which have often utilized the internet for disseminating information and organizing. For instance, in 2002, OhmyNews[42] reported on an accident in which two Korean girls were killed by an American army tractor.[43] Alerted to the incident, Koreans organized protests online and within one week, the largest anti-U.S. demonstrations in Korean history were staged in Seoul.[44]

A more recent illustration of Korean internet organization and populist efforts were the U.S. beef protests held against President Myung-bak Lee's administration. President Lee agreed to lift Korea's five-year ban on importation of American beef in 2008.[45] Online coalescence of people opposed to the decision facilitated forty days of growing protests in the streets of Seoul.[46] Fueled by health concerns, as well as broader issues of sovereignty

---

Multilateral Trade Negotiations on Intellectual Property Laws in Korea, 13 UCLA PAC. BASIN L.J. 118, 120 (1994); ARTHUR WINEBURG, INTELLECTUAL PROPERTY PROTECTION IN ASIA §1.03, at 1-9 to 1-15 (Arthur Wineburg ed., 2d ed. 1999); Yong-sik Song, *Hyunjaejojak kwan beopuie munjaejum* [*Problems with the Current Copyright Law (I)*], 19 PYŎNHOSA: SEOULJIBANG PYONHOSAHWE [LAWYER: BAR ASSOCIATION OF THE SEOUL DISTRICT] 181, 182 (1989); SANG-HAN HAN, CHOJAKKWON UI POPJE WA SILMU [COPYRIGHT LAW AND PRACTICE] 25 (1988); Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 U. BALT. INTELL. PROP. L.J. 25, 26 (1997). I do not argue the validity of such asserted influences here, but note that current cultural environment and events provide an elegantly direct explanation for the Real Name Verification System without reference to Korea's historical connection with Confucianism. For a more detailed treatment of the "Confucian Argument" as an explanation for common Korean attitudes regarding file-sharing, *see* John Leitner, *A Legal and Cultural Comparison of File-Sharing Disputes in Japan and the Republic of Korea and Implications for Future Cyber-Regulation*, 22 COLUM. J. ASIAN L. 1, 38-42 (2008).

42) OhmyNews is an internet-based news source that utilizes information gathered by users to provide a popular alternative news source in Korea. *See* DAN GILLMOR, WE THE MEDIA 110-135 (2006).

43) Jonathan Watts, *World's First Internet President Logs On*, THE GUARDIAN, Feb. 24, 2003, *available at* http://www.guardian.co.uk/technology/2003/feb/24/newmedia.koreanews.

44) *Id*.

45) *See* Sang-hun Choe, *South Koreans Press Anti-Government Protests*, N.Y. TIMES, June 20, 2008, *available at* http://www.nytimes.com/2008/06/20/world/asia/20korea.html.

46) Sang-hun Choe, *S. Korean Cabinet Offers to Quit After Beef Protests*, N.Y. TIMES, June 10, 2008, *available at* http://www.nytimes.com/2008/06/10/world/asia/10korea.html.

and self-determination,[47] the protests continued even after all the members of President Lee's cabinet offered to resign.[48]

Much concern over the social unrest exemplified by the beef protests focused on the view that online organization and the dissemination of misinformation were responsible for the magnitude of the protests, particularly the rumor that American beef could infect consumers with mad cow disease.[49] This, in turn, provided a powerful initial catalyst to further amend the law and broaden the scope of the Real Name Verification System.[50] In defending the need for further measures, President Lee said that Korea must counteract "a phenomenon in which inaccurate, false information is disseminated; prompting social unrest that spreads like an epidemic."[51] Before the Real Name Verification System was expanded, a major Korean current event impacted public opinion in favor of the measure.

2. Jin-sil Choi Suicide

Jin-sil Choi was a prolific Korean television and film actress whose popularity earned her the nickname "the Nation's Actress."[52] After Ms. Choi committed suicide in October of 2008, speculation grew that her suicidal feelings were shaped to a significant degree by online rumors of financial entanglements with another actor, as well as other online criticisms of her as a divorced single mother.[53] Cyber Libel is considered a widespread problem in

---

47) *See* Sang-hun Choe, *An Anger in Korea over More Than Beef*, N.Y. TIMES, June 12, 2008, *available at* http://www.nytimes.com/2008/06/12/world/asia/12seoul.html.

48) *See* Choe, *supra* note 46.

49) *See* Cho, *supra* note 1.

50) *See* Michael Fitzpatrick, *South Korean government looks to rein in the Net*, N.Y. TIMES, Sept. 5, 2008, *available at* http://www.nytimes.com/2008/09/05/business/worldbusiness/05iht-sknet.html.

51) *Id*.

52) Jean H. Lee, *S. Korean actress found dead in apparent suicide*, ASSOCIATED PRESS, Oct. 2, 2008, *available at* http://www.usatoday.com/news/world/2008-10-02-3818550031_x.htm.

53) *See, e.g.*, Sang-hun Choe, *Web Rumors Tied to Korean Actress's Suicide*, N.Y. TIMES, Oct. 2, 2008, *available at* http://www.nytimes.com/2008/10/03/world/asia/03actress.html?em; *Jin-sil Choi, Akpeuli Jukyeotda Dongryo · Netizen Kongbun* [*Negative replies kill Choi*], SPORTSKHAN, Oct. 2, 2008, *available at* http://sports.khan.co.kr/news/sk_index.html?cat=view&art_id=200810022225376&sec_id=562901 (Korean).

Korea,[54] and those who consider themselves to be victims of defamation are hardly confined to the ranks of celebrities. However, it is telling that the expansion of the Real Name Verification System was expedited following the suicide.[55] The public will in favor of expanding the Real Name Verification System was significantly influenced by the death of Ms. Choi.[56]

IV. Comparison with Other Nations

1. Internet Censorship

Some degree of internet censorship occurs in about 25 of 41 countries surveyed, including Korea,[57] according to a recent study[58] by the OpenNet Initiative.[59] Censorship is pervasive and government-orchestrated in approximately a dozen countries with an authoritarian form of government,

---

54) The Korean police reported 10,028 cases of online libel in 2007, a substantial increase from the 3,667 cases reported in 2004. Sang-hun Choe, *Korean Star's Suicide Reignites Debate on Web Regulation*, N.Y. TIMES, Oct. 12, 2008, *available at* http://www.nytimes.com/2008/10/13/technology/internet/13suicide.html.

55) *See* Tee Jong Lee, *Seoul Rushes Internet Bill*, THE STRAITS TIMES, Oct. 13, 2008, *available at* http://www.straitstimes.com/Breaking%2BNews/Asia/Story/STIStory_289173.html; Kim, *supra* note 35. Officially, the expansion of the Real Name Verification System was achieved by a new Presidential Decree, but the amount of political and social pressure for the issuance of the decree following the death of Ms. Choi was substantial.

56) Examples of editorials and other news outlets arguing in favor of the expanded law in light of Ms. Choi's death are numerous. *See, e.g., A Law for Choi Jin-sil*, JOONGANG DAILY, Oct. 4, 2008, *available at* http://joongangdaily.joins.com/article/view.asp?aid=2895644; Kim, *supra* note 35 (stating that Agora, a popular Korean discussion site, was "overflowing with articles supporting the expansion of real-name use on the Internet").

57) *See* OpenNet Initiative: South Korea, *supra* note 4.

58) Survey of Government Internet Filtering Practices Indicates Increasing Internet Censorship, http://cyber.law.harvard.edu/newsroom/first_global_filtering_survey_released (last updated Mar. 10, 2008).

59) The OpenNet Initiative is a partnership amongst four non-profit educational organizations, the University of Toronto Citizen Lab, the Harvard University Berkman Center for Internet & Society, the University of Cambridge Advanced Network Research Group, and the Oxford University Oxford Internet Institute. The OpenNet Initiative tests and analyzes internet censorship and surveillance worldwide. *See* About ONI, http://opennet.net/about-oni (last visited Nov. 13, 2009).

including China,[60] Saudi Arabia,[61] North Korea,[62] and Myanmar,[63] which have internet regulation regimes far more restrictive than those in other nations.[64] Korean censorship is considerably less comprehensive and is principally based on the National Security Act [Gukgaboanbeop],[65] which criminalizes anti-state activities and generally targets pro-North Korean sympathizers.[66] In 2004, the Ministry of Information and Communication used the National Security Law as authority while instructing internet service providers ("ISPs") to block access to 31 internet sites it judged to be purveying pro-North Korean propaganda,[67] a measure that blocked access to several thousand unrelated websites in the process.[68]

While the legal basis and actual instances of internet censorship are more targeted and limited in Korea than in certain other nations, Korea's censorship exceeds that of other democratic nations for which data on the subject is

---

60) *See* OpenNet Initiative: China, http://opennet.net/research/profiles/china (June 15, 2009).

61) *See* OpenNet Initiative: Saudi Arabia, http://opennet.net/research/profiles/saudi-arabia (Aug. 6, 2009).

62) *See* OpenNet Initiative: North Korea, http://opennet.net/research/profiles/north-korea (May 10, 2007).

63) *See* OpenNet Initiative: Burma, http://opennet.net/research/profiles/burma (May 10, 2007).

64) The non-governmental organization Reporters without Borders, which advocates for freedom of the press worldwide, identifies the following countries as applying a particularly active censorship regime: Burma, China, Cuba, Egypt, Iran, North Korea, Saudi Arabia, Syria, Tunisia, Turkmenistan, Uzbekistan and Vietnam. *See* Reporters without Borders, *Internet Enemies*, Mar. 12, 2009, *available at* http://www.rsf.org/IMG/pdf/Internet_enemies_2009_2_-3.pdf. *See also* OpenNet Initiative, http://opennet.net.

65) GUKGABOANBEOP [NATIONAL SECURITY ACT], Act No. 5454, Dec. 13, 1997.

66) The NATIONAL SECURITY ACT has been the subject of legal challenges in the past; in 2004, the Supreme Court of Korea upheld convictions under article 7, which criminalizes the act of publicly praising and supporting North Korea, as a constitutionally permissible restriction on speech. 209 PANRYEGONGBO 1476 (2002Do539) (Supreme Court, July 22, 2004). *See also A nation-splitting law*, KOREA HERALD, Sept. 8, 2004, *available at* http://www.asiamedia.ucla.edu/article.asp?parentid=14429; *South Korea's National Security Law*, ECONOMIST, Nov. 4, 2004.

67) OpenNet Initiative: Bulletin 009, *available at* http://opennet.net/bulletins/009/ (last updated Jan. 31, 2005).

68) According to OpenNet testing as of January 31, 2005, 3,167 additional websites unrelated to North Korea were also blocked because they were hosted on the same servers as the 31 blocked sites. *Id. See also* Seung Hun Lee, *Block on North Korean Web Site Foils Net Users*, OHMYNEWS, Nov. 17, 2004, *available at* http://english.ohmynews.com/articleview/article_view.asp?menu=c10400&no=197117&rel_no=1.

available. The freedom of the press advocacy organization Reporters without Borders identifies Korea and Australia as nations with concerning government positions on censorship.[69] In the case of Australia, however, the source of concern is a proposed law that would introduce nationwide censorship, rather than a presently implemented censorship regime.[70] Of nations studied by the OpenNet Initiative, the only democracy besides Korea to engage in some form of internet censorship is India.[71]

2. Real Name Verification

The Real Name Verification System is a step in the direction of limiting free speech that goes beyond the policies of other democratic nations and is made potentially more powerful by Korea's existing internet censorship laws and policies. Amongst democratic nations, even those (like Israel[72] and Ukraine[73]) that one might expect, as a matter of conjecture, to introduce internet censorship to protect national security and other vital national concerns do not censor or take steps to systematically identify internet users.

Comparison with China warrants specific consideration because China is the only nation besides Korea to have internet name verification.[74] China's system is not mandatory for any particular group of internet portals. A program for the city of Hangzhou[75] to require real name verification has

---

69) *See* Reporters without Borders, *supra* note 64.

70) *Id.*

71) *See* OpenNet Initiative: India, http://opennet.net/research/profiles/india (May 9, 2007). India's censorship focuses on national security-related sites, and has been applied inconsistently and sporadically.

72) *See* OpenNet Initiative: Israel, http://opennet.net/research/profiles/israel (Aug. 6, 2009). I make particular note of Israel because of its persistent internal and external conflicts and violence relating to matters of national security.

73) *See* OpenNet Initiative: Ukraine, http://opennet.net/research/profiles/ukraine (May 9, 2007). I make note of Ukraine because some recent elections have involved potential vote fraud, and destabilizing events in its political sphere include the apparent near-lethal poisoning of its president, Viktor Yushchenko.

74) Hua and Liang, *supra* note 30; David Bandurski, *Xinhua: Hangzhou's "real-name Web registration system" is "on the shelf,"* China Media Project, May 20, 2009, *available at* http://cmp.hku.hk/2009/05/20/1632/.

75) Hangzhou includes eight administrative regions and has a population of approximately 6.43 million people. *See* Hangzhou China: Administrative Districts and Population, http://www.

officially been put into effect as of May 1, 2009, though progress in its technical implementation is not clear.[76] China's approach has involved agreements with major internet portals in which the portals individually implement real name verification.[77] However, China has imposed a mandatory real name verification system for certain portals used by university students, a decision evidently targeting political speech.[78] It is not clear what sort of pressure the Chinese government may have applied in securing ISP compliance with the real name verification program.[79] However, it is clear that, at the present time, China does not have a nationwide mechanism for collecting and maintaining information on the identities of internet users and contributors, as does Korea.

It should be noted that the presence of a name verification system does not mean that the two countries will utilize identity information in the same way or restrict the same kinds of online activities. However, in terms of the verification system itself, Korea's current model is more comprehensive than the Chinese system.

V. Initial Results and Controversies

1. Deterrence of Cyber Libel

Initial research has shown that in the first two years of Korea's experience with the Real Name Verification System, defamatory comments have not become notably less common. A study examined comments and replies on a popular internet portal's bulletin boards and found that the number of total comments decreased after the introduction of the Real Name Verification

---

hangzhou.gov.cn/main/zpd/English/statistic/abriefsurvey/briefsurvey/T197434.shtml (last visited Nov. 13, 2009).

76) Hua and Liang, *supra* note 30; Bandurski, *supra* note 74.

77) *See Self-discipline for China blog providers*, CCTV.COM, Aug. 22, 2007, *available at* http://www.cctv.com/program/bizchina/20070822/105950.shtml; Anita Chang, *China: Bloggers should use real names*, USA TODAY, Aug. 22, 2007, *available at* http://www.usatoday.com/money/topstories/2007-08-22-1543352646_x.htm.

78) Philip Pan, *Chinese Crack Down On Student Web Sites*, WASH. POST, Mar. 24, 2005, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A61334-2005Mar23.

79) One might wonder whether Chinese ISPs that are requested to implement name verification of users are able, as a practical matter, to decline to do so. *See* Chang, *supra* note 77.

System, but the number of defamatory comments did not decrease.[80] A more general survey of online user behaviors has found that, contrary to common assumption, the rate at which netizen behavior deviates from a particular social norm is not impacted by anonymity.[81]

A Korea Communications Commission study[82] of the first phase of real-name verification (for web portals with 300,000 or more users per day) found that there was a decrease in the rate of malign internet posts[83] from 15.8% to 13.9%.[84] This is not necessarily inconsistent with other research, which showed a small decrease in defamatory replies.[85] However, the decline is hardly precipitous. As a best-case evaluation of the Real Name Verification System's effectiveness, this study indicates that the System has produced little improved protection of private reputation.[86]

2. *Google*

Google owns the popular international site YouTube, which permits

---

80) Woo et al., *supra* note 11, at 20-21. This study found that the number of defamatory replies to comments did decrease, along with the number of replies in general, and this reduction appeared to be the result of a change in replying patterns based on the level of use of the commenter. In general, the issue explaining rates of Cyber Libel on the bulletin boards was one of user behavior, not systematically reduced or otherwise affected by the Real Name Verification System.

81) Yong-suk Hwang, *supra* note 14, at 108.

82) This study evaluated the rate of malign reply; sought to gauge the "chilling effect" of the law, or the degree, if any, to which it discouraged use of the internet; and also attempted to measure the "balloon effect," or the degree, if any, to which the law caused netizens to switch from using large internet portals subject to the Real Name Verification System to smaller ones not subject to the requirement. Bangsongtongsinwiwonhoe [Korea Communications Commission], *Jaehanjeok boninhwakinjae hyogwabunseokeul wihan josa bogoseo* [*Analysis of the Effect of Limited Real Name Verification*], Oct. 2007, at 1-2 (Korean). The study asserted that the number of internet posts and the popularity of large internet portals demonstrated a lack of chilling effect or balloon effect. *Id*. at 18-20.

83) The term used to describe these messages in the study is "Akseongdaetgeul," which I describe in English as "malign." The study defines the term to include libel, sexual harassment, invasion of privacy, and contempt. *Id*. at 9.

84) *Id*.

85) *See* Woo et al., *supra* note 11, at 20-21.

86) Thorough studies of the expanded Real Name Verification System are not yet available, so it is not yet possible to account for any effect brought about by inclusion of additional internet portals.

registered users[87] to upload videos that can then be streamed by anyone who accesses the website. Registered users can also post comments about a particular video, which are displayed below the video box on the computer screen. Google objected to the Real Name Verification System as compromising the anonymity and therefore the freedoms of its users.[88] Google interpreted the law to only apply to the Korean version of the YouTube site, and so Google deactivated all uploads and commenting by individuals whose country preference is set to "Korea" in order to avoid a legal obligation to participate in the Real Name Verification System. However, the youtube.com site links to a page[89] that provides simple instructions for changing the country preference to another country besides Korea,[90] at which point the user is free to upload and comment without verifying her real name.[91]

---

87) While registering, users are asked to provide certain personal information, but the only piece of information that is verified is that they have access to the email address that is provided.

88) Google has a generally protective privacy policy, but its policy states that it will share information when "[w]e have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request." Google Privacy Center: Privacy Policy, http://www.google.com/privacypolicy.html (last updated Oct. 19, 2009).

89) YouTube Korea Blog, http://youtubekrblog.blogspot.com/2009/04/blog-post_08.html (last updated Apr. 8, 2009).

90) The ease by which Koreans can dodge the Real Name Verification System requirements illustrates one of the problems with this law: given Korea's unique approach to this problem, there is not, and likely will not be in the foreseeable future, a harmonized international approach that can aid in enforcement by effectively "closing the loophole" of Korean users selecting a different jurisdiction's legal standards for Google or other ISPs to effectively apply.

91) Translation from Stephen Shankland, *YouTube Korea squelches uploads, comments*, CNET NEWS, Apr. 13, 2009, *available at* http://news.cnet.com/8301-1023_3-10218419-93.html:

We have a bias in favor of people's right to free expression in everything we do. We are driven by a belief that more information generally means more choice, more freedom, and ultimately more power for the individual. We believe that it is important for free expression that people have the right to remain anonymous, if they choose.

Because of Real Name Verification System in Korea, we have voluntarily disabled comments and video uploads when using YouTube in Korea with the Korea country setting, so you will not be required to verify your identity.

You will still be able to enjoy watching and sharing videos on YouTube. You may still upload videos and comments without proving your identity by choosing a non-Korean country setting from the top of any YouTube page.

3. Park (Minerva) Prosecution

Dae-sung Park was a widely read blogger on financial issues who posted his writings under the internet alias "Minerva."[92] Mr. Park was arrested on January 7, 2009[93] after he was accused of spreading online rumors asserting that the Korean government compelled Korean banks not to buy U.S. dollars in late 2008 in order to combat the falling value of the Korean currency, the won, against the U.S. dollar.[94] The prosecution alleged that this assertion was false and that Mr. Park spread the rumor with the intent to damage public interest, in violation of the Electronic Communication Fundamental Law [Jeonki tongsin kibonbeop].[95] He was acquitted by the Seoul Central District Court on April 20, 2009.[96] Judge Young-hyun Yoo stated that "when considering all the circumstances, it is hard to conclude that Park was aware that the information was misleading when he wrote the postings" and also did not conclude that Park intended to damage public interest.[97]

We understand that this may affect your experience on YouTube. Thank you in advance for your understanding. We hope that you continue to enjoy and participate in the YouTube community.

92) Minerva is the goddess of wisdom in Roman mythology (known in Greek mythology as Athena).

93) *See* Christian Oliver, *Financial Blogger Arrested in South Korea*, FIN. TIMES, Jan. 8, 2009, *available at* http://www.ft.com/cms/s/0/092a99ca-ddab-11dd-87dc-000077b07658.html?nclick_check=1; *see also* Jane Han, *Foreigners Puzzled over Park's Arrest*, KOREA TIMES, Jan. 11, 2009, *available at* http://www.koreatimes.co.kr/www/news/biz/2009/01/123_37648.html.

94) *See* Ju-min Park and John M. Glionna, *Case of Internet Economic Pundit Minerva Roils South Korea*, L.A. TIMES, Jan. 16, 2009, *available at* http://articles.latimes.com/2009/jan/16/world/fg-korea-minerva16.

95) JEONKI KONGSIN KIBONBEOP [ELECTRONIC COMMUNICATION FUNDAMENTAL ACT], Act No. 9780, art. 47(1) states:

A person spreading a false rumor maliciously intending to damage the public interest by using an electronic machine can be sentenced to imprisonment for under five years or given a fine of under 50,000,000 won.

96) *S. Korean Court Finds "Minerva" Not Guilty*, KOREA TIMES, Apr. 20, 2009, *available at* http://www.koreatimes.co.kr/www/news/nation/2009/04/113_43467.html.

97) *Id.*; *see also* Sang-hun Choe, *Economic Blogger Who Angered Seoul is Acquitted*, N. Y. TIMES, Apr. 20, 2009, *available at* http://www.nytimes.com/2009/04/21/business/global/21blogger.html.

VI. Critical Analysis of the Real Name Verification System

1. Effectiveness

Empirical evidence indicates that rates of Cyber Libel have not been significantly reduced by the introduction of the System.[98] Further, the Real Name Verification System is easily circumvented by premeditating defamers and will thus fail to prevent the most dangerous and blameworthy defamatory statements, those that are actually false and made with an intent to defame the subject.[99] Google's response to the law as it applies to YouTube, complete with posting a link to a web page with simple instructions for the law's circumvention posted in Korean,[100] demonstrates one means by which internet contributors can effectively avoid the requirement. Migration to the use of Google products, not just for posting online videos but also for blogging[101] and other methods of creating online content, has become an increasingly popular method for individuals in Korea to remain anonymous.[102] Given the means available to a party who intends to defame another online, including the use of someone else's identification number,[103] it seems that the Real Name Verification System is particularly unlikely to prevent the most premeditated and egregious acts of defamation.[104]

---

98) *See supra* Section V. 1., "Deterrence of Cyber Libel."

99) Under Korean law, defamation does not require a showing that the allegedly defamatory statement is false or that the accused had intent to defame, but these two factors trigger heightened potential punishments. *See* CRIMINAL CODE, art. 309; INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 70. *See also supra* Section II, "Relevant Defamation Law."

100) *See* YouTube Korea Blog, *supra* note 89.

101) Google provides its "Blogger" service (www.blogger.com) to Korean users. So far, it has not qualified for the Real Name Verification System due to the number of daily users, but the site could be the source of future conflict with the Korean government if its popularity continues to grow.

102) *See* Tong-hyun Kim, *Google Avoids Regulations, Korean Portals Not so Lucky*, KOREA TIMES, Apr. 27, 2009, *available at* http://www.koreatimes.co.kr/www/news/tech/tech_view.asp?newsIdx=43939&categoryCode=129.

103) A google.com search conducted by the Korean Information Security Agency produced well over a hundred thousand usable Korean ID numbers that could be obtained for free online. *Google Exposing Thousands of Korean ID Numbers*, CHOSUNILBO, Sept. 22, 2008, *available at* http://english.chosun.com/w21data/html/news/200809/200809220010.html.

How could the Korean government boost the effectiveness of the law? One option might be to further strengthen the law, such as by increasing penalties. However, to target those who can currently evade identification, the only options for truly preventing the posting of defamatory statements might be to require heavily trafficked sites to not permit any postings or commentary at all, or to sharply confine user contributions and assign heightened ISP liability for postings and contributions that are permitted.[105] Regardless of whether this would be constitutional in Korea, such legal modifications seem too draconian and likely to chill internet freedoms to be seriously considered.

The government might also consider a change in the law or the enforcement of the law to elicit a more cooperative stance by Google and to deter other major ISPs who would permit Korean users to effectively select another jurisdiction's laws when utilizing a service.[106] This measure could force the issue that Google has sought to avoid: a choice between on the one hand, complying with the letter (and spirit) of the law and compromising a stated objective of promoting "privacy" for internet users,[107] or on the other hand, more fully limiting Korean access to the site, thereby reducing the reach and market share of internet properties while preserving user anonymity. However, the Korean government first faces the awkward and difficult choice of either accepting Google's current position or initiating an open conflict with the company.

---

104) Provocative research already exists suggesting that instances of Cyber Libel have not been curbed by the introduction of the Real Name Verification System. *See* Woo et al., *supra* note 11, at 20-21.

105) Scholars have called into question whether current legal requirements for Korean ISPs may already be too onerous. *See* Kwon, *supra* note 23, at 131-134.

106) Many available internet portals do not have a legal presence in Korea and could operate outside of Korea's Real Name Verification System with no obligation or legal consequence for doing so. The greatest impact of the law may ultimately be to cause individuals to switch to non-Korean portals that might be less likely to be frequently viewed by a large Korean audience. In that case, compelling removal of the offending content would be made more difficult or even impossible. In the process, Korea could make itself a less attractive jurisdiction for major ISPs to maintain an employment-generating, tax-paying physical presence.

107) *See* Google Privacy Center, *supra* note 88.

2. Interference with Free Expression and Privacy

Free expression is critical to a politically free society, and free expression on the internet is particularly critical to Korean democratic culture. As Professor Youngjoon Kwon states, "Online democracy [in Korea] has reached its pinnacle, due mainly to two factors: a remarkably high broadband penetration rate and a great number of electronic bulletin boards."[108] To this I would add a more abstract consideration, the youth and vigor of Korea's less-than-20-year-old democracy, which has largely taken shape in the internet age.

In the case of Korea, the same generations of individuals who utilize the internet as part of everyday life witnessed and participated in the birth of the present Korean democracy.[109] The potential of cyberspace to facilitate many forms of democratic activity, together with the fact that these activities have taken place online for about as long as civilian democracy has existed in Korea, establish a meaningful social link between internet freedom and democracy.

Cyberspace has already facilitated South Korean democratic participation, as illustrated by the crucial role of online political activism in the election of former President Moo-hyun Roh. Mr. Roh ran against the favored Grand National Party candidate Hoi-chang Lee in the 2002 election with a political strategy that made extensive use of online campaigning and used e-mail and text messages to communicate with supporters. One online point of coalescence for Roh supporters was the popular online news site OhmyNews.[110] On the day of the elections, Roh supporters furiously blogged and encouraged others to vote.[111] Roh narrowly won the presidency.[112] Online political activities

---

108) Kwon, *supra* note 23, at 122.

109) The transition from authoritarian government to democracy was at least partially driven by mostly peaceful protests in Korea.

110) Woo-Young Chang, *Online Civic Participation, and Political Empowerment: Online Media and Public Opinion Formation in Korea*, 27 MEDIA, CULTURE & SOC'Y, 925, 931 (2005).

111) *Id.*

112) *See* Sang Yin Lee, *Rohmoohyun 16dae daetongryung dangseon* [*Roh Moo Hyun elected as the 16th president*], CHOSUNILBO, Dec. 19, 2002, *available at* http://news.chosun.com/svc/content_view/content_view.html?contid=2002121970408 (Korean).

intersected with traditional political organization and arguably helped to determine a critical election outcome and created new roles for citizen participation in politics.[113)]

In light of the social value of free expression, the concept of "privacy" in the online space becomes more complicated. Proponents of the Real Name Verification System correctly assert that individuals have an interest in the protection of their private "personal rights," such as reputation and freedom from libel.[114)] However, individuals also have an interest in privacy in a different sense, that is, in maintaining an anonymous profile online for the purposes of utilizing legitimate expressive and associative opportunities while being insulated from the possibility of stigma or suppression.[115)] While some have questioned the value of anonymous expression,[116)] examples of the value of anonymity include the sharing of sensitive information regarding personal health issues, matters of personal and sexual identity,[117)] and politically controversial topics.[118)] The Constitution explicitly protects the reputation of Korean individuals,[119)] but reputation should be understood to include

---

113) *See* Ihlwan Moon, *Have Computers, Will Fight for Reform*, BUS. WK., Feb. 16, 2004, *available at* http://www.businessweek.com/magazine/content/04_07/b3870077.htm.

114) *See* Wan Choung, *Cyberpokryeokui Pihaesiltaewa Daeeungbangan* [*A Legal Study of Cyber Violence*], 13 PIHAEJAHAKYEONGU [KOREAN J. OF VICTIMOLOGY] 329, 347-48 (2005). Professor Choung describes "in-gyeok kwon," translated here as "personal rights," as requiring the protection provided by such policies as the Real Name Verification System.

115) As Justice Hugo Black insightfully wrote in *Talley v. California*, a case in which the U.S. Supreme Court invalidated a Los Angeles city ordinance illegalizing handbills unless they were printed with the names and addresses of their authors, "Persecuted groups and sects from time to time throughout history have been able to criticize the oppressive practices and laws either anonymously or not at all… It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Talley v. California*, 362 U.S. 60, 65-66 (1960).

116) This debate also rages in American society. *See, e.g.*, Randy Cohen, *Is It O.K. to Blog About This Woman Anonymously?*, N.Y. TIMES, Aug. 24, 2009, *available at* http://ethicist.blogs.nytimes.com/2009/08/24/is-it-ok-to-blog-about-this-woman-anonymously/?emc=eta1.

117) *See* Woo and Lee, *supra* note 16, at 28-29 (*citing* David J. Phillips, *Negotiating the Digital Closet: Online Pseudonyms and the Politics of Sexual Identity*, 5 INFO. COMM. & SOC'Y 406 (2002)).

118) Although this discussion principally focuses on opportunities for overtly political expression online, the concept of "democratic culture" that is embodied and advanced by online expression can be much more inclusive, including topics from all facets of popular culture. According to Professor Jack Balkin, "Freedom of speech means giving everyone … the chance to use technology to participate in their culture, to interact, to create, to build … whether it be [about] politics, public issues, or popular culture." Balkin, *supra* note 2, at 45.

119) *See* CONSTITUTION OF KOREA, art. 21(4).

personal control over reputation, and integral to that control is power over the public identity that the individual creates for herself.

Initial Korean government analysis suggested that the Real Name Verification System had not had a "chilling effect" on Korean expression through the internet due to a consistent or increasing number of posts after the System was introduced.[120] However, this fact alone does not establish a lack of chilling effect, as the introduction of Real Name Verification may have slowed the rate of increase in posting that may have otherwise occurred. Furthermore, statistics alone cannot reveal the kind of expression that is made (or not made) through the internet, and it is possible that speech on particularly sensitive but socially important subjects has been reduced.

At best, the Real Name Verification System invites misapplication. Heightened online restrictions and punishments have been defended as a way to prevent or at least more swiftly punish "a second and third 'Minerva' situation,"[121] but Mr. Park was not guilty of a crime. The prevention of the second and third Minervas, then, would not appear to be an act of crime prevention, but rather a restriction of the free exchange of information and ideas regarding topics of the utmost social importance.

3. A Proposal for Mitigating Individual Freedom Concerns

Since the most troubling (and internationally distinctive) aspect of the Real Name Verification System is that it is mandatory, it may be effective to convert the System to a voluntary program where ISPs may "opt-in." This would permit posters to seek the System's protections while also respecting others' preferences for privacy and open expression. Assuming that some major ISPs would opt into the Real Name Verification System while others would not, bloggers and other authors could choose between preserving their own anonymity and accepting that commenters would also be anonymous, or

---

120) Korea Communications Commission, *supra* note 82, at 18.

121) At Assembly hearings in January 2009, See-joong Choi, chairman of the Korea Communications Commission, said, "If there were a cyber defamation law, we would be able to avoid a second and third 'Minerva' situation." Tong-hyung Kim, *Cyber Defamation Law May Be Softened*, KOREA TIMES, Apr. 21, 2009, *available at* http://www.koreatimes.co.kr/www/news/biz/2009/04/123_43565.html.

registering for the Real Name Verification System, foregoing full anonymity for the comfort that those posting responses would also have completed the registration process. While this proposal does not solve the problem of original defamatory posts (as such posters would be likely to avoid portals opting into the System), it would preserve a major purported benefit of the Real Name Verification System while providing channels for fully free expression.

VII. Conclusion

Korea, as a society, sets a relatively restrictive set of parameters for free speech in an attempt to balance this liberty with reputational protection. A critical assessment of the Real Name Verification System reveals that the measure has thus far been of little help in combating Cyber Libel, while its consequences for freedom of expression cannot be dismissed. It may be most propitious to seek an alternative legal approach to address Cyber Libel without interfering to such a degree with freedom of expression and personal privacy. As the Constitutional Court has counseled, "[T]he regulatory modes for this ever changing sphere of communication [the internet] also should be explored within the framework of the Constitution in a diverse and innovative way."[122] Can we unbundle private defamation from valued personal expression and political speech in a meaningful way to effectively isolate and target Cyber Libel?

The threat of criminal prosecution deeply entangles the state with online expression and may operate as a blunt instrument for the deterrence of truly wrongful internet postings. To deter defamation without stifling internet expression, civil remedies provide an efficient and minimally intrusive means.[123] Korean law already permits purported victims of Cyber Libel to

122) Constitutional Court, *supra* note 14, at 632.

123) As discussed *supra* Section II. 2., Korea provides for criminal punishment of defamation. While prosecutors are generally obliged to investigate complaints they receive from purported victims, the Seoul Prosecutor's Office has, in the past, established certain policies and parameters for the enforcement of particular laws. *See, e.g.*, Ah-young Chung, *Commercial Online Music File Swappers Face Criminal Charges*, Korea Times, Jan. 16, 2006, *available at* http://www.

object to offensive content, which is then removed by the ISP hosting the content while it is reviewed.[124] This measure provides a powerful initial protection against the continued presence of the allegedly defamatory content after it has been discovered by the victim. To address compensation for potential damages, and to provide a legal channel for alleged victims to pursue public justice, should they so desire, the Korean Civil Code[125] provides for remedies for defamation.[126]

No doubt an objection to such a reliance on civil law would be that civil remedies are often costly for an alleged victim to pursue. However, the infrastructure and delegated resources for removing Cyber Libel are already in place, so the matter of preventing future harm to the victim is addressed, while only the matter of compensation and other restorative measures[127] assessed against the poster personally is left to a civil dispute amongst the parties.[128] Furthermore, resource barriers to seeking justice through the Korean civil court may not be particularly great, given the ability of Korean

---

asiamedia.ucla.edu/article.asp?parentid=37126 (describing a Seoul Prosecutor's Office policy that only those who infringe copyrights through online file-sharing for commercial gain would be criminally prosecuted, while non-commercial file-sharers would not be). Complaints of at least certain kinds of Cyber Libel may be best directed away from criminal prosecution and towards a civil court remedy.

124) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-2(4).

125) This arrangement better aligns the legal intervention against most cases of potential defamation with the purposes of the Korean codes. Commentary has distinguished the Criminal Code defamation provisions, intended to be used for maintaining "public peace and order," with the Civil Code defamation provisions, intended for "safeguarding … reputations." Youm, *supra* note 14, at 144.

126) CIVIL CODE, art. 751, monetary compensation may be awarded for damages as follows:

> 1) A person who had injured another person, his liberty or reputation … shall make compensation for any other damage arising therefrom as well as damage in the property;
>
> 2) The court may order the compensation under the preceding paragraph paid by periodical payments and may order a reasonable security furnished in order to ensure the performance of such obligation.

127) CIVIL CODE, article 764 permits the court, pursuant to the request of the injured party, "to take suitable measures to restore the injured party's reputation, either in lieu of or together with compensation for damages."

128) For a discussion of civil remedies related to the invasion of private data, see Sang Jo Jong and Youngjoon Kwon, *Kaein Jungboui Bohowa Minsajeok Kujaesudan* [*Protection of Personal Data and its Civil Remedy*], 630 BEOPJO [KOREA LAWYERS ASSOCIATION JOURNAL] 5 (2009) (Korean).

litigants to represent themselves and preserve a reasonable opportunity for a favorable outcome. In this way, a victim who believes that the wrong against them was not satisfactorily ameliorated by the removal of a particular message or post could capably seek relief in civil court.[129)]

The uniquely transformative power of the internet is a linchpin on both sides of the Real Name Verification System debate, as both the effects of defamation and misinformation on one hand, and the value of free expression on the other, are enhanced by an unregulated and widely accessed internet. In Korea in particular, the damage of Cyber Libel to reputation has the potential to be great, but the positive effects of a broad body of shared online political and social information and opinions are also much magnified. The legal system should work to protect victims of Cyber Libel, but the Real Name Verification System is, on balance, not an effective instrument for mitigating Cyber Libel while preserving social freedoms.

KEY WORDS: defamation, cyber libel, real name verification, internet, privacy, free speech, Google, anonymity, identification, Korea

Manuscript received: Sept. 29, 2009; review completed: Nov. 25, 2009; accepted: Dec. 10, 2009.

129) Under Korean law, there is not a mechanism by which a poster of content who believes her content was wrongly removed from the internet can seek to have the content restored. Introducing such a cause of action may provide a more balanced means by which civil proceedings can resolve lingering grievances of both parties in cases of purported Cyber Libel.

Journal of Korean Law | Vol. 9, 109-124, December 2009

The Protection of Private Information in the Internet under Tort Law in Korea: From the Perspectives of Three Major Legal Conceptions of Law*

*Seong Wook Heo***

Abstract

This paper is a follow-up paper of my previous paper on the issue of protection of private information in the Internet under tort law.

In the previous paper, I reviewed the facts, legal issues, background information, and policy issues in the lineage II case, coming to the conclusion that the process of finding law by the judges in a new case which does not have any convention or precedent inevitably entails the policy makings of the judiciary.

Based on the factual and legal foundations of the previous paper, in this paper, I made a new effort of analyzing the three major legal conceptions of modern jurisprudence from the perspective of finding the 'law' in hard cases and applying the legal conceptions to solving the lineage II case.

The three legal conceptions I referred are conventionalism, legal pragmatism, and integrity in law.

By reviewing and comparing each of the three legal conceptions, I came to the conclusion that legal pragmatism is the most candid and suitable legal methodology in dealing with the recent private information leakage lawsuits in Korea.

---

* The original draft of this paper was presented at the 2008 SNU-Freiburg Symposium held in Freiburg Germany from July 16-19 of 2008. The relevant issue of this paper was formerly dealt with in my Korean paper included in the book "Science Technology and Law (Parkyoungsa)" published in July 2007. Compared with the former Korean paper, I made a new effort in this paper to analyze the legal issues in the previous paper in the perspective of three different kinds of conception of law; conventionalism, legal pragmatism, and integrity in the law. I developed the three different kinds of conception of law on the issue of private information protection case in the follow up paper of the previous Korean paper with the title of "Several legal issues on private information leakage lawsuits -mainly about the methodology of finding law in hard cases-" which was published at *The Justice* of the Korean Legal Center in April 2009.

I am especially thankful to my friend Prof. Wei, Gu-Yeon in Harvard Engineering School, who kindly provided me with his office in Harvard while I was staying at Cambridge 2008 summer.

** Assistant Professor, Seoul National University School of Law. This Article was funded by the Seoul National University Law Foundation in 2009.

I. Introduction

The protection of private information is increasingly becoming important with the rapid development of computer technology and the Internet in Korea. However, traditional legal system of Korea is yet to provide for legal theories those specifically deal with the aspect of protection of information in the cyberspace. Therefore, the problem of leakage and misappropriation of private information in the cyberspace has been governed by the traditional Korean tort law. However, there are several problems that we should consider in addressing the protection of private information in the cyberspace when applying the traditional Korean tort law.

First of all, due to the special characteristics of cyberspace where the users are often anonymous, it is not easy to identify the wrongdoers.

Second, even if the wrongdoer is identified, it is not easy for the plaintiff to establish the causation between the wrongful act committed by the wrongdoer and the actual injury suffered by the plaintiff. In general, it is extremely difficult for the plaintiff to specify the concrete monetary damages inflicted on him or her by the defendant's leakage of private information.

Third, relating to the second problem, the plaintiff tends to demand consolation money rather than compensation for monetary damages. In such cases, the plaintiff often requests judges to consider monetary injuries, which are often hard to prove and unquantifiable, in calculating the amount of consolation money. According to the Korean tort law, judges can decide the amount of consolation money at his or her own discretion taking into consideration of the totality of circumstances presented during the trial. However, in such cases, it is not easy for judges to determine the appropriate amount of consolation money because the decision would not only bind the parties of the case but would also influence various legal policies relating to cyberspace governance.

The matter of how heavily should the ISP(Internet Service Provider) be liable for the leakage of private information can have great influence on the prosperity of IT industry. In this sense, the court's decisions on consolation money in private information cases have the aspect of policy making.

In this regard, this paper is written to review several issues on the protection of private information under the Korean tort law. Recently in

Korea, several cases on those issues have been decided by the court. Among those cases, "Seoul Central District Court *2005Gadan240057*" case dated April 28, 2006 is regarded as the leading case.[1)]

This paper is written to open discussions on such problems in relation to "Seoul Central District Court *2005Gadan240057*" case which dealt with the problem of private information leakage in the Internet.

In this paper, I made an attempt to apply three different methods of tort law interpretation from the different perspectives of the three major conceptions of law — which is conventionalism, legal pragmatism, and law as integrity.

I sincerely hope that the reflections I had in that case and in this paper would help other judges and scholars dealing with similar problems in other cases.

II. Seoul Central District Court *2005Gadan240057* Decision (Hereinafter, the 'Lineage II Case')

1. Facts

(1) The defendant "ncsoft corporation" is an on-line game operating company in Korea, and the plaintiffs are the users of the MMORPG (Massive Multiplayer Online Role Playing Game) game named 'lineage II' provided by the defendant.

(2) In May 11, 2005, while processing the game server updating, the technician of the defendant mistakenly left the plaintiffs' IDs & Passwords to be written at the log file which is saved at the user PC's hard-disc.

(3) Once ID & Password is written at the log file, anybody using the PC can have access to the information simply by searching for the log file. In this sense, the private information of plaintiffs has been leaked. I will

1) Actually, I was the presiding judge of the case while I was serving as a judge in Korea. And this paper is on the reflections I had while I was considering the case as a judge in charge of the case.

call this leakage of private information as "the accident in this case."

(4) Not until May 16, 2006 12:00 pm, did the defendant know that the accident in this case had happened, and at that time the defendant took measures to prevent the leakage of private information.

(5) From May 11 to May 16, more than a half million users logged on this game, and their IDs & Passwords have been written at the log file.

(6) No monetary damages to the plaintiffs have been verified until the trial procedure began. And the plaintiffs are claiming against the defendant their mental damages from the leakage of their private information.

2. Issues

(1) The first issue in this case is whether it could be said that the leakage of private information has happened simply because the ID & Password was written at the log file.

(2) The second issue is whether the defendant is liable for the consolation money to the plaintiffs in the case that the leakage of private information is admitted. And the appropriate amount of money to console the mental injuries of the plaintiffs.

3. The Court Ruling

(1) On the issue of whether the leakage of private information has happened in this case, the court ruled as follows. "The defendant, as an on-line game service provider, was under the legal and contractual obligation of taking necessary measures not to leak the customers' private information. In the world of on-line game and the Internet, the ID & Password is the private information by which the identity of the user can be recognized. And, if ID & Password is written at the log file, anybody who uses the computer can have access to the ID & Password simply by checking the log file in the hard-disc."

(2) On the issue of whether the defendant is liable for the mental injuries of the plaintiffs, the court ruled that the plaintiffs must have suffered the mental injury from the leakage of their private information considering the high probability of the misuse of their information in the Internet accompanied by the fast development of computer technology and

Internet. So the defendant is liable for the consolation money to the plaintiffs.

(3) About the amount of consolation money, the court ruled that KRW 500,000 (about $500) for each plaintiff is the appropriate amount of consolation money in consideration of the totality of this case. The court ruled that it is necessary to protect the private information of the plaintiffs but it is also true that it is too far going to let the defendant go bankruptcy just because of one mistake. In consideration of all these factors, the court decided that KRW 500,000 is an appropriate amount of consolation money in this case.[2)]

III. The Protection of Private Information in the Internet under Tort Law in Korea and the Three Conceptions of Law

1. Basic legal doctrine of the Korean tort law

The basic law governing the tort liability in Korea comes from the interpretation of the Civil Act §750, §751, §763, and §393.

The Civil Act §750 provides: "Anybody who has illegally inflicted injury on others by intention or negligence is liable for the injury." For a person to be liable under tort law in Korea, 1) his action or inaction should be illegal (illegality), 2) injury has been inflicted on the victim (injury), 3) the injurer should have acted by intention or by negligence (responsibility), 4) there should be the causation between the injurer's action or inaction and the victim's injury (causation).

And the Civil Act §751 provides: "The injurer who has inflicted the mental

---

2) At the appellate court, the amount of consolation money was reduced to KRW 100,000. But the basic legal reasoning was all the same with this case. *See* Decision of January 26, 2007, *2006Na12182* (Seoul C.D. Ct). And the legal reasoning was also maintained at the Supreme Court Decision. *See* Decision of August 21, 2008, *2007Da17888* (Sup. Ct. of Korea). Afterwards, several other cases on private information leakage followed the reasoning of this case. *See* Decision of February 8, 2007, *2006Gahap33602* (Seoul C.D. Ct.), Decision of January 3, 2008, *2006Gahap87762* (Seoul C.D. Ct.).

anguish on the victim is also liable for the victim's mental damages."

And the Civil Act §393 provides: "The amount of damages is limited to the ordinary damages, and the extraordinary damages are granted only when the debtor knew or could know the special situation of the creditor." And this is applied correspondingly to the scope of liability in tort by the Civil Act §763.

2. The Interpretation of the Civil Act §750, §751, §763, and §393 in this case and the issues to be solved by legal reasoning.

It is not difficult to establish in this case that the defendant was negligent, and that its negligence was illegal.

The issue is whether the injury caused by the defendant's negligent act was occurred to the plaintiffs or not. As we have seen above, no monetary damage has been verified. The problem is whether the plaintiffs ordinarily suffer mental damage simply because of the leakage of their private information. And if they do, what is the amount of the mental damages compensation which has to be paid by the defendant to the plaintiffs?

The issues and problems in this case can be solved differently according to the different conceptions of law.

3. Three Major Conceptions of Law[3)]

1) Introduction

In this section, I will try to find 'the law' in this case in the perspective of three different kinds of conceptions[4)] of law mainly discussed in the field of legal philosophy.

---

3) The explanation about the conception of law in this part is mainly dependent on that of DONALD DWORKIN, LAW'S EMPIRE 94-96 (1986).

4) Dwokin uses the word 'concept' and 'conception' differently according to the different level of abstraction at which the interpretation of the practice can be studied. For example, about the concept and conception of courtesy, the initial trunk of the tree — the presently uncontroversial tie between courtesy and respect — is concept, and the branches from the trunk — the controversial meaning of how to show respect as courtesy — is conception. That is to say, for this community, respect provides the concept of courtesy and that competing positions about what respect really requires are conceptions of that concept. *Id.* at 70-71. The concept of law and the conception of law can be understood in the same way.

According to Ronald Dworkin's explanation, there can be three different kinds of conceptions of law in relation to how they answer the next three questions of law.[5),6)]

First, is the supposed link between law and coercion justified at all? Is there any point in requiring public force to be used only in ways conforming to rights and responsibilities that "flow from" past political decisions?

Second, if there is such a point, what is it?

Third, what reading of "flow from"-what notion of consistency with past decisions-best serve it?

2) Conventionalism

Conventionalism explains that whether a person has a legal right is determined by the content of social conventions. If he has a right according to social conventions about who has the power to legislate and how that power is to be exercised and how doubts created by the language are to be settled then he has a legal right, but not otherwise.[7)]

Conventionalism is a kind of non-skeptical theory about legal rights people have. People have as legal rights whatever rights legal conventions extract from past political decisions.[8)]

Conventionalism does not admit the popular layman's view on law that there is always law to enforce. In conventionalism, law is never complete, because new issues on law ceaselessly arise about which no convention has been established yet.

On the issue of finding law under the situation of no convention, conventionalist adds like this; "Judges must decide such novel cases as best as they can, but by hypothesis no party has any right to win flowing from past collective decisions, that is to say, no party has a legal right to win, because the only rights of that character are those established by convention. So the decision a judge must make in a hard case is discretionary in this sense. A

---

5) *Id.* at 94.

6) Actually, this categorization is not the unique one of Dworkin's, his categorization is on the line of historical debate between the natural law claims and the positive law claims. About the succinct explanation on the origin of law and jurisprudence, refer to RICHARD A. POSNER, THE PROBLEM OF JURISPRUDENCE 4-23 (1990).

7) *Id.* at 115.

8) *Id.* at 152.

judge must find some other kinds of justification to support his decision beyond any requirement of consistency with decisions made in the past."[9)]

Of course those new decisions can make a new convention for the future and create a new legal right for the future.

Hart's version of positivism can be categorized as conventionalism in the sense that his rule of recognition is a rule that was accepted by almost everyone, or at least by almost all judges and other lawyers, no matter what the content of that rule may be.[10)]

There has been a good deal of debate about the meaning of "acceptance of the rule of recognition", but Hart's root idea that the truth of propositions of law is in some important way dependent upon conventional patterns of recognizing law has attracted wide support from scholars.[11)]

To the legal positivist like Hart, 'law' is what is promulgated as law by the agency which has the authority to do so, generally a legislature. But the problem begins when the meaning of a statute cannot be discerned. Cases depending on the meaning of a statute must be decided at any rate. Judges cannot send parties to their home empty handed simply because the meaning of a statute cannot be discerned.

Hart argues that in such cases the judges have to "legislate."[12)]

In this aspect legal positivism shares much with legal pragmatism.

As Richard A. Posner has pointed out correctly, judicial legislating is obviously at the pragmatic end of the pragmatism-formalism spectrum.[13)] But positivism has big part not sharing with pragmatism and it goes only half the distance to pragmatism. Hart limits the judges' pragmatic, legislative discretion to filling gaps in the "law." Borrowing John Dewey's terminology, Posner explains that a Hartian judge employs a logic relative to antecedents until he encounters a gap, whereupon he switches to a logic relative to consequences.[14)]

---

9) *Id.* at 115.

10) H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961). (recited from DWORKIN, *supra* note 3, at 431).

11) DWORKIN, *supra* note 3, at 34-35.

12) HART, *supra* note 10, at 252, 272-273 (1994).

13) RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 81 (2003).

14) *Id.* at 81.

3) Legal Pragmatism

Posner has repeatedly argued that pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance, and thus the best normative as well as positive theory of the judicial role.[15),16)]

Pragmatism denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power.

Pragmatism finds the justification for legal coercion in justice, efficiency, some other contemporary virtue of the coercive decision itself, as and when it is made by judges.[17)]

In this sense, pragmatism is a type of skeptical theory of legal right. It

---

15) *Id.* at 1.

16) Posner makes the following generalizations of legal pragmatism. [*Id.* at 59-60.]

1. Legal pragmatism is not just a fancy term for ad hoc adjudication; it involves consideration of systematic and not just case-specific consequences.
2. Only in exceptional circumstances, however, will the pragmatic judge give controlling weight to systemic consequences, as legal formalism does; that is, only rarely will legal formalism be a pragmatic strategy. And sometimes case-specific circumstances will completely dominate the decisional process.
3. The ultimate criterion of pragmatic adjudication is reasonableness.
4. And so, despite the emphasis on consequences, legal pragmatism is not a form of consequentialism, the set of philosophical doctrines (most prominently utilitarianism) that evaluate actions by the value of their consequences: the best action is the one with the best consequences.
5. Legal pragmatism is forward-looking, regarding adherence to past decisions as a qualified necessity rather than as an ethical duty.
6. The legal pragmatist believes that no general analytic procedure distinguishes legal reasoning from other practical reasoning.
7. Legal pragmatism is empiricist.
8. Therefore it is not hostile to all theory. Indeed, it is more hospitable to some forms of theory than legal formalism is, namely theories that guide empirical inquiry. Legal pragmatism is hostile to the idea of using abstract moral and political theory to guide judicial decision making.
9. The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages of the evolution of a legal doctrine.
10. Legal pragmatism is not a supplement to formalism, and is thus distinct from the positivism of H. L. Hart.
11. Legal pragmatism is sympathetic to the sophistic and Aristotelian conception of rhetoric as a mode of reasoning.
12. It is different from both legal realism and critical legal studies.

17) DWORKIN, *supra* note 3, at 151.

denies that people ever have legal rights. People do not have any legal right until judges decide that they do.

According to Posner, the basic objection to legal pragmatism is that while pragmatism undoubtedly explains much of the form and the content of legislation and of governmental action generally, pragmatic adjudication is formless; the principles of pragmatism leave a very large, as it were blank, space in which the judge has discretion; pragmatism leads us to lawlessness, accepting and embracing the inevitability that like cases will not be treated alike, since different judges will weigh consequences differently, depending on each judge's background, temperament, training, experience, and ideology.[18)]

Dworkin objects the pragmatism in the sense that it is just advising lawyers and judges to seek the decision that "works" in the specific legal case without relying on a theory or a doctrine, but that turns out to be empty. He says that in law and moral, the admonition to avoid thorny question by seeing "what works" is not just unhelpful but it is unintelligible.[19)]

On this objection, Posner admits that legal pragmatism is not always and everywhere the best approach to law. But he empathizes that in twenty-first-century America,[20)] there is no alternative to legal pragmatism. He argues that modern countries contain such a diversity of moral and political thoughts that the judiciary has to be heterogeneous to retain its effectiveness and legitimacy; and the members of a heterogeneous judicial community cannot subscribe to a common set of moral and political dogmas that would make their decisionmakings determinate.[21)] Moreover, Posner adds, pragmatism does not leave judges at large. The pragmatic judge is less constrained by doctrine or theory than the formalist judge thinks himself to be. But the pragmatic judge is still under the material, psychological, and institutional constraints, which limit the discretion of judge.[22)]

---

18) POSNER, *supra* note 13, at 93-94.

19) DONALD DWORKIN, JUSTICE IN ROBES 64-65 (2006).

20) This explanation can be also applied to other modern countries including Korea.

21) POSNER, *supra* note 13, at 94.

22) *Id.* at 95.

4) Law as Integrity

According to law as integrity, propositions of law are true if they fit to or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.[23)]

Law as integrity is also a nonskeptical theory of legal rights in the sense that people have whatever rights are sponsored by the principles that provide the best justification of legal practice as a whole, as legal rights.[24)]

The detailed explanation of law as integrity will be presented at the later part of this paper.

4. The probable conclusions of this case according to each conception of law

(1) Under the conventionalism conception of law, the issue of the mental consolation damages claim in this case cannot be easily answered.

The problem of private information leakage is relatively novel issue in Korea and so the convention about whether to allow the compensation for the metal damages to the victims has not been established, which means that the victims of private information leakage do not have legal rights on consolation money flowing from the past practices.

In one aspect, the plaintiffs' claim on consolation money might have been rejected by the court. There was no statutes specifically ordering the payment of consolation money for the leakage of private information, and no precedents granting consolation money to the victims like the plaintiffs in this case could be found.

On the contrary, it might be said that there were social conventions not allowing the payment of consolation money in this kind of cases in Korea. The court has been generally reluctant in ordering the payment for the abstract and non-monetary injuries. The court has repeatedly ruled that the victim's mental injury is generally recouped by the payment of economic injuries unless victims are under special situation in which the mental injury cannot be

23) DWORKIN, *supra* note 3, at 225.

24) *Id.* at 152.

cured by the payment of economic injuries.[25)]

Anyway, in deciding cases without conventions, judges inevitably have to exert their discretion. It is not certain in what way the conventionalism demands judges to use their discretion.

In my view, the discretionary decision of judges in the area of no convention becomes much similar to that of legal pragmatism.

Actually, as we have seen above, Hart demands the judicial legislating in filling the gap in the "law." And the judicial legislating is obviously at the pragmatic end of the pragmatism-formalism spectrum.

(2) Under the pragmatism conception of law, the conclusion of this case can be different according to the perspectives judges have about the justice, efficiency or some other contemporary virtues on this issue. In this case, the court ruled that it would be better to impose heavy liability on the defendant considering the increasing risk of misuse of leaked private information accompanied by the speedy development of computer technology and Internet.

The court decided that imposing heavy liability on ISPs can help the ISPs to have incentives to take necessary measures to protect the customers' private information.

Of Course judges can disagree about which rule would be best for the future of our community.

Some judges may think that it is impetuous for the court to order the payment of consolation money in this kind of case. They may think that no social consensus has been made about how strictly the ISPs should be liable for the private information leakage. The IT industry in Korea is under severe competition both in domestic and international market and yet to grow much. Imposing too heavy liability on ISPs may hinder the IT industry development.

Actually, in this case, the potential plaintiffs who had suffered the same private information leakage like the plaintiffs were as many as a half million. If $ 1,000(about KRW 1,000,000) of consolation money for each victim is granted by the court, then the total sum of potential damages the defendant have to pay to the potential plaintiffs amounts to nearly $ 500,000,000(about KRW 500,000,000,000).[26)] It would not be easy to find any company which can

25) *See* Decision of November 26, 1996, *96Da31574* (Sup. Ct. of Korea).

endure that amount of damages not only in Korea but also in international market. According to this calculation, the judge's decision ordering the payment of consolation money in this case may be the decision of ordering the defendant to go to ruin.

Some judges may think that unless the legislature has specifically made the legislation ordering the payment of consolation money in this kind of cases, it would not be appropriate for the judiciary to move forward in the policy making issue. They may think that the role of policy making should be left to the political branches of the government which act under the political responsibility for the people, and the judiciary is better to be kept at its position as the least dangerous branch of the government.[27)]

(3) It is difficult to know exactly what kind of conclusion the court can provide under the law as integrity conception of law.

Dworkin explains that law as integrity asks judges to assume, so far as possible, that the law is structured by a coherent set of principles about justice, fairness and procedural due process, and it asks them to enforce those principles in the new cases that come before them, so that each person's situation is fair and just according to the same standards.[28)]

Under law as integrity, Judges must make their common-law decisions on grounds of principle, not policy. In this sense, law as integrity rejects pragmatism.[29)]

To better understand the way integrity operates in the process of interpretation, I will modify and use Dworkin's analysis of McLoughlin case[30)] to fit our case.

Let's suppose that Hercules, an imaginary judge of superhuman intellectual power and patience who accepts law as integrity, is making an interpretation of Korean tort law in this case.

---

26) = $ 1,000×500,000. Of course not every victim will sue against the defendant. If, however, quite a big portion of victims comes to sue against the defendant, then the total amount of damages will be big enough to lead the defendant to bankruptcy.

27) ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH — THE SUPREME COURT AT THE BAR OF POLITICS — (1986).

28) DWORKIN, *supra* note 3, at 243.

29) *Id.* at 244.

30) *McLoughlin v. O'Brian* [1983] 1 A.C. 410, reversing [1981] Q.B. 599.

In parallel with Dworkin's example,[31] we can think of the next six lists of interpretations among which Hercules chooses the best fit for integrity.

i. No one has a moral right to compensation except for economic injury.
ii. People have a moral right to compensation for mental injury from the leakage of private information only in the case when they were using PC open to public use, but have no right to compensation if they were using their own personal computers. Because in the latter case there is no possibility of other people accessing the log file.
iii. People should recover compensation for mental injury when a practice of requiring compensation in their circumstances would diminish the overall costs of private information leakage or otherwise make our community richer in the long run.
iv. People have a moral right to compensation for any injury, mental or economic, which is the direct consequence of negligent leakage of private information, no matter how unlikely or unforeseeable it is that the leakage would result in that injury.
v. People have a moral right to compensation for mental or economic injury that is the consequence of negligent leakage of private information, but only if that injury was reasonably foreseeable by the person who acted carelessly.
vi. People have a moral right to compensation for reasonably foreseeable injury but not in circumstances when recognizing such a right would impose massive and destructive financial burdens on people who have been careless out of proportion to their moral fault.

These statements on victim's right contradict one another and no more than one can be chosen as interpretation of tort law in this case.

If Hercules chooses i., he will decide for the defendant, if iv., for the plaintiffs. The other statements require further thoughts, but the line of reasoning will be different.

Dworkin explains that Hercules' decision will depend on the two

31) DWORKIN, *supra* note 3, at 240-241.

constituent virtues of political morality: justice and fairness.[32] His decision will depend not only on his belief about which of these principles is superior as a matter of abstract justice but also on the moral convictions a community members have as a matter of political fairness.[33]

After a long discussion, Dworkin concludes that Hercules might choose interpretation v. or vi. in accordance with his political morality and the community's moral convictions.[34]

I am not sure that I have understood Dworkin's legal reasoning 100 percent perfectly in Hercules' interpretation of hard case law.

However, I cannot but give some doubtful eye on Hercules' way of finding integrity in law in the sense that he himself is also playing politics in finding or defining integrity.[35] If Hercules cannot escape playing politics in finding integrity in law at the final stage of interpretation, he actually becomes no different from the judge in pragmatism of conventionalism. It might be better to admit candidly that in some stage judges should inevitably make a policy decision and it that sense they are playing politics. We can understand the principle of separation of powers as including the policy making aspect of the judiciary in hard cases.

IV. Conclusion

In this paper, I have tried to make a possible interpretation of Korean tort law on the protection of private information in the Internet from the three different perspectives of conception of law; conventionalism, pragmatism, and integrity in the law.

The decision of the lineage II case was mainly made in the perspective of legal pragmatism. The court considered several related factors and interests

---

32) *Id.* at 249.

33) *Id.* at 249.

34) *Id.* at 245-259.

35) Actually, Dworkin himself is pointing out that the first and most common objection to integrity in law is that Hercules is playing politics and is repudiating that this objection is an album of confusions. *Id.* at 258-260. However, I am not sure that his explanation was enough to repudiate the objection.

and concluded that it would be better to impose heavy liability on ISP by ordering the compensation of mental damages to the plaintiffs for the sake of building a more private information protective IT industry in Korea.

The legal reasoning in reaching the 'law' in this case can be different according to which legal conception we take in interpretation. However, my opinion is that on whichever legal conception we are standing, we cannot help but allow the policy making of the judge at the final stage of finding law in hard cases. And in that sense, the way of finding law becomes much similar in each legal conception.

As far as my legal reasoning supports, my understanding is that legal pragmatism is a rather candid posture of interpreting law in hard cases. After all, judges would have to make a policy decision in hard cases which do not have the outright answer. Trying to explain the process of finding law in such hard cases only from the perspective of convention or integrity in law can be misleading.

I sincerely hope that the issues and considerations discussed in this paper might be helpful to other judges and commentators interested in similar legal subjects.

KEY WORDS: Protection of private information in the Internet, conventionalism, legal pragmatism, integrity in law, jurisprudence, legal conceptions

Manuscript received: Oct. 10, 2009; review completed: Dec. 1, 2009; accepted: Dec. 10, 2009.

Journal of Korean Law | Vol. 9, 125-146, December 2009

Developing and Implementing Effective Legal Writing Programs in Korean Law Schools

*Jo Ellen D. Lewis**

Abstract

This article is based on a three-day workshop the author presented in July 2009 at the invitation of Seoul National University and the Korean Association of Law Schools. The workshop was designed to assist Korean law professors to develop and teach a legal writing course in the new graduate law schools. The goal of this article is to provide practical suggestions as a starting point for teaching legal writing in Korean Law schools. The following topics are discussed in the article: the basics of teaching legal writing, including designing assignments and a course syllabus; teaching techniques; critiquing assignments; and conferencing with students. The article ends with some final thoughts and recommendations for Korean law schools.

I. Introduction

In March, 2009, the first group of graduate law students matriculated to the new law schools recently approved by the Korean Ministry of Education. Similar to the legal writing requirement in all American Bar Association ("ABA") accredited law schools in the United States, all South Korean graduate law schools require their students to take a legal writing course. To prepare faculty to teach legal writing, I was invited to conduct a workshop on the basics of teaching legal writing based on the Legal Practice course ("LP Course") I teach at Washington University in St. Louis, School of Law.[1)] The

* Professor of Practice and Director of Legal Practice, Washington University Law, Washington University in St. Louis.

1) This article is based on a workshop I conducted at Seoul National University on July 6th-8th, 2009. A video of the workshop, excluding DVD clips I prepared, is available for review through Seoul National University library *at* http://event.snu.ac.kr/DetailView.jsp?uid=300&cid=3287914. I would like to thank Seoul National University School of Law and the Korean Association of Law Schools for sponsoring the workshop. I would also like to gratefully

LP Course is a two-semester course that our students take during the first year of law school. In this article, the majority of the information presented during the workshop is included.[2] The following topics are discussed below: the basics of teaching legal writing, including designing assignments and a course syllabus; teaching techniques; critiquing assignments; and conferencing with students. I end the article with some final thoughts and recommendations for Korean law schools.[3]

II. The Basics of Teaching Legal Writing: Designing Assignments and a Course Syllabus; Teaching Techniques

Constructing effective legal writing assignments in a way that is manageable for both faculty and students, and designing a syllabus based on teaching the skills needed to complete those assignments, are the keys to a successful legal writing program.

1. Designing Legal Writing Assignments

Designing effective legal writing assignments is fundamental to meeting the goals of any legal writing course. Such assignments are the basic building blocks of the course structure. When creating effective legal writing assignments, we consider the following: 1) Who will be completing the

acknowledge Mary Beth Beazley, Associate Professor of Law and Director of Legal Writing, The Ohio State University, for sharing her ideas and materials used for teaching legal writing with me. In addition, I would like to thank my colleague, Denise Field, Professor of Practice at Washington University School of Law, for her helpful comments on an earlier draft of this article. I would also like to thank Alyssa Razook, J.D. candidate 2010, one of my teaching assistants for her assistance with this article.

2) For brevity, information from the following sessions are excluded from this article: 1) teaching students the skill of oral presentation of research results; 2) various structures of, and resources for, legal writing programs; and 3) clinical education programs at Washington University. For information on clinical education programs at Washington University School of Law, see http://law.wustl.edu/clinicaled/.

3) The ideas for teaching legal writing discussed in this article are applicable to law schools in other countries which, similar to Korean law schools, are modeled after an American legal education system. Law professors may choose to modify the teaching methods suggested in this article to better suit the goals of their respective law schools.

assignment?; 2) What kind of assignment should I put together?; 3) Where can I get ideas from for assignments?; and 4) How should I convey the assignment to the students?

Attorneys serve several roles relevant to legal writing, including the roles of a planner and problem-solver.[4] A legal writing course should teach students technical lawyering skills, including legal analysis and communication of that analysis in writing and professional skills, including collaboration. Students in our LP Course have several opportunities to collaborate with other students as colleagues.

When determining what kind of assignment to use, certain concepts have proven important. One concept is to start simple and get more complicated throughout the semester. Often, our legal writing assignments follow a "building-block" approach where each lesson "builds" on the prior one. For example, the first assignment might involve analysis of a statute and client facts. The second assignment could involve the same statute, additional client facts and a case. The third assignment would then include the same statute, more client facts and perhaps, several cases. A second concept to keep in mind when determining what kind of assignment to use is to choose a topic that will interest and appeal to students. A topic that students are passionate about, or at least interested in, and even maybe somewhat familiar with, will engage students in the learning process. Third, the topic should not be too "emotionally charged" or controversial to the point of making students uncomfortable. Even the names of parties deserve careful consideration. Using names that are realistic and that do not embody stereotypes is important in the LP Course, as students often use completed legal writing assignments as writing samples and, therefore, those samples should contain realistic names. Fourth, the topic should not be too complex or dependent on a sophisticated understanding of a legal concept that students will not have covered yet in law school. It is especially helpful if the chosen topic relates to law studied in another course students are currently taking. This shows students the relationship between legal writing and other courses. It also shows students that the skills they are learning in legal writing are important for any area of law. For example, at Washington University in St. Louis, legal

4) *See* BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES 1-5 (2d ed. 1992).

writing assignments are typically based on topics covered in other first year courses, such as contracts, property or torts. Another concept that is important when determining what kind of assignment to use is to try to find a "gray" area of the law. An assignment should contain arguments on both sides. It is sometimes possible to split the class into two groups so that both sides in a controversy are represented. Class discussion can be enhanced when both sides are represented. Finally, an assignment that contains nuances and fine points of the law will allow outstanding students to be challenged and stand out from other students. The overwhelming majority of legal writing courses in American law schools are graded on a bell curve and legal writing teachers need to create assignments that separate students for grading purposes.

1) Who will be completing the assignment?

In order to design effective legal writing assignments for my students, I find it helpful to know who they are as people. The more a legal writing professor knows about the students, the easier it will be to design an assignment that will be interesting and engaging for them and will ultimately make teaching more rewarding. At the beginning of each semester, I ask my new students to complete a survey that identifies the students' educational backgrounds, including undergraduate and graduate degrees and institutions. Questions regarding students' prior research and writing experience are included in the survey. I ask students to share information with me regarding their work experience, whether or not legally related. I also ask my students to identify their goals and career plans, if known, and finally, I ask several "just for fun" questions, including questions about hobbies and favorite books. All of these questions allow me to get to know students on a personal level quickly. Getting to know the students is helpful for both the students and the legal writing professor. It helps the legal writing professor identify which students can be a resource for certain issues and which students have common interests or backgrounds. For students, it indicates that the legal writing professor sees each student as an individual which helps many students receive the criticism they will get on their writing in the spirit in which it was intended — constructive. In addition, information from the survey can be used to introduce students to other students with similar backgrounds and interests. This encourages students to see each other as colleagues now and in the future as lawyers who may seek counsel from each

other.

Knowing who the students are allows me to engage students in class discussion based on a student's expertise. For example, business major students can be asked questions when an assignment involves a business issue. Those students have the undergraduate, and in some cases, graduate, background to understand business-related issues. Another bonus of knowing students is in terms of the legal writing professor's ability to mentor students. I often get inquiries about students from other faculty or prospective employers and I can be much more helpful to students when I know the students on a personal, as well as professional, level. Detailed reference letters are easier to write when the legal writing professor knows students well.

2) What kind of assignment should I use?

To determine what kind of assignment to use, first I identify the general goals for the course and the specific skills I want my students to learn in the course. Such goals and skills can include: learning to read a statute; analyzing client facts with respect to a statute; learning how to synthesize several cases or other legal authorities to discern a legal rule; learning the predictable, conventional format of a particular legal document; and learning to craft an argument and communicate it in writing. Once the overall goals and skills for the legal writing course are determined, the second step is to identify the goal for a particular assignment. Effective assignments serve a limited number of goals, especially early in the course. The goals for each assignment should build on knowledge gained from the previous assignment.

Because a legal writing course implies that most assignments will culminate in a written project, the third step in designing an effective assignment requires a consideration of the kind of document students will draft for a particular assignment. Documents that fall within three general categories of legal writing can be considered for first year legal writing assignments: pre-litigation; litigation; and simple transactional documents. The first category, pre-litigation, involves objective analysis and communication of such analysis in writing. Typical documents include office memoranda, client advisory letters and opinion letters. The second category, litigation, can involve pleadings, such as complaints and answers, motions, briefs and court orders. The third category, simple transactional documents, can include drafting contracts. A thorough legal writing course will include

assignments from each of these categories of documents. When students draft a variety of legal documents it may assist them in determining areas of future personal interest. If a legal writing assignment approximates what students will do when they graduate law school, they will want to do the assignment and they will want to do it well. Students go to law school to become lawyers and anything they do that makes them feel like a lawyer is motivating to them. Students must be given assignments they believe are similar to what they will do when they are practicing lawyers.

The fourth step in designing an effective assignment is to complete the due diligence to make sure the assignment will work. This involves preliminary research on the substantive law to anticipate concepts that may be difficult for students. Due diligence can also include having upper-class students complete assignments to see how a first-year student will approach the assignment.

The fifth step in designing an assignment is to prepare an assignment sheet and packet of materials to convey the assignment to students. The most important consideration in preparing an assignment sheet is to identify questions for students that are focused, specific and clear. For example, rather than ask students to answer the broad question, "Is this contract enforceable?", it will be more beneficial to ask students a more specific question, such as, "Assuming that the contract is valid and has not been breached, is Section 7 of the contract enforceable as written under New York law?" Asking a more specific question also makes grading the assignment easier in that the question students were asked is not open to individual interpretation. More specific questions also are more realistic. Most clients do not necessarily know what question to ask and one of the lawyer's jobs is to discern the relevant issue or question to address and often, that results in a specific question. It is also important in an assignment sheet to specify the physical parameters of an assignment, including a page or word limit, font, and margin requirements. In the United States, all jurisdictions have format requirements for court documents. Thus it is important that students learn early in their legal careers how to follow procedural rules. I provide my students with a set of "Local Rules of Procedure" that specify the physical requirements of each type of assignment they will complete during the LP Course. Finally, all materials I create for student assignments are posted on a course web site accessible by the students. Sometimes, depending on the

nature of a particular assignment, a hard copy of the assignment materials may be given to a student. However, students actually prefer having assignment materials posted on a course web site as they can access such materials at any time.

After students complete an assignment, the sixth and final step is to analyze whether or not the assignment "worked," that is, whether or not the assignment achieved the desired goal. If the assignment accomplished the desired goals and it may be used at another time or in another way, I usually keep copies of three strong student papers. Those student papers can be used as samples in class[5] or kept on reserve for student review. If student samples are used either in class or put on reserve, I redact all identifying information and make sure that other students are allowed simply to review the model student papers and not copy them. This can be accomplished by putting model student papers on a limited time reserve in the law school library or with a faculty assistant.

If an assignment is used more than one time, I update the research and am mindful of the teaching cycle. For example, in the United States, because law school is three years, it is important not to use the same assignment more than once every four years. All law schools in the United States have strict honor codes forbidding students from sharing information regarding assignments but to minimize any conflict, it is best for us to use assignments on a four-year cycle at a minimum.

Sometimes, despite the best planning, an assignment will not meet its goals or work for reasons that cannot be anticipated. If this is the case, then unless the necessary changes can be made to the assignment to accomplish its goals, that assignment should not be used in the future.

3) Where can I get ideas from for assignments?

There are several areas from which assignments can be generated. First, you can use cases with which you are personally familiar. You may have worked on a case in private practice or during your legal studies that could be the basis for an assignment for your students. Current cases, gleaned from the

5) *See infra* Part II. 3 (discussing use of student samples as an effective classroom teaching technique).

headlines of legal newspapers or local news can also be a source for assignments. Colleagues are often a great source of ideas for assignments as they may be doing research in an area that could be the basis for a legal writing assignment. Another source of ideas for legal writing assignments is internet search engines. Legal newspapers can be searched on-line to find topical areas of the law to use as a basis for assignments, including circuit splits.[6] In addition, some legal writing and other law school related associations maintain idea banks for members. Those idea banks hold a multitude of ideas for assignments as well as well-developed assignments that have been used successfully by various law schools.[7] There are also commercially available materials that contain ideas for actual legal writing assignments.[8] Some law schools publish moot court case books that contain materials for appellate writing assignments.[9] In addition to using colleagues as a source of ideas for legal writing assignments, legal writing professors may want to consider collaborating with other legal writing professors in developing assignments. Using the same legal writing assignments for several groups of students makes the course more consistent for all students and will make the legal writing professor's work load more manageable, especially when first developing legal writing assignments.

4) How should I convey an assignment to the students?

We communicate assignments to students in writing, using a taped client interview or using a "live" client interview. Each of these methods has merits. Conveying an assignment to students in writing often takes the form of a written memo from the Senior Partner (legal writing professor) to the Junior Partner (student). In that memo, I include relevant and irrelevant facts and

---

6) *See, e.g.*, UNITED STATES LAW WEEK, *at* http://www.bna.com/products/lit/uslw.htm.

7) The Legal Writing Institute is an association of legal writing educators that maintains an idea bank for its members. See www.lwionline.org for membership guidelines.

8) Some of the legal publishers who publish a number of legal writing texts that include legal writing assignments are: Aspen Publishers, *at* www.aspenpublishers.com; Thomson West, *at* http://west.thomson.com; and Lexis Nexis, *at* http://www.lexisnexis.com.

9) New York University Law School and Wake Forest University Law School publish moot court case books on an annual basis. *See* http://www3.law.nyu.edu/journals/mootcourt/casebook.html (New York); *See also* http://web.law.wfu.edu/mootcourt/problem/ (Wake Forest).

identify the question students are asked to answer. The memo is printed on firm letterhead to look realistic. Conveying the assignment to students through a written memo format allows me to control the flow of information more than the other methods described below. The downside of this method is that it is rarely used in legal practice anymore and therefore it is less realistic. The second method, using a taped client interview, allows for some control of the flow of information as only specific portions of the taped interview can be used. For this method, we sometimes ask an upper-class student to act as the client and provide him or her with a script. With both of these first two methods, it is important to include some irrelevant facts as students need to learn how to sift through client facts and focus on only legally relevant facts. The third method, a live client interview, is the most realistic and the most difficult to do. It involves some risk because it is not possible to control everything the client says in the interview. This is especially true if the students ask the client questions. It is difficult to prepare a client for every possible question.

In addition to conveying the facts of a case, we usually include supporting documents with an assignment. For example, if the assignment involves an employment issue, an employment agreement can be part of the assignment package or file. If it involves a real property issue, often a lease is included. Client files are set up the way a client file would be in private or public practice, including a client matter number. Regardless of which method is used to convey facts, the assignment needs to be "real" to students. Including supporting documents, as mentioned above, will help teach students how to review documents and extract information they need to address the client's problem.

2. Designing a Syllabus Using Legal Writing Assignments

Legal writing classes can be taught using a semester-long syllabus, a monthly syllabus, a weekly syllabus, or a syllabus for each problem. Although there are many advantages to using a semester-long syllabus, the first time anyone teaches legal writing, it is difficult to create a semester-long syllabus as all of the assignments are new and it is difficult to predict with certainty how long each assignment will take. Therefore, it is recommended that first-time legal writing professors consider using the assignment based syllabus, that is,

a syllabus for each assignment.

The first assignment will require more incremental teaching than subsequent assignments as every concept and task required is new to law students. It is often easier for law students if the first assignment is broken down into several smaller assignments. For example, the first assignment can be broken down into: specific reading assignments; an outline before drafting; a first draft of an assignment; and a second and even third draft of the assignment. Breaking down the first assignment into several smaller assignments, as suggested, means that one assignment may encompass several classes and several weeks of work for students.[10] Subsequent assignments will require less incremental teaching and students will be able to complete more of the assignments on their own.

In addition to learning legal writing, students need to learn the skill of time management. Students can be taught time management by learning how to "back into" a deadline. For example, students can be encouraged to complete the final draft of a document two days prior to a deadline so that they can proof the document during those two days. A week before the "proofing date," a first draft should be completed and a week prior to the first draft deadline, the most important portions of the document should be drafted. Given this time frame, as noted below, a larger assignment requiring some research will take about five weeks to complete.

Based on a 14-week semester and two hour-long legal writing classes per week, each semester in the LP Course is generally broken down as follows:

- First legal writing assignment (no research) — 3 weeks (6 classes)
- Subsequent legal writing assignments (requiring independent legal research) — 5 or 6 weeks depending on the complexity of the issue(s)
  - 2 weeks — read client file and complete research (4 classes)
  - 2 weeks — draft document conveying legal analysis (4 classes)

10) Even though we sometimes require students to complete portions of an assignment incrementally, not all interim assignments are graded. Interim assignments can help students learn to estimate the time it takes to write. Often, newer law students underestimate the amount of time it takes to understand a client issue and convey that understanding in writing. One other bonus of requiring students to complete interim assignments is that it provides a basis for students and the legal writing professor to know where students are having difficulty. Students have an easier time articulating questions when they have actually started drafting.

- 1 week — polish draft and meet for conference on draft with legal writing professor[11)]

We build time into the semester for students to complete the work and for us to grade the previous assignment. While the legal writing professor is grading a previous assignment, students can be completing legal research or a draft of the document for the current assignment. Classes may be suspended during this time to provide the time needed to grade the previous assignments. As explained in detail below, without adequate feedback, students' legal writing skills will not improve.[12)]

3. Teaching Techniques

Legal writing is a different kind of class that requires teaching techniques in addition to the traditional teaching techniques used in other law school courses.[13)] I demonstrated four kinds of teaching techniques used to teach legal writing in the workshop. One teaching technique, traditional Socratic lecture, can be used when teaching legal writing. The Socratic lectures contain information and ask students questions about concepts they will need to know to complete an assignment and solve a client problem. For example, if students are working on a non-competition problem in an employment context, a lecture might include information on the different considerations involved with non-competition covenants in an employment vs. a sale of business context. The lecture might also include a description of the provisions of an employment agreement and which provisions might be relevant to the client's issue. A second teaching technique I demonstrated is using class time as a workshop. Students are grouped together and asked to analyze certain cases and then report the results of the group's analysis back to the entire class. Small group work is important as it helps students work in teams, similar to how lawyers work in practice. A third teaching technique I demonstrated is using class time to show and discuss samples of documents.

---

11) *See infra* Part IV (discussing student conferences).

12) *See infra* Part III (discussing critiquing students' writing).

13) For a list of selected resources on teaching legal writing, including regularly published journals of the two major international legal writing associations, please see Appendix A.

Using student drafted documents as samples is particularly good as students see what other similarly situated students have done in past years. It is more realistic for students to see writing done at their same stage of legal education rather than review writing that was done by someone with several years of legal experience. Entire documents or just portions of documents, including paragraphs, can be used as samples, depending on the concept discussed. The fourth teaching technique I demonstrated is using class time for in-class writing assignments. This helps students get used to writing under time pressure and provides much needed writing practice.

III. Critiquing Students' Writing

One of the most time-consuming and challenging aspects of teaching legal writing involves critiquing students' writing and providing effective feedback on assignments. Without focused feedback, students do not know what to do to improve their writing. Becoming an effective lawyer, including an effective legal writer, is a process and to become more effective, students need to know how they can improve. Even though initially the legal writing professor is the critic, students must learn to critique and edit their own work.[14] In contrast to grading an exam in another law school course, where only a numeric score is provided to students, with legal writing assignments, the legal writing professor's detailed comments are essential in terms of assisting students in improving their writing and even more important than the numeric score earned on the legal writing assignment.

When I critique students' written work, I include comments that address: 1) substantive or analytical issues; and 2) communication issues, whether or not the student effectively communicated such legal analysis. I like to show students what they have done well and even more importantly, to explain

14) Critiquing is so important to teaching legal writing that many law schools, including Washington University School of Law, require that all applicants for a legal writing teaching position critique a sample student paper as part of the application process. Applicants are "graded" by the legal writing faculty on whether or not the applicant's comments focused on the most critical aspects of the student's paper needing improvement and whether the comments were stated in a way that provided enough information to assist the student in improving the student's writing and encouraged and motivated the student to improve.

why what the student did well was effective. Without specific information regarding what was effective and why, the student will not necessarily recreate that effective communication. Finally, I draft my comments in a way that I hope motivates every student to continue to improve and eventually become his or her own editor. I point out areas of a student's paper that are not clear and ask questions in my comments to help the student determine what needs to be clarified and how to make a concept clear. Students will be more likely to become self-editors when they are encouraged to evaluate their own writing rather than when the legal writing professor is making the revisions.

Comments on students' papers can be handwritten on the paper, typed in a separate document, computer generated on the paper itself, or a combination of methods. I generally provide students with comments that address specific issues with that student's paper ("Individual Comments") and comments that address general issues that several students in the class may have had and that can be used as a general guideline for future assignments ("General Comments").

1. Individual Comments

Individual Comments include comments on the paper itself and comments at the end of the paper, which summarize and prioritize the two or three revisions that would most enhance the paper. I strive to keep the number of comments on any one page to a minimum. Generally, no more than three major comments per page are effective. Students cannot absorb too many comments. If there are too many comments on any one page, the student may get overwhelmed or frustrated and lose motivation. In addition, the student may focus on a less important comment than a comment that would enhance the paper to a greater extent. Writing comments from the perspective of the reader, i.e., what the judge or client needs to know to follow the student's analysis, helps students evaluate their own writing to a greater extent than comments from a legal writing professor's perspective. Comments that focus on the reader are perceived as more objective by students.

Comments should be phrased with the same terminology used in class for consistency. I use abbreviations in my comments and make sure that the student knows the meaning of the abbreviations. To the extent the student

uses a word that is not conveying what the student intended as effectively as could be conveyed, it is more helpful to the student to include two or three suggested substitute words rather than crossing out the student's word and substituting another word for it. Individual Comments are geared primarily to issues related to legal writing and not grammar. I assume that at this stage of their education, the overwhelming majority of students have a minimum writing competency.[15)]

In addition to Individual Comments on the paper itself, comments at the end of the paper ("End Comments") are a useful way to summarize and prioritize the major areas the student should focus on in the future. End Comments should not include something that was not mentioned within the Individual Comments; rather, End Comments should highlight the two or three changes that would make the most difference in the effectiveness of the student's paper. I always start the End Comments with a positive comment by noting something the student did well. Starting with a positive comment can be very motivating to students. I organize End Comments by the type of paragraph or section of the paper to assist students in following End Comments and provide a structure for such comments. End Comments that focus on big picture items, such as macro organization, can be helpful. End Comments can be stored on computer by student name or number (if assignments are graded anonymously) as a way to track if students are improving in a particular area. If I have major concerns that the student may have a fundamental misunderstanding of the nature of the assignment, I usually include my concern in an End Comment and encourage the student to come see me. Finally, I sign the End Comments. Including my signature personalizes the comments and lets the student know that I carefully considered each comment. Writing is very personal and under the best of circumstances, it is difficult to accept criticism on one's written work. Letting students know that you, the legal writing professor, believe that the student has the ability to improve, will go a long way to motivate the student.

---

15) If a particular student has issues with grammar, the legal writing professor can recommend resources that such student can use to improve in that area. Such resources can include a review text on grammar or referral to a university writing center if the university associated with the law school has such a center. Many major universities have writing centers staffed by graduate English students who can assist law students with grammatical issues.

2. General Comments

General Comments provided to the entire class are a great vehicle to convey common concerns and to summarize suggestions for future assignments. I write formal General Comments and provide them to all students in the class in addition to the student's Individual Comments. These General Comments summarize items most likely covered in class when discussing the assignment. Such comments can include information directly related to the specific writing assignment and to legal writing in general. For example, some of the General Comments may relate to the substantive area of law and some may relate to the components of a particular writing assignment. I encourage students to use the General Comments as a guideline for future assignments. General Comments are time consuming to draft initially but can be revised for future use with different problems.

3. Other Thoughts on Critiquing and Grading Legal Writing Assignments

It is important for students to have time to absorb the Individual Comments and General Comments. I prefer to hand back papers at the end of the week as that gives students the weekend to review and absorb the comments. After students review all of the comments, if a student has questions about the comments or the assignment in general, he or she can schedule an individual conference with me to discuss such questions. As discussed above, the legal writing professor may want to keep three of the best student papers for future reference to remind him or her about what can be achieved by students on this kind of assignment. The best student papers can also be put on reserve for review by other students. Reviewing another student's paper on the same topic can be very revealing to students who have difficulty understanding or accepting constructive criticism.

Commenting on and grading papers, like legal writing, are a process. As the year progresses, a legal writing professor's expectations of students can and should rise. As the year progresses, a focus on large scale organization (overall format of the document, including context before detail) and general legal analysis will shift to a focus on smaller scale organization (paragraphs

and sentences) and more subtle points of legal analysis. A rise in expectations is consistent with what students will encounter as practicing lawyers. As the year progresses, I also give more weight to writing assignments for grading purposes. The first assignment can even be graded on a pass/fail or good faith effort basis rather than a score or letter grade. I approach critiquing of student papers with the assumption that the paper I am reading is the student's best effort. Most law students do not have experience in legal analysis or communicating that analysis in writing and most legal writing professors have significant experience and often expectations commensurate with that experience. While it is important to have high expectations for students, such expectations need to be realistic. In most American law schools, legal writing assignments are usually graded on a curved basis and not an absolute scale. Grading on a curve actually benefits all students if you assume that most students have not had significant experience in legal analysis or legal writing prior to law school. Before commenting on, or grading, any student's paper, I read at least ten student papers to get an idea of the range of papers. Understanding that there will be a range of papers helps me focus my comments and tempers my expectations.

IV. Conferencing with Students

Conferences are one of the most powerful tools to help students become their own critics and editors. In no other venue will the student have the opportunity to ask questions and even more importantly, verbalize his or her thinking and get immediate feedback. Notwithstanding the time it takes to meet with each student, conferences are an essential component of an effective legal writing program.

1. Benefits of Conferences

Both students and legal writing professors benefit from conferences. Students learn differently in a one-on-one situation because the focus of the conversation is completely on the individual student. In the classroom, a legal writing professor often teaches to the "middle" of the class because teaching is in a large group. If the legal writing professor teaches too "high" or too "low,"

some students will be lost. Stronger students may need more challenge and may have questions about nuances of the law that will not be appropriate for class discussion as many students may not be able to follow the discussion. A conference is the perfect time to focus on these strong students and encourage them to think more deeply about the issues. For students who are not as strong, a conference is useful in that the legal writing professor can make sure that the student understands the basic information covered in class. Often going over information one more time on an individual basis can assist these students. In addition, it is possible in a conference to review previously covered concepts in a way that would not be appropriate in a large group. For all students, an individual conference provides the opportunity to get feedback from the person who will be doing the commenting and grading. As the year progresses, students will take more responsibility in leading the conferences and asking questions. Such responsibility is a professional skill to be encouraged in students. Initially, students may not know what questions to ask, so I ask more leading questions during the conference to understand the student's confusion. Throughout the course of the year, the conferences become student-directed rather than teacher-directed. It is critical for students to be able to talk to supervising attorneys and communicate questions regarding a project in a concise and productive manner. Conferences can assist students in developing this essential professional skill.

A legal writing professor benefits from conferences with students as conferences give the professor a window into students' thinking. Usually common concerns surface in conferences and those concerns can then be discussed in class. Individual conferences also give legal writing professors credibility with students. When a legal writing professor hones in on problems students may be having with an assignment, students feel that the professor understands the difficulties they are having with an assignment.

Students use e-mail to a great extent and may prefer to ask questions of a legal writing professor via e-mail rather than meet in person. However, for several reasons it is recommended that legal writing professors limit the use of e-mail to respond to student questions. First, when students send questions via e-mail, such questions are not necessarily the actual question the student meant to ask. In a face-to-face situation, it is possible to ask follow-up questions to make sure the student gets the answer to the question he or she meant to ask. Second, responding to an e-mail question can often take a

tremendous amount of a legal writing professor's time and the danger is that the answer may be taken out of context. Students, other than the student who asked the question, may believe they have the same question and therefore, assume that the legal writing professor's answer applies to both questions, but often this is not true. A response to an e-mail question can end up doing more harm than good if taken out of context. If a student asks a question in an e-mail that requires more than a very simple response, it is useful to encourage the student to schedule a conference to discuss that question.

2. Timing of Conferences

Conferences can occur before a student has drafted a paper ("Pre-Draft"), after a student has drafted of a paper but before it is finalized ("Post-Draft") or after a paper is finalized, critiqued and graded ("Post-Comments"). Pre-Draft conferences are usually informal, such as when a student asks a quick question on a non-appointment basis. These conferences are not typically very productive unless a student is meeting to discuss basic questions or research results before drafting. If a student has not begun drafting, it is difficult for the student to know what issues that student will encounter in drafting and therefore, I encourage students to begin drafting before meeting with me. If a student still wants to have a Pre-Draft conference, it is best to keep it relatively short. The exception, as noted above, is if a student is doing research and wants to confirm that the student's research and analysis of the legal issue is on the right track. For this limited purpose, a Pre-Draft conference can be helpful to the student.

Post-Draft conferences are the most common type of conferences and should be encouraged. Once students begin drafting, they are in a better position to have questions regarding difficulties communicating their legal analysis. These conferences can be scheduled on a more formal basis and often last fifteen to thirty minutes, depending on the complexity of the project. It is also possible to have a conference in a small group of three or four students rather than on an individual basis, but such small group conferences work best if students are working through the same issues, which can be difficult to discern until you meet with the students.

During law school, conferences can be optional or mandatory. I require one mandatory conference per semester or year as it provides me the

opportunity to get to know the students on an individual basis and it gives each student some experience in meeting with a supervisor. As noted above, knowing students on a personal basis enhances the classroom experience and ultimately makes teaching more rewarding.[16] Making all conferences mandatory is not necessary and will not benefit all students. I believe that law students must begin to make decisions about how to allocate their time and to make judgments about when to seek assistance.

Post-Comments conferences provide an opportunity to answer a student's questions on Individual Comments or General Comments or clarify issues on a prior assignment.[17] Sometimes students simply do not understand a comment and need clarification before beginning the next assignment. The focus during this type of conference can be in areas of improvement for the future rather than on a particular grade for a particular assignment.

3. Considerations Before, During and After the Conference

Depending on whether the student is coming in for a Pre-Draft, a Post-Draft or a Post-Comments conference, the student's level of preparation will vary. For Pre-Draft conferences, students should have specific questions in mind but without drafting, this can be difficult. If students are having difficulty drafting, they can be encouraged to, at a minimum, draft an outline of the paper and discuss the macro-format of the paper during the Pre-Draft conference.

For Post-Draft conferences, students should be encouraged to think about the areas that were difficult during the drafting process and to ask questions about those areas. I ask students to make notes in the margins of their drafts so that they can remember their specific concerns. In addition, if students are considering more than one way of conveying an idea in a paper, they should be encouraged to discuss the merits of those different ideas with me during the conference. During Post-Draft conferences, students can ask general questions regarding format or specific questions regarding drafting decisions. In Post-Comments conferences, grades are not discussed; rather suggestions

16) *See supra* Part II. 1. 1).

17) *See supra* Part III.

for improvement are the focus of this type of conference.

The legal writing professor's preparation for the conference is limited. Before a "get-to-know-you" conference, I review the student's survey.[18] If the conference is required and focuses on a particular project, the legal writing professor will want to review the student's draft and have a few points in mind to discuss with the student. I often use a checklist to make sure that I cover the same points with all students in a mandatory conference. If common problems arise during student conferences, I note those problems in conferences with other students.

During the conference, I encourage students to take notes. I refrain from writing on the student's paper or leading the discussion. If a student has a specific question regarding a drafting decision, I will review the paragraph or sentence that the student is struggling with and ask leading questions to help the student reach a resolution. It is better for a student to make the ultimate drafting decision than for the legal writing professor to just revise the paragraph or sentence. Most likely, the drafting issue will occur more than once in a paper and to the extent the student works through the issue once with my guidance, that student will be better prepared to work through similar issues alone in the future.

During the conference, I try to point out something the student has done well in the draft to keep the student motivated. Finally, it is important to stay on schedule and this can be difficult. About five minutes before the end of the conference time, I let the student know that the conference is nearing ending time to make sure the student has the opportunity to ask a critical question the student has not asked yet.

After all of the conferences are completed, general concerns, common issues and items needing clarification are reviewed in class as a follow-up to the conferences. Even if there are no follow-up items, I typically make some general comments in class about the conferences even if the comments only summarize some of the items discussed in conferences.[19]

---

18) *See supra* Part II. 1. 1) (discussing student surveys).

19) There are many articles that address conferences with students in great detail. *See, e.g.*, Robin S. Wellford-Slocum, *The Law Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255 (2004).

V. Final Thoughts and Recommendations

Korean law schools are poised to develop a first year required legal writing course and eventually, an exciting array of advanced legal writing courses. Enthusiastic and energetic law professors from more than a third of the new law schools in South Korea attended the workshop and shared ideas about teaching legal writing.[20] Some of the attendees had just finished teaching legal writing for the first time and others were preparing to teach legal writing in the next year. Given the commitment of those in attendance, there is no doubt that Korean law students will receive an excellent legal writing education.

Attendees were encouraged to work together to develop legal writing problems even if at different law schools. Collaboration across schools is commonplace in the United States. List-serves of legal writing professors provide a way to share teaching ideas and solutions for issues that arise in the legal writing class. During the workshop, we discussed the possibility of starting a Korean association of legal writing professors or a sub-group of the Korean Association of Law Schools for faculty interested in legal writing to share ideas and resources. An e-mail list-serve of legal writing professors in Korea could be created. Legal writing professors in Korea are encouraged to join the United States based legal writing associations, including the Legal Writing Institute[21] and the Association of Legal Writing Directors.[22] Global collaboration would benefit all legal writing professors and law students. It will be exciting to watch as the discipline of legal writing develops in Korean law schools.

KEY WORDS: teaching legal writing, teaching techniques, critiquing student writing, student conferences

Manuscript received: Sept. 9, 2009; review completed: Nov. 24, 2009; accepted: Dec. 10, 2009.

---

20) Professors from several Korean law schools, including the following law schools, attended the workshop: Ajou University, Chonbuk National University, Chungnam National University, Hanyang University, Kangwon National University, Korea Univerisity, Kyung Hee University, Kyung Pook National University, Pusan National University, Seoul National University, Sungkyunkwan University, Wonkwang University, and Yeungnam University.

21) www.lwionline.org.

22) www.alwd.org.

Appendix A

Selected Resources:

Legal Writing Institute - www.lwionline.org

Including publications: *The Second Draft and Legal Writing: Journal of the Legal Writing Institute*

http://www.lwionline.org/the_second_draft.html

http://www.lwionline.org/journal_of_the_lwi.html

Association of Legal Writing Directors - www.alwd.org

Including publications, in particular: *The Journal of the Association of Legal Writing Directors*

http://www.alwd.org/publications.html

http://www.alwd.org/jalwd.html

Institute on Law Teaching and Learning — http://lawteaching.org

American Bar Association — Section on Legal Education and Admissions to the Bar, Sourcebook on Legal Writing Programs (Second Edition - 2006)

http://www.abanet.org/legaled.html

Stuckey, et al, Best Practices in Legal Education (2007)

Association of American Law Schools - www.aals.org

Publishers of the Majority of Legal Research and Writing Texts in the United States:

Aspen Publishers - www.aspenpublishers.com

Thomson West — http://www.thomsonwest.com/http://west.thomson.com

Westlaw

Nutshell Series

Lexis Nexis — http://www.lexis.com/http://www.lexisnexis.com

Lexis

Matthew Bender Publishers

Journal of Korean Law | Vol. 9, 147-160, December 2009

Kelsen's Pure Theory of Law from the Perspective of Globalization

*Un Jong Pak**

Abstract

This essay attempts to critically look at Kelsen's pure theory of law and pyramid model of legal order(der Stufenbau der Rechtsordnung) from the perspective of globalization. The stream of globalization has changed the face of legal order: legal plurality, inter-legality spread out, retreat of legal formalism, advent of 'soft law' and legal particularism, and accordingly it has become increasingly difficult to put limitations on how far each domain of regulation covers. It is my belief that this in fact reflects how the lines between domains in the pyramid are becoming hazy.

In this essay I will briefly look at the particular features of Kelsen's legal theory; afterwards, the limitations of the pyramid model, the retreat of the state law centrism following globalization. Under this light, I will attempt to demonstrate that legal autonomy and purism as asserted by Kelsen cannot be maintained easily. We can but say that law is only partially enveloped by the pyramid model.

I. Introduction

Throughout his life, Kelsen has advocated the view that knowledge of law is possible without moral knowledge. Amongst the scholars of law, Kelsen is the only legal scholar who has been chosen — in welcoming the new millennium — as one of the highly influential figures during the last one thousand years. It is easy to see Kelsen's singular status in law, his works having been translated into almost 28 languages.[1)]

Kelsen was not only a scholar of law but from 1921 to 1930 he practiced as a judge at the Austrian Federal Court of Constitution of which its establishment he actively participated in.[2)] Many people mistakenly believe the pure theory

* Professor, Seoul National University School of Law. This Article was funded by the Seoul National University Law Foundation in 2009.

1) For more information, see Werner Krawietz, *Hans Kelsen – Ein Normativer Mastermind des Rechts und der Rechtstheorie für das 21. Jahrhundert?*, 38 RECHTSTHEORIE 34 (2007).

2) *Id.* at 35 f.

of law to be somewhat the result of many years toiling in an ivory tower, in fact that theory reflects much of his long experience during his time as a practitioner.[3] Being Jewish he lived most of his life as a wayward traveler, nevertheless he said that law — even Nazi law! — could not be called not law just because of its contents and throughout his life he stuck to his opinion that knowledge of law should be separate from moral knowledge.[4]

Kelsen aimed to understand not the content but the structure of law. This structure can be explained by four features. These are: positivity of law, legality, dualism of is and ought and lastly the pyramid model(der Stufenbau der Rechtsordnung). This essay attempts to critically look at Kelsen's pure theory of law and pyramid model of legal order from the perspective of globalization.

In short we can but say that law is only partially enveloped by the pyramid model.[5] The stream of globalization has changed the face of legal order: legal plurality, inter-legality spread out, retreat of legal formalism, advent of 'soft law' and legal particularism, and accordingly it has become increasingly difficult to put limitations on how far each domain of regulation covers. It is my belief that this in fact reflects how the lines between domains in the pyramid are becoming hazy.

In this essay I will briefly look at the particular features of Kelsen's legal theory; afterwards, the limitations of the pyramid model, the retreat of the state law centrism following globalization. Under this light, I will attempt to demonstrate that legal autonomy and purism as asserted by Kelsen cannot be maintained easily.

II. The Problem of the Pure Theory of Law and the Basic Norm

Kelsen described the 'pure' theory like following. "Als Theorie will sie

---

3) *Id*. at 35.

4) Hans Kelsen, *Rechts und Moral, in* 1 DIE WIENER RECHTSTHEORETISCHE SCHULE 797ff (Hans R. Klecatsky et al. eds., 1968).

5) Mario G. Losano, *Turbulenzen im Rechtssystem der Modernen Gesellschaft – Pyramide, Stufenbau und Netzwerkcharakter der Rechtsordnung als ordnungsstiftende Modelle*, 38 RECHTSTHEORIE 30 (2007).

ausschließlich und allein ihren Gegenstand erkennen. Sie versucht die Frage zu beantworten, was und wie das Recht ist, nicht aber die Frage, wie es sein oder gemacht werden soll. Sie ist Rechtswissenschaft, nicht aber Rechtspolitik. Wenn sie sich als eine 'reine' Lehre vom Recht bezeichnet, so darum, weil sie nur eine auf das Recht gerichtete Erkenntnis sicherstellen und weil sie aus dieser Erkenntnis alles ausscheiden möchte, was nicht zu dem exakt als Recht bestimmten Gegenstande gehört. Das heißt: sie will die Rechtswissenschaft von allen ihr fremden Elementen befreien. Das ist ihr methodisches Grundprinzip."[6)]

To free the science of law from alien elements Kelsen aimed to thoroughly pull apart and understand not the content but the structure of law. This structure can be understood by four distinct features: positivity, legality, dualism of is and ought and the hierarchical structure of the legal order (the pyramid model). That is, firstly, law is and means the positive law itself. With no regard to whether that law is right or wrong, Kelsen takes into account only the question of ought in terms of law. This is because law only exists in terms of its legality, that is whether it ought to be or not. Therefore when it comes to the content of law and every other fact linked to this, or even the realm of values, these cannot set foot into the realm of law. The world of law in terms of what ought to be, is, not law according to whether its contents are correct or not — Kelsen would refute, asking who could vouch for such a thing?[7)] But law according to the fact that it comes into effect as it *ought* to, according to its structure, overriding other regards.

Therefore the order of law according to Kelsen is not an order dictated by reason but by hierarchy. This hierarchical structure is essential in purifying law by separating it from other non-law regions (pure theory), and at the same time forming an integrated system of fundamental concepts in law (general jurisprudence). Kelsen is strong and consistent in his request of

---

6) HANS KELSEN, REINE RECHTSLEHRE 1 (zwiete Auflage, Unveränderter Nachdruck, Verlag Franz Deuticke Wien 1976) (1960).

7) *Id.* at 349-350: "Allein von einem auf das positive Recht gerichteten Standpunkt aus gibt es kein Kriterium, auf Grund dessen die eine der im Rahmen des anzuwendenden Rechts gegebenen Möglichkeiten der anderen vorgezogen werden könnte …… Es ist trotz aller Bemühungen der traditionalen Jurisprudenz bisher nicht gelungen, den Konflikt zwischen Wille und Ausdruck in einer objektiv gültigen Weise zugunsten einen oder des anderen zu entscheiden."

putting all law into one system, that is, from one unified viewpoint, interpreting it as complete and whole in itself.[8)]

In the stage by stage structure commonly referred to as the pyramid model, what stage do you suppose is at the top? Since Kelsen's legal theory is theory of positive law, it seems natural that constitutional law, the foremost of all positive laws, is placed on top. The logic behind his pyramid model is based on the idea that what should be legally is followed through by transporting the validity of the ought(norm). If so, then, what transport the validity of the constitutional law? The general will of the people? The natural law or natural rights? According to Kelsen, this kind of answer is impossible. This is because these things are impure matters unable to set its foot inside the legal world. The concept introduced to solve this problem is the basic norm(Grundnorm).[9)] So this is in fact Kelsen's logical equivalent of the constitution, transcendental-logical presupposition,[10)] so that it may be possible to put into effect what ought to be, that is, a norm which cannot be retracted to a higher state of 'ought.'

In Kelsen's legal world, norms do not hold meaning due to its contents but because it is what it is, a norm, and therefore this 'Grundnorm' cannot make any meaningful demand.[11)] Even so, if we were to dictate a demand, it would be "do as the constitutional law demands." That is, if we were to assume positive law as being effective, people would foremost set down the premise that the constitutional law, historically the very first law, on which all other positive legal order has been built upon, this very constitutional law should be abided word to word.

III. The Significance and Limitations of the Pyramid Model

The pyramid model explains well the characteristics of law explained by Kelsen. The influence of Kelsen's pure theory and hierarchical order of law is so great that the pyramid model is now almost the shining symbol of law

8) *Id*. at 209.
9) *Id*. at 204 f.
10) *Id*. at 204 ff.
11) *Id*. at 196.

itself. I myself remember the strong impression I got as a student when my professors drew a diagram of a pyramid with ordinances, orders, statutes on the bottom of the pyramid and the constitutional law on top. Then again, I feel that the pyramid model goes beyond the theoretical and into reality, holding significance in practice. It allows us to understand law more easily, readily, and has the 'psychological effect' of creating a feeling that the legal world is orderly and encompassing.

The pyramid model, in the sense that it should include only law that fits in with the bottom level of the pyramid to the top, fits in well with the characteristic that the system of law should be consistent and systematically correct. It also conveys an impression of completeness, as everything that should be inside of it is included. Also since that everything is arranged so that the top level of the pyramid is the pinnacle, each element comprising each level can be deduced to the highest order. Above all, the pyramid model is most effective in outlining the hierarchical structure of legal order.

The study of law has long been stuck in the rut of deductive syllogism. This fact has primarily been responsible in making law look a lot like science, according to the German legal philosopher, Arthur Kaufmann.[12)]

Systematic thinking leads in reality mainly to habituality. By emphasizing the system, it can exaggerate the stability and integrated nature of actual practice, which in reality is rough and rocky. Also it can sneak in aspects of reality which have no place in this system. On this point, I would like to introduce an old Chinese fable about the foot and 'tak (度).' Here the Chinese character 'tak' refers to a picture of a foot such as one you would get from placing your foot on a piece of paper and drawing the outline of it. In the State of Zheng (BC 806~375, China) there was a man named "Chachiri (且置履)" who drew the outline of his foot, a 'tak,' and then forgot to take it to the market with him. On arriving at the market he realized this and went back to his house to get it — but by the time he returned to the market with his 'tak,' the markets had closed and he could not buy his shoes. When people asked him why he did not just try on the shoes, he answered that he could trust an imprint of his foot but could not trust his own foot.[13)]

---

12) ARTHUR KAUFMANN, RECHTSPHILOSOPHIE 54 (2. Auflage, C.H. Beck, 1997).

13) Folktale from Han Fei Tzu.

Kelsen's theory on the hierarchical levels of law is a result of legislative positivism. Fundamentally, it springs from the idea of a legislative state and it is a positivism model appropriate for the state law structure. However, today we have departed from state-centrism and with the strong wind of international law blowing, the state law is placed under pressures and exposed to new environments where overlapping with supra-state laws such as EU law (EU law itself also conflicts with international law) is inevitable. The pyramid model cannot but face limitations in explaining such new predicaments.

In short the law is only partly explained by the pyramid model.[14] When we consider overlapping or pluralizing of legal order and the difficulties involved in setting boundaries of governance, the boundaries in the pyramid model also become ambiguous.

IV. The Crisis of the Governing Capacity of Law

During the last two centuries the law order was run according to state law centrism. Thoughts on law in the Western world assume the politics and society of a modern national state. The rational form of governance which went hand in hand with western modernization was 'rule of law' as pointed out by Max Weber as being the last stage of modernization. Such rule of law was conceptually general.

History discovered that this unlimitedness of the concept of the rule of law appeared to be bound by the national state. As a modern, political scheme this universal or general concept proffered the fundamental blocks on which sovereignty and autonomy of the national state could be built on. In this sense it was a legal concept which accompanied the process of becoming a state. And accordingly the jurisprudence continued to be a general jurisprudence.

The rule of 'law' grew into becoming the 'rule' of law because geographical circumstances compelled it so; and hence since modern times, the lawful state under the rule of law is the result of this development. The reason why political, economical rule could mold a form of rule which took root, grew and

14) Losano, *supra* note 5, at 30.

expanded — while regional exceptions and beliefs, tradition and customs and social status was ignored — was because a legal system existed. The expansion of the rule of law reveals itself in the formation of many social theories. For example in social engineering by Comte wherein he suggested the pinnacle of social thought lay in a positivism-utopia; and by Emil Durkheim when he suggested the development of legal institutions as evidence of a system based on regional values and beliefs, having undergone division of labor and accordingly having achieved functional integration or bonds. Ferdinand Tönnies explained the same phenomenon as the development from a tradition and custom based 'Gemeinschaft' to a rationality based 'Gesellschaft,' and in his own words Sir Henry Maine expressed this as: "from status to contract."

To the extent that we understand internationalization to be a strategy for strengthening the state and expanding territory, the universal or general concept of state law is a concept which goes hand in hand with the birth of today's international legal order. Therefore international law springs from the assumption of state-centrism. Theorists who associated the rule of law with global order and world peace are scarce in number, to name one Kant may be the only obvious answer.

To summarize it would be correct to say that the 'rule of law' principle is missing in international law.[15] This is because the principle of division of power or distribution of authority in the rule of law was considered to be applicable only to nationals and state institutions. And accordingly the principle of nonintervention became a key principle of international law.

During the last twenty years or so one of the features following the tide of globalization is that state-law centrism is retreating. In the legal relationship outside the boundaries of the state, the state no longer emerges as the singular actor. Of course even though globalization continues to occur, that process will not be completely free from the actions of the state. However many scholars, following the progress of globalization agree that the state's monopolistic role as the distributor of social values is starting to depart from that of actors other than the state.[16] This can be interpreted to some extent that

---

15) Danilo Zolo, *The Rule of Law: A Critical Reappraisal, in* THE RULE OF LAW: HISTORY, THEORY AND CRITICISM 40 (Pietro Costa & Danilo Zolo eds., 2007).

16) *Id.* at 45, 48.

the state's role as the regulator, direct public welfare producer or guarantor of social equity is changing to one of a co-ordinator.

With the state existing in the 'interstates system' under the phenomenon of the decrease in effectiveness of the state law system, weakening of the state law's ability to regulate, the secondary nature of the state's regulatory function, the regulatory power of 'informal laws' that are not state law; an asymmetry between state law and non-state law is arising.[17)]

V. The Advent of Legal Particularism

Regulations that are not made by the state are showing notable growth. Due to the growth of regulations at the local, supranational and global level the phenomena such as legal plurality, monopoly of state law, and social regulations transcending the state level is appearing.

At the regional level, among African states, for example, the state's regulation is changing into a role of a subsidiary or a comprehensive sum of all non-state laws due to the pressures of the hegemonic forces in the world economy.[18)] Also there are only a few lawyers in the field of business and finance who are able to deal with multinational corporations, and the law in the lives of ordinary citizens is showing signs of returning to regional laws that depend on the traditional authority.[19)] In Brazil, in the outskirts of the city where some thousands of ostracized lower classes operate under an informal form of 'underground law' for the internal maintenance of order and commercial trading among them, and this 'underground law' the government tacitly tolerates.[20)]

There is also the self-regulation, trading practice, and the supranational law made by firms behind these emerging as new sources for international law. One example is the UCL, which works in supranational commercial trading fields. This in fact is the emergence of legal particularism.

---

17) Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation 96 (2d ed., Butterworths 2002).

18) About the case of Mozambique, see *id.* at 93.

19) *Id.* at 193.

20) *Id.* at 155.

Especially in the case of developing countries, multinational corporations are pushing through agreements made among them concerning tree felling, medical supplies, etc through global self-regulation. There is the tendency of relying more heavily on pools of trust like arbitration or human relationships rather than relying on regulations to resolve conflicts over world economy issues.[21] In legal activity which crosses over national boundaries guiding principles or general transaction provisions, international law firms, the World Chamber of Commerce, International Bonds Collection Organization, human networks based on trust, these things have a more important role than the international law order.[22] These can hardly be called global laws, more likely they are the domineering phenomenon of globalized regional law.

The main feature of the globalized world where on one hand regionalization (EU) and globalization (WTO, UN), and on the other hand, the localization simultaneously occur is that the actor and the objective of acts can not be uniform. In this aspect the world legal culture can be understood as a facet of the 'complications of postmodernism.'[23] The law, instead of having one uniform foundation, is a multifold structure of regional, transnational, and supranational.

As a result, in the multilayered relationship where the actors and objectives of the acts become complex, no one unit structure or linkage structure can be homogeneous in the traditional sense. This situation demonstrates that social conflicts can no longer be solved satisfactorily

---

21) For empirical research results that indispensible predictability and trust in cross-border trading is obtained by building on personal trust, mutual interdependence, long history of trading, arbitration procedures rather than through legal obligations, see Wai-Keung Chung and Gary G. Hamilton, *Social Logic as Business Logic: Guanxi, Trustworthiness, and the Embeddedness of Chinese Business Practices, in* RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 325-346 (Richard P. Appelbaum, William L. F. Felstiner & Volkmar Gessner eds., 2001).

22) On the tendency to resolve problems through non-law methods in order to avoid high costs of making a claim on credit because of differences in legal culture, difficulties due to custom, lack of experience, complexity of the situation in international trading despite the efforts of state law to achieve coherence and uniformality, see Yves Dezalay, *The Big Bang and the Law: The Internalization and Restructuration of the Legal Field*, 7 THEORY, CULTURE & SOC'Y 279-293 (1990).

23) Santos, *Law: A Map of Misleading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC'Y 279-302 (1987).

through authorities of the past.

VI. Enfeeblement of Legal Formalism

When we look at the process of establishing and executing norms related to international · supranational economical transactions the retreat of legality seems to be apparent. The hope of all multinational corporations is the minimizing of national regulation and control. Instead of sacrificing the regulations of the individual state by putting up the vitalization of the economy and finance, multinational corporations are opting to develop an arbitrary behavioral norm. They have a tendency to distrust the courts of individual states. They believe that those courts prioritize state interests over the global standard. So, they seek to find ways of resolving conflicts through other means than through the formal justice system. Forms of contracts are also changing into weaker forms such as standard provisions or gentlemen's agreement.

In the midst of this trend, changes of norms are being based more and more on firm or market customs rather than on case law or scholarly doctrines. As an example UCL, where 175 banks are a part of and is one of the main examples of 'lex mercatoria,' is a supranational pact which exerts influence over international financial transactions and binding to most countries. These regulations can be seen as being quite successful in excluding the interference of the state thanks to the immediacy of transactions, the cost factor involved in transnational transactions, transparency, etc. Although these regulations do not satisfy the 'normative expectations' in comparison to state law, it does meet up to the standards of 'cognitive expectations' which induce actions and motives to maintain order in the field of transactions.[24)]

24) Behavioral patterns which stop at cognitive expectations(kognitive Erwartungen) begin to transform into normative demand with the progress of globalization. That is, cognitive expectations develop into normative expectations(normative Erwartungen). In the midst of this global law orders such as the aforementioned 'soft law' appear. This can be seen as a global standard wherein enforceable powers are not guaranteed and therefore it is at a stage between cognitive expectations and normative expectations such as gentlemen's agreements or soft law which have weak normative powers. For more, see Klaus F. Röhl, *Die Rolle des Rechts im Prozeß der Globalisierung*, 17 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 23 (Heft 1, 1996); HOLGER KREMSER, 'SOFT

The increase in the amount of 'soft laws'[25] which sits between 'cognitive expectations' and 'normative expectations' can be explained in the sense of retreat of legal formalism. This trend is forcing the retreat of generality, openness, neutrality, legal certainty and stability, continuity etc which are the main aspects of rule of law.[26]

VII. The Crumbling of Law as an Autonomous Discipline

Throughout history, the request for autonomy and legal formalism as asserted by Kelsen has been theoretically challenged.[27] The biggest threat to the autonomy of law comes, of course, from morality. From the perspective of law, to accept moral under legal logic means accepting particular moral values and subjectivity which follows through, and at this point it becomes difficult to establish standards to evaluate the values in the content and thereby can harm generality, certainty and legal stability. Another important problem is that such morals might entail partiality in legal interpretation. In law the request for formality is closely tied up with autonomy of law. The fact that law is in want of formality means that it does not want to be enveloped or subordinated by a interest structure by something outside of law.[28] It can be said that legal formalism is prepared for the dangers of moral subjectivity and accordingly partiality from legal interpretation. In other words formalism aims to make law seem to have a simple and straightforward structure in order to make interpretation of law self-evident or unnecessary in legal practice.[29]

However when we look to history, that which is evident in the name of

---

LAW' DER UNESCO UND GRUNDGESETZ. DARGESTELLT AM BEISPIEL DER MEDIENDEKLARATION (1996).

25) WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 117 n. 132 (2009).

26) William E. Scheuerman, *Franz Neumann: Legal Theorist of Globalization?*, 88/1 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 79-89 (2002).

27) Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761-780 (1987).

28) Stanley Fish, T*he Law Wishes to Have a Formal Existence, in* CLOSURE OR CRITIQUE. NEW DIRECTIONS IN LEGAL THEORY 157 f (Alan Norrie ed., 1993).

29) Kelsen, *supra* note 6, at 30.

formality has become increasingly diminished in the field of law.[30] For example in ancient and medieval law, formality has been much more pronounced than today. At one point formality was law itself. External formality which emphasizes procedures, symbolism, and ceremony has been expressed in the shape of wigs, robes and architecture of the court and some of it still remains intact today.

The modality of expression cannot help but reflect the way of life of that era. In our reality today law is made because of the realistic needs of today. Therefore judges of today must take into account transaction customs and public sentiment, and it has become increasingly difficult to disregard or nullify certain regulations just because it does not fit legal formality. In actuality the spirit of the times has changed, we have chosen the road to find material truth. The paradigm of law has been converted too, from formal law to material law. Along with globalization of law there is acceleration of materialization of law, and conversion into 'soft law.' This means that, contrary to Kelsen's opinion, the assumption that legal truth is a self-evident communication system which cannot be linked to a certain experience or a situation has finally crumbled.[31]

If so does law have its own window through which it looks into the world? If we were to stoutly disagree with this question it will seem that we are announcing that law in its discourse, methodology and knowledge, it does not have any inherent characteristics.[32] However I feel that this is an overstatement. Just because we admit to the ebb of the autonomy of law this cannot also negate the status of legal science as a division of scholarly study.

---

30) Wilhelm Ebel, *Recht und Form*, VOM STILWANDEL IM DEUTSCHEN RECHT 14 ff (J.C.B. Mohr: Tübingen 1975).

31) Kelsen, *supra* note 6, at 205 ff.

32) For example, ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 51 (2006): "Law's social conditions of practice determine the forms of knowledge appropriate to it. It lacks any of the usual intellectual marks of disciplinary: controlling master theories, distinctive methods of intellectual debate, established paradigms of research practice, familial epistemological and ontological positions or controversies…."

VIII. Communication rather than System

Now return to Kelsen's system: Can the new legal environment be rearranged into a pyramid structure? If so then what will be placed on top of the new pyramid? Additionally a new discussion must be opened on what will be placed on the bottom of the pyramid. Among legal sociologists there are those who are paying close attention to this phenomenon and assert that there must be a shift of paradigm from the pyramid model to the 'networking' model. While traditional legal positivists like Kelsen understood the law as a structure and came up with the pyramid model, these legal sociologists have approached law from the perspective of legal functionalism and have suggested the network model.[33] However in truth legal system in some ways has contained attributes pertaining to networks. In Korea we oftentimes use the rhetoric legal network (法網). It seems right to say that the internal attributes of the network have been strengthened by the influence of IT, globalization, etc.

In conclusion we must find a way that takes both the pyramid and the network fully into account. On this point Kelsen's theory on the hierarchical order of law has its limits in being able to contribute to the legal discourse in the transition era of today.

It is important to view the system as act or system of communications rather than to focus on the rigid system itself. The production of the legal text is important, however, more important is applying the text to reality and blowing life into it by giving it meaning. This job, contrary to Kelsen's opinion, cannot be conducted by law alone, and without supplementary discourse.

The verses like those of W. H. Auden in the poem 'Law, Like Love' can now really be uttered only when we recite poetry.

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,

33) Losano, *supra* note 5, at 30.

Law is but let me explain it once more,
Law is The Law.

KEY WORDS: pure theory of law, basic norm, globalization, pyramid model, legal plurality, interlegality

Manuscript received: Oct. 26, 2009; review completed: Dec. 1, 2009; accepted: Dec. 10, 2009.

Journal of Korean Law | Vol. 9, 161-171, December 2009

Legal Issues Regarding the Legislation for an Emission Trading System in Korea*

*Hong Sik Cho***

Abstract

This paper will study the potential legislative issues that can be raised in the process of creating an emission trading system.

First, the constitutionality of carbon credits can be questioned in relation to the freedom to choose an occupation and property rights. Second, Emission trading might be regarded as a way of granting the right to pollute, which is a violation of environmental rights. Third, the "polluter pays principle" (PPP), stipulated under the Framework Act on Environmental Policy, might be inconsistent with an ETS targeting only the upstream pollution sources.

Fourth, the problem of determining the period(short-term or long-term) and the reduction amount and the target gases. Fifth, to whom the emission credits should be allocated. Sixth, to choose between different methods to allocate emission allowances: free allocation (grand-fathering and benchmarking (baseline and credit)) and paid allocation (auctioning).

Seventh, given the regulatory gap on emissions among countries, Korea should come up with countermeasures against the negative impact on the international competitiveness of its domestic industry and potential carbon leakage in the world that could be caused by domestic regulations.

Eighth, it is crucial to be open to other various policy tools such as command-and-control, environmental taxes, subsidies, support for technology development and the readjustment of the social infrastructure, and to adopt a policy-mix method that uses a combination of these various tools.

Ninth, the regulatory consequences of implementing an ETS can be a huge burden on those in the industry. To minimize the regulatory burden, the following legal basis will be needed to allow a gradual implementation of the regulation.

---

* This essay is a revised version of the paper presented at the "International Conference on the Emissions Trading System" which Korea Legislation Research Institute held on Sept. 10, 2009 at Convention Hall, Korea Federation of Banks.

** Professor, Seoul National University School of Law. This Article was funded by the Seoul National University Law Foundation in 2009.

I. The Background and History of the Emission Trading System in Korea

Korea is currently the 10th largest greenhouse gas emitter in the world.[1] Its greenhouse gas (GHG) emissions have sharply increased since the 1990s, which can largely be attributed to its manufacturing-based economic growth. Between 1990 and 2005, GHG emissions in Korea increased by 86.8%, which was the largest increase in emissions during that period among the OECD countries.[2] This stems from the fact that the Korean economy has an energy-intensive industrial structure and a high level of dependency on fossil fuels. As of 2006, energy-intensive industries including steel, cement and the petrochemical industries accounted for 8% of the entire industrial structure in Korea,[3] far exceeding both Japan and the United States, where these industries accounted for 4.6% and 3.1%, respectively.[4] In addition, the average fuel efficiency of domestically manufactured and sold vehicles was 11 km/*l* in 2007, which is only 70% compared to that of Japanese vehicles.[5] Meanwhile, the development of the green industry and technology, which is pivotal for GHG emissions reductions, is rather poor in Korea. For example, the distribution rate of new and renewable energy sources was a mere 2.37% in 2007, the lowest among OECD member states.[6]

Since climate change is a global environmental issue, global cooperation plays a vital role in its resolution. Major emitting countries are working

---

1) Editorial: Achieving Overwhelming Goal of Greenhouse Gas Reduction, MAEIL BUSINESS NEWSPAPER, *available at* http://media.daum.net/foreign/englishnews/view.html?cateid=1047&newsid= 20091118104716996&p=mk.

2) State Strategy to Green Growth, *available at* http://www.greengrowth.go.kr/download.ddo?fid=bbs&bbs_cd_n=12&bbs_seq_n=149&order_no_n=2 p.12.

3) *Id.*

4) *Id.*

5) The Press Release from the Ministry of Knowledge Economy, *available at* http://blog.daum.net/mocie/15610034.

6) Economy Focus 1, INVEST KOREA JOURNAL (Issue Nov-Dec 2009), *available at* http://www.ikjournal.com/InvestKoreaWar/work/journal/content/content_main.jsp?code=4650104&select1=465&select2=4650104&query=&gubun=; State Strategy to Green Growth, *available at* http://www.greengrowth. go.kr/download.ddo?fid=bbs&bbs_cd_n=12&bbs_seq_n=149&order_no_n=2 p.13.

together to develop and maintain an international framework under which they share the roles and responsibilities for fighting climate change. Though Korea is not bound by the mandatory emission cuts of the Kyoto Protocol, it can no longer free-ride on the efforts of other nations under the excuse of being a developing country, given that Korea is eager to improve its position in the international community and has a high dependency rate on trade. In fact, the international community seems hopeful that Korea will exert greater efforts in reducing GHG emissions compared to other developing nations. Moreover, the possibility that Korea may be included among Annex I countries in the post-Kyoto Protocol era cannot be ruled out.

Under these circumstances, the Korean government has begun to develop legislation for reducing GHG emissions. The government has embraced the "low-carbon, green-growth" paradigm as the new national development framework. This framework aims to create new growth engines and job opportunities by moving away from the carbon-based development strategy and instead moving towards green technology and clean energy. The new paradigm also means the achievement of sustainable development by reducing GHG emissions and environmental pollution. The government has drafted the Basic Act on Low Carbon and Green Growth [Jeotanso Noksaekseongjang Kibonbeopan] which is currently under deliberation in the National Assembly. Article 46 of the Act specifies the basis for an emission trading system (ETS) as follows:[7)]

> Article 46 (Introduction of Cap-and-Trade System, etc.)
>
> ① In order to prepare for the globally expanding emission trading market and to efficiently reduce greenhouse gases through a market mechanism, the government may implement a system, etc.; the system sets a limit or cap on the amount of a greenhouse gas that can be emitted and allows the emission allowance to be traded (hereinafter referred to as a "cap-and-trade system").
>
> ② The government shall take into account international

7) JEOTANSO NOKSAEKSEONGJANG KIBONBEOPAN [Basic Act on Low Carbon and Green Growth], Nat'l Assembly, Draft No. 3967 (Feb. 27, 2009), *available at* http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_G0I9I0O2X2U71O8S2Q0M3U0I6B9A4.

negotiations relating to climate change, international competitiveness, etc. when implementing a cap-and-trade system.

③ Allocation methods, the registration and management of greenhouse gas emission allowances, and the establishment and operation of an exchange for implementing a cap-and-trade system shall be prescribed by separate acts.

Moreover, according to Korea's Strategy and Five-Year Plan for Green Growth set by the Presidential Committee on Green Growth on July 6, 2009, the government will implement a trial cap-and-trade system until 2011 and gradually introduce the system in 2012.[8)]

The cap-and-trade system, however, has gained only limited support. Those in the industry argue that the ETS will discourage new investments, hike costs of production, and drive the manufacturing sector abroad. They added that the government should provide more support to enhance national competitiveness instead of imposing regulation on the industry.[9)] On the other hand, environmental groups criticized the government, asserting that the word "etc." in paragraph (1) of Article 46 of the Basic Act allows the introduction of methods other than a cap-and-trade system.[10)]

This paper will study the potential legislative issues that can be raised in the process of creating an emission trading system, based on the background behind the introduction of the ETS.

II. Criteria and Constraints in Designing an Emission Trading System

Two factors should be considered when designing an emission trading system: first, the regulative ideal or standard that controls the system design;

---

8) Myung-je Chung, *Gov't to Inject W107 Trillion into Green Growth Sector for 5 Years*, KOREA IT TIMES, July 9, 2009, *available at* www.greengrowth.org/download/2009/news/Korea-inject-107-trillion.pdf.

9) Ellee Park, *Tteugeoun Gamja 'Chongryangjehan Tansobaechulkwon Georaeje' Nollan Gayeol* [*Heated debate over 'cap-and-trade system'*], MEDICAL TODAY, June 15, 2009, *available at* http://www.mdtoday.co.kr/mdtoday/index.html?no=86166.

10) *Id.*

and second, national conditions that restrict the design of such a system. The former is an aggressive and universal factor while the latter is a passive and parochial factor.

First, we need to consider the standard that controls the design phase of the ETS. Various policy tools are available for the policy goal of cutting GHG emissions. In order to select the ETS, its effectiveness in reducing GHG emissions should be guaranteed. International environmental treaties such as the United Nations Framework Convention on Climate Change and the Kyoto Protocol are not self-executing treaties that automatically take effect in Korea as domestic law. Instead, each signatory must enact and enforce domestic laws to meet its obligations under the treaty. Moreover, once a country signs and ratifies a treaty, it cannot avoid implementing and complying with the treaty obligations because of its domestic conditions. Accordingly, it is of utmost importance that Korea, which is expected to be a member of the post-Kyoto Protocol, design an effective ETS that guarantees successful achievement of the reduction targets.

Another important concept in designing an ETS is cost-effectiveness. Under the ETS, an emitter must purchase credits to emit carbon so that the entire community can meet the reduction target at a low cost. By putting a price on emissions, the ETS encourages emitters to search for inexpensive alternatives to purchasing carbon credits. Then, through the carbon credit trade, emitters may purchase carbon credits from other emitters who have reduced carbon emissions at a lower cost. As such, the ETS aims to promote a cost-effective way of cutting GHG emissions. The cost-effectiveness approach can be understood as attaining the goal of emissions reduction at a low cost by guaranteeing emitters flexibility when choosing GHG emissions reduction methods. In addition, the focus on cost can encourage technological development. As the price of carbon credit increases, highly efficient technologies will be introduced and by setting a proper long term goal, further technological development will be stimulated.

Next, we will review the passive factors that restrict the ETS. From an economic perspective, Korea's heavily coal-intensive industrial structure prevents an immediate introduction of an ETS. Therefore, the gradual adoption of an ETS must be considered. Moreover, there is no emission-related statistic data, which is necessary for the implementation of an ETS. Without access to such data, designing a regulatory system and providing

subsidies will be impossible. Considering that data collection requires much time and cost, various policy measures for facilitating data collection need to be legislated. For instance, regulations that protect companies' confidential information need to be legislated.

From a socio-cultural perspective, since Koreans have a strong sense of protecting their rights, there may be a conflict in the initial distribution of carbon credits. Korean society is no longer perceived as a non-litigious society, as evidenced by the rising number of lawsuits, including civil and administrative cases.[11] In the past, the distribution of carbon credits may not have caused any difficulty, since it could be carried out through an agreement between an authoritarian government and passive companies. However, today, highly self-conscious citizens, grass-root civic groups and bold companies are ready to fight for their rights. Especially considering the redistribution effects of an ETS, we can imagine the massive social impact that these controversies will bring about. Therefore, in designing an ETS, it is pivotal that the interested parties participate in the legislation process and all parties share the responsibilities fairly, preventing any unfair attainment of initial credits. Also, a transition period should be granted before implementing a full-scale ETS in order to minimize the adverse effects.

From a legislative perspective, the Korean Constitution declares that "all people have the right to live in a healthy and pleasant environment."[12] It is well-known that, in Europe, there is a heated debate over the constitutionality of carbon credits in relation to the freedom to choose an occupation and property rights. In the same vein, emission trading may be regarded as a way of granting the right to pollute, which is a violation of environmental rights in Korea. In addition, the "polluter pays principle" (PPP) is stipulated under the Framework Act on Environmental Policy.[13] Accordingly, an ETS targeting upstream pollution sources would be inconsistent with the PPP. Furthermore, the ETS has several factors that conflict with other environmental adminis-

---

11) You can find statistics from http://file.scourt.go.kr//AttachDownload?path=001&seqnum=39&gubun=10&file=1248336732962_171212.pdf&downFile=2.사건의추이(누년비교).pdf.

12) DAEHANMINGUK HEONBEOP [Constitution of Korea], art. 35(1) (1987), *translated at* http://english.ccourt.go.kr/home/english/welcome/republic.jsp (last visited Nov.13, 2009).

13) Article 7 of FRAMEWORK ACT ON ENVIRONMENTAL POLICY. You can search the full text at http://elaw.klri.re.kr/.

trative laws and regulations. To solve such problems, careful fine-tuning of the provisions is required and a separate regulation on the execution and management of the ETS should specify the implementation procedures of the ETS. For example, a task force or procedure can be established for resolving conflicts between the ETS and other environmental administrative laws.

III. Legal Issues in Designing an Emission Trading System

Legal issues in designing the ETS can be divided into internal issues which constitute the details of the ETS and external issues which determine the success of the ETS.

The most basic internal issue is to determine "how much of what should be reduced until when." In other words, the period (short-, mid-(post-Kyoto period, 2013-2020) and long-term (2021-2050)), the reduction amount and the target gases (CO2, CH4, N2O, HFCs, PFCs, SF6) should be decided. With regard to these factors, rules on compliance with reduction obligations such as the compliance period, depreciation obligations and measures for non-compliance should be in place. Such rules on compliance are of utmost significance because they serve as the precondition for emission rights and trade. On August 4, 2009, the Korean government announced its goal to reduce GHG emissions by 30% until 2020, relative to the so-called "business as usual" (BAU) scenario.[14] The BAU refers to the level of GHG emissions the country is forecasted to reach by a certain year if emissions grow at their current pace. The social debate with regard to this announcement shows the importance of deciding the reduction amount. Above all, a social agreement should be sought.

Another issue is deciding to whom the emission credits should be allocated. Once the allocation subjects are decided, industrial sectors and types of businesses to be covered by the ETS and their portions of the total emissions in Korea can be determined. For instance, it must be determined whether

14) The Press Release from the Presidential Committee on Green Growth, *available at* http://www. greengrowth.go.kr/download.ddo?fid=bbs&bbs_cd_n=17&bbs_seq_n=26&order_no_n= 3.

those in the upstream — including producers, importers and sellers of fuels — or those in the downstream — including energy users (producers or users of power) — can receive the emission credits. Once the allocation subjects of the emission credit are decided, the method of allocating those credits should be determined in a "fair" manner. Fairness is crucial for the success of the ETS since the participants will support the system only when it is implemented in a fair way.

There are two different methods to allocate emission allowances: free allocation (grand-fathering and benchmarking (baseline and credit)) and paid allocation (auctioning). The above-mentioned issues relating to the Constitution and the PPP will be discussed with regard to the allocation methods. Measures against those who take early action should be sought as well. Also, issues regarding new business operators and facility closure need to be reviewed. These issues depend on the legal definition of property rights. For instance, if the emission credit is regarded as a civil liberty, there shall be no barriers for new businesses to enter the market, while if the credit is regarded as a property right, a company which shuts down its facilities should receive emission credits equivalent to the reduced emission.

The internal infrastructure for implementing the ETS includes the establishment of a registry for emission credits and the adjustment of rules on "monitoring, estimating and reporting of emissions" and "verification of emissions" for measuring the exact amount of emissions. This issue also depends on the legal definition of emission credits. For example, it should be determined whether the credit shall be regarded as movable property or immovable property, and if it is regarded as movable property, whether the establishment of a right of pledge shall be permitted or not.

In addition to designing of the ETS, cost-alleviating measures such as banking, borrowing, price caps, overseas credits, etc. should be established by taking into account the adverse effects that price spikes and fluctuations can have on the economy. This is to promote price stability and avoid a sudden rise in costs, while maintaining the goal of reducing GHG emissions, by introducing measures that flexibly increase the supply of emission credits in the event of a price spike or an imbalance between supply and demand.

In addition, given the regulatory gap on emissions among countries, Korea should come up with countermeasures against the negative impact on the international competitiveness of its domestic industry and potential carbon

leakage in the world that could be caused by domestic regulations. In this regard, free allocation to certain sectors and adjustment of reduction obligations among countries (so-called "border adjustments") may be considered.

Lastly, possible interdependencies between domestic and international ETSs should be reviewed. International trade of emission credits would cause a short term outflow of funds to countries that can reduce emissions at a low cost. Such a problem, if the amount involved is enormous, could lead to a political issue. Moreover, the increase of trade volume and participants due to global linkages may undermine the control of each government. Hence, rules that can be applied to international emission credit transactions should be established.

External factors that will serve as the basis for the ETS are two-fold: one is rules on accounting and taxation, which will regulate the allocation and trade of emission credits. The other is the establishment of a foundation that facilitates transactions and an appropriately functioning market, so that efficient reduction of emissions can be achieved through price signals. Accounting and taxation standards are highly likely to converge globally as ETSs become a global system. Any divergence from international accounting standards should be eliminated by observing the developments at the International Accounting Standards Board (IASB). For the facilitation of emissions trade, it is important that sufficient participants are secured and institutional support is provided to encourage the creation of brokers. Additionally, measures should be taken to secure the credibility and stability of the transactions.

IV. Some Proposals: Policy Mix and Incremental Implementation

As mentioned previously, it is necessary to jump over various legal hurdles in order to implement an ETS in Korea. To that end, it is crucial to be open to other various policy tools such as command-and-control, environmental taxes, subsidies, support for technology development and the readjustment of the social infrastructure, and to adopt a policy-mix method that uses a combination of these various tools. For instance, a mix of

command-and-control and the tax system would be useful for monitoring and verifying a large number of small-sized emitters. Also, even when the cost of purchasing emission allowances is cheaper than the cost for reducing emissions, subsidies can be offered for the goal of nurturing the technologies and industries which are essential for future reductions.

The regulatory consequences of implementing an ETS can be a huge burden on those in the industry. To minimize the regulatory burden, the following legal basis will be needed to allow a gradual implementation of the regulation.

In the first phase, the industry should be able to voluntarily come up with an action plan. Such voluntary action plans would be cost-effective and politically acceptable, due to their autonomous nature. If there is concern that this would result in laissez-faire in the industry, a voluntary agreement could be an alternative. A voluntary agreement refers to an agreement that the industry can enter into with the government, under which companies would submit their GHG emissions reduction plans to the government. Then the government or a third party would manage, approve and evaluate the reduction process.

The second phase combines a tax system on GHG emissions — mainly a carbon tax — and the voluntary agreement. For the successful operation of the agreement, incentives are needed to encourage companies to voluntarily participate. Simultaneously, there should be disincentives for companies that fail to meet their reduction targets as arranged under the agreement. To establish such an incentive system, first, taxes would be imposed on GHG emissions while participants to the agreement receive tax reductions. Second, those who fail to comply with the agreement will be deprived of the tax reduction or be levied a heavier tax. The tax system alone may be insufficient since it is difficult to set a specific tax rate. In this regard, a combination of the tax system with the voluntary agreement can help set the tax rate. As a result, a national plan for cutting GHG emissions can be successfully implemented.

Under the third phase, signatories to the agreement can take part in emission trading. Tax reductions for the signatories may hamper the efficient distribution of resources. Such a problem can be minimized by allowing them to trade emissions. The combination of an emission trading system and the agreement can help avert the allocation issues and promote political acceptability in the form of an agreement. Those who emit moderate or large

amounts of greenhouse gases can turn from the second phase to the third phase, while those who emit small amounts can be subject to tax incentives. This is because substantial costs will be incurred for monitoring compliance with emission limitations.

In addition, it would be appropriate to employ command-and-control and subsidies in a limited manner, such as when technological innovation is called for.

KEY WORDS: the constitutionality of emission trading system, carbon leakage, emission allowances, grand-fathering, benchmarking, baseline and credit, auctioning, polluter pays principle, property rights, the right to pollute, Environmental rights

Manuscript received: Oct. 7, 2009; review completed: Dec. 1, 2009; accepted: Dec. 10, 2009.

***

***