Human Rights in the Republic of Korea and the North Korea: A Critical view of Human Rights Policy*

by

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1. Introduction

Is South Korea a victim of the Watergate? The aftermath of the Watergate has contributed to the demise of the South Vietnam. In the last days of the Vietnamese War, during which the anti-war movement was at its peak, the western intellectuals and journalists, especially many of the liberal American intellectuals and journalists, were very critical of the corrupt practices and human rights violations, particularly against dissidents. In the anti-war rhetoric, the American commitment to South Vietnam was identified with American support of the corrupt, dictatorial Thieu regime. Interestingly enough, however, North Vietnam was rosily described as a disciplined society; Uncle Ho, and the Vietnamese nationalists bravely fighting against “American imperialists” under the leadership of the Vietnamese Workers Party, and North Vietnamese war efforts were even romanticized. That North Vietnam is basically a communist-controlled, totalitarian society where human rights in the Western sense do not exist was rarely heard.

There is a certain parallel between the attitudes of American critics toward the Korean situation and that toward the Vietnamese war: that is, their double standards. They are invariably very critical of the American allies for the

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latter’s corrupt and dictatorial practices—probably there are very few non-Western American allies in the world which are not thus viewed. The very same critics, however, remain silent about the political practices of communist regimes that far outdistance those of the non-Western American allies in the counts of human rights violation. This kind of double standards appeared most clearly in Indochina.

They maintain similar double standards in the Korean situation. The double standards of liberals are partly responsible for Carter’s human rights policy and his policy of military pull-out from South Korea. Yet the same critics who are outspoken against the South Korean government for its corrupt practices and human rights violations were silent about the very absence of human rights and the corrupt practices of different dimensions in North Korea.

The North Korean Constitution of 1972 has an elaborate list of “the Fundamental Rights and Duties of the Citizens.” The questions raised in this paper, therefore, center around the problems of how to evaluate the constitutionally provided human rights of North Korean citizens in the “disciplined” socialist society. The questions evoke a host of similarly related questions. A few examples would include: what is the meaning of the constitution in a communist-controlled society in which the Party supremacy over the constitution prevails?; what is the meaning of the constitutionally guaranteed fundamental rights in such a society in which an independent judiciary does not exist?; and is there anything there that can be called human rights of the Western sense?

In my opinion if their meaning of the constitution and fundamental rights are of a different order from those of Western democracy—that is, if Western constitutionalism and human rights are non-existent—it is unfair and unfortunate on the part of the critics to apply human rights criteria to one country and not to others.

One may encounter considerable difficulties when comparing two societies if one knows two societies in great detail. It may be easier to compare them if one is largely ignorant of both societies beyond a superficial knowledge of them
or if one intentionally ignores the details of great significance to make comparison easy. Thus the South and the North may not seem to differ from two Vietnams. From the perspective of class ideologies, the Western democratic form of government may be worse than a communist-controlled totalitarian government because the former serves only “capitalist” interests. A fair and proper comparison can be reached when one acquires correct and rich knowledge of both societies and one can obtain social science objective perspectives. Only then, can one visualize the South and the North differing from two Vietnams. A communist society is a communist society, and it is only in a Western democratic form of government that the constitutionally guaranteed fundamental rights of the citizens are worth being called human rights even in a traditional society lacking Western liberal tradition.

This paper will take a critical look at the constitutionally provided fundamental rights of North Korea in comparison with those of South Korea. It seems especially significant because the South and the North were initially a homogeneous society, but the South was modelled after a Western model of society whereas the North after a communist model. First, a legal analysis is undertaken to tackle the problem. Also involved here is the question of how to evaluate two non-Western traditional societies when their respective models of society are Western democracy and Marxist-Leninist socialism. A formal legal-institutional approach is by no means meaningless in understanding North Korean politics. It is true that the Constitution of North Korea did not provide for the “living” law of North Korea. However, the Constitution is at the least expressive of some aspects of North Korean political reality: political values and behavior.

Before going into a detailed analysis, a brief comparison of the South and the North and two Vietnams seems to be in order. Originally, the national leaders of reputation and myth before liberation, Korean counterparts of Uncle Ho, came to South Korea instead of North Korea. Secondly, Korea is neighbored by two communist giants and by an economic giant, Japan. Because of the strategic location of Korea, South Korea is perhaps more important to the
American interests in the world politics than South Vietnam—probably this great strategic importance led to a divided Korea.

More significantly, South Korea is determined to defend a free democratic system whereas South Vietnam seemed to have relaxed in their determination, and finally failed, to defend their system from communism. South Koreans are staunchly anti-communist; they are strongly committed to the defense of their Western democratic model of government. This last point significantly makes South Korea depart from South Vietnam where there were many communist sympathizers and neutralists, not to mention, outright communists.

Finally, it must be noted that there is also the problem of how to evaluate the fate of Western democratic forms of government in a non-Western society like South Korea. Surely there are gaps between the ideal and the reality. Thus, there are many who would argue that the Western form of government is only a farce and there is no difference between South and North in terms of the repression of dissidents. What they miss is that constitution, human rights and freedom of political dissenting in the South are of different order from those of the North. In the South, there are genuine commitment to the values of western democracy and only the reality falls short of the ideal, whereas in the North there are none of those elements. In the North, there are no human rights in the Western sense. The Western democratic values are discredited in the North as “capitalist.” Loewenstein’s classification makes the point rather clear. The constitution of North Korea is only a “semantic” constitution. (1)

Moreover, gaps between the ideal and the reality exist in North Korea to a much greater degree. The North Korean political reality does not even live up to even its own ideal; it is not relevant at all to its own constitutional provisions of fundamental rights. The most evident contradiction may be that of Kim II-song’s family kingdom established in the name of communist socialism.

In the lexicon of Marxism-Leninism, a family succession rule does not find its proper place. In North Korea, Kim Il-song’s own son is officially designated as the successor of his father’s leadership.\(^{(2)}\)


Following the model of other socialist constitutions, which in turn took the form of Western constitutions, the Constitution of North Korea provided for a Chapter on the Fundamental Rights and Duties of the Citizens (Chapter 4), consisting of 24 articles. The Chapter includes three classes of rights and freedoms and a group of duties.

The first class of rights and freedoms may be termed the political rights and freedoms or the civil rights, which constitute the core of the individual rights and freedoms in liberal Western democracies. They include the right of equality in all spheres of the state, political, economic, cultural and social life (Article 51); the right of sexual equality (Article 62); the electoral right (Article 52); the freedom of speech, publication, assembly, association and demonstrations (Article 53); the freedom of religious belief and of conducting anti-religious propaganda (Article 54); the freedom to engage in scientific, literal and artistic pursuits (Article 60); and the inviolability of a person and the home and the privacy of correspondence (Article 64). Also included is the right to petition and to file complaints (Article 55).

The second class may be termed social rights, the realization of which depends on the positive state actions whereas the rights and freedoms of the first class are found in the restraints placed on the state action or in the

absence of state interference into the individual spheres. They include the right to work and the wage according to the quantity and the quality of the work conducted (Article 56); the right to rest (Article 57); the right to free medical service and to material assistance in old age, in case of sickness or disability, and in young age (Article 58); and the right to education (Article 59).

The third class of the provision in the Chapter, which are not really among the individual rights and freedoms in the pure sense but only related to the constitutional law guarantees for the protection of public institutions or the legal order (*institutionelle Garantien* and *Institutsgarantien* in German jurisprudence), although they are listed along with the rights and freedoms in the same Chapter on the Fundamental Rights and Duties of the Citizens. They include the protection of copy rights and patents by law (Article 60 Section 2); the special protection of the state and society of those who have struggled for revolution, of family members of those who have struggled for revolution, of family members of patriots, of family members of those who are serving the People's Army in the front, and of the honored soldiers (Article 61); the state protection of marriage and the family (Article 63); the right to legal protection of Koreans abroad (Article 65); and the protection of foreign citizens who have struggled for peace, democracy, or national liberation or upheld scientific and cultural freedoms and who seek asylum (Article 66).

Listed among the duties are the duty to abide by the law of the state, socialist social norms, behavioral rules, and regulations (Article 67); the duty to enhance the spirit of collectivism (Article 68); the duty to work (Article 69); the duty to take good care of the state and communal properties, to struggle against corruption and waste, and to manage national economy in the owner-like manner (Article 70); the duty to enhance revolutionary watchfulness against all the conspiracies of imperialists and other antagonists (Article 71); and the duty to defend the Fatherland (Article 72).

Now, the question is how to evaluate the constitutionally provided fundamental rights and duties of North Korea. In the first place, are they really the kind of human rights known as human rights in Western democracies? If the answer is negative, what differentiates them from those of the Western world?

Whatever the Marxist class-oriented rationale may be, the difference basically lies in the fact that the constitutions in the communist world, including that of North Korea, are founded on entirely different Weltanschauung and value premises concerning the role of the individuals vis-a-vis the state; they are based on collectivist or totalitarian ideas about the role of the individual in society. In the West, needless to add, the inviolability of human dignity and individual liberties are of overarching importance and value. No doubt, the natural law ideas that human beings have inherent and inalienable rights and the notion of social contract (that the state is based on the consent of the ruled) had contributed to the early development of constitutionalism in eighteenth century Europe. Under such individual value-oriented premises, the raison d'être of the state is for the full realization of individual potential; the state must be organized so as to help individuals enjoy these liberties fully. Thus, a system of restraint upon governmental action is regarded as essential. And individual freedoms find their limits only where they encroach on the freedoms of others or endanger the interests of the community. It is the very individualist and liberal ideas on the respective roles of the individual and the state that are discredited in the communist ideology. They are invariably criticized as capitalist, individualistic, egoistic, or reactionary. In the communist world today, the opposite ideas on the respective roles of the individual and the state prevail. The state interests, represented by the class interests of the working masses, are of overwhelming importance and value. Individual freedoms, whether they can be called freedoms in a true sense or mere reflections of what is not prescribed, exist only where they are judged as promoting or as not hurting the very broadly perceived state interests. As will
be seen shortly, it is further doubtful whether they can be called individual freedoms that can be vindicated as individual rights vis-a-vis the state. Liberal ideas of individual freedoms are alien in the communist world. It is not surprising that such collectivist and totalitarian ideas on individual freedoms are reflected everywhere in the North Korean constitutional provisions on the state organization and on the fundamental rights and duties. A provision “The rights and duties of citizens in the DPRK shall be based on the collectivism of one for all and all for one” (Article 49) is placed at the outset of the Chapter 4 on the Fundamental Rights and Duties of the Citizens. This provision is matched by the provision “All the state organizations of the DPRK shall be organized and operated according to the principles of democratic centralism” (Article 9) and by still another provision “The DPRK shall practice Proletarian dictatorship...”(Article 10). The term democratic centralism is no more than a euphemism for centralized decision-making and control by the communist party.

Liberal democratic constitutions in the West have the human rights and the principle of separation of power as indispensable ingredients. Without these two ingredients in one form or the other, no country can be said to have a constitution, as clearly manifested in France’s Declaration of the Rights of Men and the Citizens of 1789. In such a constitution, the human rights and liberties are understood as constituting the indispensable ingredients of the constitution, as in the Third and Fourth Republics of France. The human rights and freedoms without the principle of the separation of powers, especially the presence of the independent court system, are unthinkable in such a constitution.

Needless to add, the principle of the separation of powers includes among others the following notions: the three functions of the government—the legislative, administrative, and judicial functions—are entrusted to three different branches. Through checks and balances among these three branches, the supremacy of one over the other two or the concentration of governmental powers in the hands of one department is thwarted and thus arbitrary exercise of
powers is prevented. As a result, the unfettered individual rights and freedoms are realized and the human dignity is fully guaranteed. Included in such notions are the ideas that the limits of the power of each branch are clearly demarked so that every citizen can predict where the governmental actions stop and their freedoms start. In the liberal democratic constitution the provisions of human rights and freedoms are understood as the indispensable ingredients of the limits of the governmental powers vis-a-vis the individual. It is ideal to have all those notions and ideas related to the principle of the separation of power and human rights manifestly declared in the written document called the Constitution as the highest law of the land.

The status of the unfettered individual rights and freedoms declared and guaranteed in the written constitutional document is augmented by the Western constitutional strategy that the constitutional document incorporates the highest law of the land whose change cannot be realized by an ordinary legislative method but only through a specifically constitutionally provided amendment procedure (except in a few cases, such as that of England and New Zealand). Usually, the constitutionally provided amendment procedure makes a constitutional amendment more difficult than a statutory amendment, like a two-thirds vote of congress requirement, ratification by a certain number of the constituent states in a federal system, or ratification by way of referendum. An idea lying behind such a special amendment procedure is that the human rights and freedoms are thus better protected than otherwise.

The point is that in a liberal democratic constitution the principle of the separation of powers and human rights are not only closely related to each other, one is the precondition of the other—the separation of powers without human rights and the human rights without the separation of powers is meaningless. They are both the required elements of the formally ordained constitution as part of the highest law of the land. Also involved is the concept of the rule of law or the Rechtsstaat. Any state action which can legitimately limit or encroach on individual rights is made in the form of statutes passed
by the congress (legislation), within the constitutional limits or in the form of administrative action made strictly under the statutory authorization. Furthermore, the idea that such a state action must be subject to some form of judicial review at the initiative of the individual assumes that the state action is made within the constitutional and/or statutory limits. Such an idea is then an inseparable ingredient. The notion behind the idea of judicial review is that the constitutionally provided individual rights cannot be guaranteed entirely by leaving the issue in the hands of the legislative departments, or two political branches alone (although it is true that in England there is no judicial review of legislation as such).

Closely related to the judicial review is the right of an individual to seek redress at the court when his constitutionally guaranteed right of freedom is unlawfully encroached upon, or when one unlawfully sustains damage, by a state action. Redress usually takes the form of having a state action made null and void or declaring the government responsible for the damage done.

What we arrive at is that the human rights and freedoms are closely intertwined with a number of other notions, assumptions, and concepts, of the liberal Western democratic constitutionalism: that is, the separation of powers, the written and rigid constitutional law as the supreme law of the land, the rule of law or Rechtsstaat, and many others. In the Western democratic constitutional process the human rights and freedoms work as the restraints constitutionally placed on the exercise of the governmental powers. In this regard, the human rights and freedoms are in terms of their legal structure parts of the supreme law of the land directly binding all the governmental departments, legislative, executive, and judicial departments and agencies. Secondly, they are essentially the rights that can be claimed or asserted and vindicated as such vis-à-vis the state before the court.

It is needless to consult the historical development of the Western law as can be seen in the case of the Roman law concept of actio and the early English common law notion of action for the notion of action preceded that of a substantive right. Whatever their natural law ingredients may be, the constitu-
tionally declared human rights lie in their legal essence in the probability that they can be vindicated against the state before the court at the initiative of the individual whose right is infringed. Without such a probability of judicial action, they are no more than political or semantic rights with no positive legal foundation.

Underlying the individual rights and freedoms are the optimistic and in some sense romantic assumption that the ideal social order and harmony in all spheres of political, social, and economic life is predestined to be realized when the individuals are left at the unfettered enjoyment of their freedoms to develop their potentiality to its full extent while the governmental intervention in the individual spheres is minimized. Western constitutional history taught us a lesson that the assumption only works when there is some degree of social and economic equality prevailing among the citizens. Too great a disparity between the rich and the poor works against the democratic constitution. The catalogue of the so-called social rights, on the one hand, and the increased functions of the modern government, on the other, in the Western democracies function partly to cure the situation to secure the human dignity of the poor as individuals; to disarm destructive forces against the constitution itself, etc. The expanding social rights and the increased state intervention stop short only of restoring the impaired self-regulatory mechanism of the invisible hands. From there the communist catalogues of the fundamental rights of citizens start. The governmental intervention in the Western democratic constitutions never supercedes the self-regulatory mechanism of the invisible hands.

All those and other Western liberal democratic constitutional notions, concepts, and assumptions, are lacking in the North Korean constitution. They are not only absent but also systematically negated in theory and practice as against the class interests of the working people. They are deemed incompatible with the proletariat dictatorship which the Constitution of North Korea advocates. The properties of the Western human rights are not part of the attributes of the fundamental rights in North Korea at all.
First of all, it should be noted at the outset that the Party supremacy over the constitution is the rule in North Korean society. The Workers Party, the communist party of North Korea as the so-called vanguard party of the workers, dominates all areas of North Korean political, economic, social, and cultural lives. The depth of its penetration into the formal governmental institutions, including judicial institutions, secondary organizations, and even individual lives is unparalleled even in the communist bloc. Very little individual initiatives and decentralized decision-making centers are allowed independent of the Party; the highly centralized decision-making prevail in all spheres of human activities from the national policy matters up to the marital and family matters of North Koreans.

The Party members are made the dominant figures of all organizations — political, social, economic, and cultural — from the President of the DPRK on the top down to a Ri agricultural cooperative and to a factory at the bottom. The ratio of the Party members to the entire population is the highest in the communist world, one out of ten (approximately 11 to 12 per cent of the population). Major decisions affecting organizational and individual lives of North Koreans at all levels are made by the Party at its appropriate level. All the governmental institutional decisions are in fact the formal affirmations of the Party decisions or made following the Party policy lines, with no exception made in the judicial decision-making. Jurisprudence independent of the Party ideologies, and judicial decision-making independent of the Party intervention in the form of the Party policy lines or the Party’s approval are quite alien to


the North Korean legal theories and practices. In case of conflict between the Party policy lines and the legal principles the former has as a matter of course the priority to the latter in decision-making.

Kim Il-song, the demi-god in the North Korean power structure, is quite specific about this point.

"Our law is an important weapon to implement the policies of our State. The policies of our State are the very policies of our Party. It is impossible to implement the law without knowing the political lines and policies of our Party. We must know that anyone who enforces the law is a kind of the political worker that implements the policies of our Party and all the programs of the State. The law cannot be built alone in the open air. The law must be subservient to politics and cannot be separated from the politics, since the law is an expression of the politics. Then, in the first place, who represents the revolution and the policy lines of our State? Needless to say, it is our Party that leads our revolution and the politics of our State. Therefore, our Party is the political head of our people." (6)

He then went on,

"Our law is the law of a socialist society and the law of the sovereign power of our State which practices the proletariat dictatorship. Therefore, our law is fundamentally different from, and, moreover, in diametric opposition to, the law of the imperialist Japan before the liberation of August 15th. The law of the imperialist Japan was the law of the Japanese colonial government which oppressed our nation and exploited the workers and peasants.

The important thing for the judicial workers to do is to purge the residual notions of the obsolete law, in other words, the remnant ideas of the imperialist Japanese law. According to the report of the Justice Department, the anti-Party factionalists were said to have repeatedly used such catch words as 'humanism', 'democracy', and so forth, which the Japanese imperialists were used to utilize in order to deceive our working people. We must quickly purge those remnant elements of the obsolete ideas." (7)

These ideas were expressed to strike a blow to a modicum of a liberal movement then waging in North Korea of 1957 following the aftermath of the de-

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(7) *Kim Il-song sonjip*, ibid., p. 450.
Stalinization in the Soviet Union. At that time, it is said that such words as judicial independence, human rights, and others were openly discussed. However, such liberal movement soon died out; those, Pak Ch’ang-ok, Ch’oe Ch’ang-ik, Yun Kong-hun, and Ko Bong-ki, who were in the forefront to stand for such principles and collective leadership met their demise. The Department of Justice was, it is said, also a victim of the political blow by Kim Il-song; it was officially abolished in 1959 and its functions were consolidated into the Supreme Court. Independent judicial decision-making which tended to be fostered by the presence of the Department of Justice, met its demise too, and the Party control over the judicial department was established.

Despite its decisive importance in North Korean lives, however, the Party is only marginally mentioned in the Constitution. The Constitution of 1948 had a number of provisions which gave a wrong impression that there was a plural party system in North Korea. Article 13 was an example. It provided for the right of citizens to organize and to join democratic parties, trade unions, etc. In the early days of North Korea, there was a plurality of political parties and groups which vied for political supremacy for a brief period of time. As a tactical matter for communist hegemony, therefore, there was a genuine need for a “united front” policy and for a formal recognition of outward pluralism (or for their pretense at the least). However, even today when the dominance of the KWP has been long established following a systematic elimination of rival political parties and groups, the predominant presence of the KWP is still not a matter of the written constitutional law. The Party’s presence is only marginally and scantily mentioned in the Article 4 of the Constitution, which provides that: “The DPRK stands, as the guiding lines of its activities, for chuch’i thoughts or the Korean Workers Party in which Marxism-Leninism was

(8) For the chuch’i thoughts and the background lying the chuch’i thoughts, see Pukhan chongch’iron, ibid., Chapter on Chuch’i thoughts and political education, pp. 295-367; Sahojsiu i bo� bwanhan hyokmyongui widadan suryong Kim Il-song dontjiui riron(Great Leader Kim Il-song’s Theories on Socialist Law), Sahoekwahak ch‘ulpansa, Pyonyang, 1971, pp. 89-108.
creatively applied to the reality of our nation." Otherwise, the Constitution still gives a wrong impression of the presence of political pluralism. Article 53 provides for the freedom of citizens to hold an assembly, to organize an association, and to stage a demonstration and for the duty of the State to guarantee the conditions for the unfettered activities of democratic parties and social organizations. Moreover, there are a few political parties and social organizations other than the KWP and its front organizations. In short, however, they are no more than paper parties and paper organizations today. Their functions are confined strictly to the following two: 1. a decorative function of giving unaware and innocent onlookers a wrong impression that there is a political pluralism, and 2. that of giving an unconditioned support for the policy lines and decisions of the KWP in their charters and in their announcements as dictated by the occasion. The Puk choson minjudang (North Korean Democratic Party) and the Ch'ondokyo ch'ongudang (Young Friends Party) are two examples. These two parties do not have a single local organization. Members of the KWP are made their respective party chairmen. 

Of course, the governmental institutional structures, their functions, and their processes are matters of written constitutional provisions, as in Western democracies. However, the governmental pattern is that of "Janus-faced" assembly government, which is the standard pattern in the communist bloc. Assembly government can serve as the organizational instrument for democracy and autocracy alike. In the communist world, the assembly pattern is designed to work for the consolidation of governmental powers. In North Korea it has been serving the obesity of powers held by Kim Il-song, who is officially the Secretary General of the Korean Workers Party, the President of the DPRK, the Chairman of the Central People's Committee, and the Supreme Commander-in-Chief of the Korean People's Army, as will be seen in due course.

The total absence of the principle of the separation of powers is among


(10) Loewenstein, ibid., pp. 79-85.
the notable features of North Korean governmental organization. The Supreme People’s Assembly, which is the highest sovereign organ of the DPRK having the legislative power (Article 73), is the North Korean counterpart of legislative department in a Western constitution. Its power, however, is purely a matter of formality; approving, passing, or adopting constitutional amendment, statute, or resolution already de facto determined by the Central People’s Committee. When convened, it holds its session only for a few days a year to play such a ceremonial formal role. The previous formal authority held by the Supreme People’ Assembly under the Constitution of 1948 was carved out with the creation of the Presidency and of the Central People’s Committee in the new Constitution of 1972. For example, the roles of the President as the head of the State (Article 89) had previously been played by the Supreme People’s Assembly or its Presidium under the Constitution of 1948. The deputies, of whom the Supreme People’s Assembly is composed, are elected “by secret ballot based on the principle of universal, equal, and direct suffrage” (Article 74). However, it should be noted that the method of balloting is that of casting a black or white ballot to a single candidate who is nominated exclusively by the Party. In North Korea, furthermore, 100% turn-outs and 100% yes votes are the rule.11)

With the adoption of the Constitution of 1972, the Central People’s Committee, “the highest sovereign guidance organ of the DPRK (Article 100) was established as the locus of all the constitutional powers which cover not only executive but also legislative and judicial functions including military and diplomatic functions (Article 103). The Committee has the following constitutional powers and functions under its authority (Article 103): domestic and foreign policy-making; guidance for the works of the Administrative Council (Cabinet), local People’s Assemblies, and local People’s Committees; guidance for the judicial and procuratorial works; guidance for the national defense; overseeing of Constitution, the laws of the Supreme People’s Assembly, the

decrees of the President, and the decrees, decisions, directives and executive regulations and abrogation of a decision or an instruction of state organization which conflicts with one of the above; establishment or abolition of an executive agency of the Administrative Council; appointment or dismissal of Vice-Premier, departmental ministers, and other members of the Administrative Council; appointment or recall of ambassadors and ministers; appointment or dismissal of highranking military personnel and award of military title or honor; award of the titles of honor; proclamation of clemency; change of the administrative districts; and proclamation of the general mobilization in case of emergency or war situation.

In other words, all the constitutional powers are constitutionally concentrated in the hands of the Central People’s Committee: the Committee constitutionally empowered to make all the major national policies and decisions and to issue directives or instructions in all fields of the governmental activities, legislative and judicial as well as executive fields including military and diplomatic matters. Only the residual powers, powers to legislatively, judicially or administratively execute the policy decisions which were already made by the Committee, are separated into the three powers respectively held by the Administrative Council (Cabinet), the judicial department, and the legislature (the SPA). Not only the Administrative Council (the appointment of whose members, except for the Premier, is owed to and which is for its performance responsible to the Central People’s Committee) but also the SPA (which is “the highest sovereign organ of the DPRK”), and the judicial department are all under the direction and supervision of the Committee.

The Central People’s Committee is composed of the President and the Vice-President of the DPRK and the Secretary-General and other members of the Committee (Article 102). Moreover, the Committee is as a constitutional matter headed by the President of the DPRK (Article 101). It is only a matter of formality that the President and Vice-President of the DPRK and the Secretary-General and other members of the Central People’s Committee are elected by the SPA (Article 76 No.3 and 4).
What is more important is that Kim Il-sŏng, the Secretary-General of the KWP, is elected by the SPA as the President of the DPRK who is the Commander-in-Chief of the KPA at the same time. In his capacity as the President of the DPRK, Kim is the head of the Central People’s Committee (Article 101), which he is constitutionally empowered to “personaly direct” (Article 91). In his capacity as the President of the DPRK, Kim is empowered to convene and to direct the Administratave Council (Article 92), which is composed of the Premier, Vice-Premier, Ministers and other members. Kim, as the head of the Central People’s Committee, is empowered to make the major policy decisions for the SPA and the judicial department and to personally direct and supervise the latter’s works (Article 103). The Constitutional provisions on the governmental power structures under the Constitution of 1972 are exactly designed for the concentration of powers in the hands of Kim, and to give him the absolute powers unchecked by any constitutional institutional and procedural arrangements of governmental organization. In North Korea, accordingly, the principle of the separation of powers is not among the principles and rules of constitutional law at all.

The judicial functions are performed by the judicial department composed of the Central Court, the Provincial Courts, the People’s Courts, and the Special Courts. And the Chief Judge of the Central Court is elected by the SPA for the term of 4 years and subject to its recall (Article 76 No. 8) whereas its other judges and people’s assessors are elected by the SPA’s Standing Committee for term of 4 years (Article 134).

The judges and people’s assessors of the Provincial and People’s Courts are elected respectively by the Provincial and Kun People’s Assemblies (Article 134) for the term of the latter’s duration. The Chief Judge and Judges of the Special Court are elected by the Central Court, and its people’s assessors are elected by the appropriate workers general assembly (Article 135). The

(12) For the organization of the courts, their trial practice, etc., see the Chapter 4 of Kang Koo-chin’s Pukhanbopui yonku, ibid.
Central Court is responsible to the SPA, the President, and the Central People's Committee. And the Provincial and People's Courts are in turn responsible to the People's Assemblies of the appropriate level (Article 142). As we have noted, the Central Court is under the direction and supervision of the Central People's Committee in their judicial functions (Article 103 No. 3). The Central Court in its capacity as the supreme court of the DPRK is constitutionally authorized to supervise the adjudicatory works of the lower courts (Article 141).

There is no legally provided qualification requirement to be a people's assessor or even a judge. Therefore, anyone with electoral rights, that is, any one who is 17 years of age or older is eligible to be an assessor or even a judge unless he is deprived of electoral rights by a court judgment, unless he is mentally ill, or unless he was a judge or prosecutor during the Japanese rule.\(^\text{(13)}\) Consequently, legal training is not part of the requirements. Certainly one apparent de facto requirement is loyalty to the Party or the Party membership. Thus, as implied above, the Party policy lines and directives (to the Party members) through the Party functionaries constitute the important parts of the de facto sources of law, along with the Constitution, statutes, and decrees, in the judicial personnel's performance of their adjudicatory functions—that is, their finding of facts and interpretation and application of law in trial.

On the other side of the same coin, there is no judicial review of legislative and administrative activities upon the complaint instituted as a matter of one's procedural constitutional right. Without the presence of the independent judicial department free from influence of other political and social forces, and without the probability of one's having his rights vindicated by the court, all the constitutionally provided fundamental rights strike empty, however rosily they may be described. In North Korea, no one as a matter of his right is entitled to have the court declare as unconstitutional and thus nullify any statute or a part of it in issue on the grounds that the statute or a part of it is against

the Constitution. And no one as a matter of his civil rights is entitled to have the court or administrative tribunal hold as unlawful and thus null and void any administrative order or action on the grounds that the administrative order or action is against the Constitution, statutes, or decrees or on the ground of ultra vires. There is no way for a North Korean citizen to have the court declare the government responsible for damage done to him by the government. In North Korean land reform (1946), no compensation and no payment was the rule. There was no compensation for the banks, industries and others nationalized by the North Korean regime in the early days (1946). In the process of introducing cooperative farms on the North Korean rural scene there was no compensation either for lands or farming instruments communized.\(^{(14)}\)

In North Korea the court by no means has the final authority to interpret either the Constitution, statutes, decrees, or other forms of legislation. The court is not empowered to strike a statute or other form of legislation and administrative actions as unlawful or null and void. Instead, under the Constitution of 1972, the Standing Committee (Presidium) of the SPA is constitutionally empowered to authoritatively interpret statutes and other forms of legislation (Article 87 No.3). Furthermore, the Central People’s Committee is constitutionally authorized to oversee the Constitution, statutes, various decrees, directives, and regulations and to strike down a decision or directive of any state organ when it is against the Constitution or other forms of legislation (Article 103 No.5). The Administrative Council is empowered to strike down an action of any state managerial organ when it is against decisions and directives of the Council (Article 109 No.10). Moreover, the Public Procurator’s Office is constitutionally responsible to see to it that a decision or directive of any state organ does not violate the Constitution and other forms of legislation (Article 144 No.2).

\(^{(14)}\) See Scalapino and Lee, \textit{ibid.}, pp. 1057 ff.; \textit{Pukhan chongch’iron, ibid.}, Chapter 9 on peasants and collective farms, pp. 461 ff.

Following the Soviet suit, the North Korean Public Procurator’s Office is thus in charge of overseeing state organs, enterprises, cooperatives and individual citizens to see that they comply with the law (Article 144 No. 1) and the duties mentioned above, beyond the ordinary prosecutorial works (Article 144 No. 3) (unlike Western public prosecutors). Also, the socialist procuratorial system is by no means the Scandinavian model Ombudsman system which is elected by the congress. The “socialist legality” in the communist world is no more than a euphemism for strict compliance with the state law, which is a far cry from the rule of law or Rechtsstaat in the West.

The Constitution has a provision on its amendment, according to which two-thirds affirmative vote of the entire members of deputies of the SPA is required to either adopt or amend the Constitution (Article 82 Section 2). In practice, however, the Constitution does not stand far above statutes and other forms of legislation (and more significantly decisions made by the Party). For there are no effective institutional and procedural arrangements (e.g., judicial review) to refute a statute, decrees, or a provision thereof when the latter violates the Constitution. This function is not performed by the independent court but the Central People’s Committee and the Administrative Council which are respectively empowered to issue decrees and other supposedly lower forms of legislation. The North Korean Constitutional history amply shows that the Constitution has simply succumbed to changes according as the statutes or decrees or a provision thereof that conflicts with the constitutional provision were adopted. Either adoption of the constitution or its amendment in many cases is no more than a confirmatory action unto what has already been an accomplished fact. In many other cases, the constitutional provisions are simply ignored.

In conclusion, there is no legal-judicial protector of the constitution. The constitution is retained to serve political purposes. It is preserved politically for the consolidation of the powers, that is, Kim Il-sŏng’s powers and, in North Korean communist terminology, the proletariat dictatorship (Article 10). To that extent, there is no legal-judicial but only political or semantic guarantees of
the fundamental rights.

In sum, what stands out from our brief analysis of the North Korean Constitution is that, in theory as well as in practice, the constitution is designed to serve the interests of the powers that be, the government, in real terms, the Party, and, in the final analysis, Kim Il-sŏng, but not to prevent interference with fundamental rights by the public authorities to serve individual freedom and human dignity; it is designed to consolidate the powers, but not to restrain them.

This characterization of the North Korean fundamental rights appears most clearly in the political rights and freedoms. It is common sense that there are no political rights and freedoms in the Western sense in the communist world. All the accounts of former North Korean agents and other sources indicate that violation of political rights and freedoms in North Korea is the worst even among the communist countries. Among others which may explain why, the following three factors loom large: the absolute Party supremacy over all matters in North Korean lives and the total regimentaion of society under the Party leadership; the founding of the Kim Il-sŏng kingdom; and the military mobilization of the entire society for the invasion of South Korea ("liberation of South Korea from American imperialists" in North Korean terms).

Whatever their wording may be, we have noted that the North Korean fundamental rights lack such institutional arrangements as the separation of powers, presence of the independent judicial department, judicial review of legislation and administrative activities, and judicial redress behind the fundamental rights in order that they become real — constitutional law — rights. One former North Korean agent-deserter tells that today in North Korea those classified in the 22 categories of the North Korean enemy list from "the undesirable to the most hated" constitute 51% of the total population.\(^{(16)}\) Needless

to add, they are systematically denied all the benefits of the constitutionally provided fundamental rights and freedoms that are called "fruits of the glorious socialist victory in North". In this respect, the Soviet Constitution of 1918 which provided, for example, for the purpose of securing freedom of expression to the toiling masses, to abolish all dependence of the press upon capital, and to turn over to the working people and the poorest peasantry all the technical and material means for the publication of newspapers, pamphlets, books, etc., sounds more frank and straightforwards. However the constitution of 1936 and thereafter was made in appearance similar to Western constitution. North Korea simply followed the Soviet suit in its wording.

More realistically speaking, "the freedom of speech, press, assembly, association, and demonstrations" (Article 53), for example, is the freedom to speak, assemble, etc. as a communist and/or as dictated or permitted by the communist party. No other meaningful speech, press, etc. than as a communits and/or as dictated or permitted by the communist is possible in North Korea. Any so-called underground paper is impossible there. Even private conversation and meeting are closely watched openly and silently by secret agents and informants and even by colleagues under a mutual watch system. There is a litany of no freedoms: there is no freedom of religion, knowledge and science, travel, job, love, marriage, contract, privacy, correspondence, etc.\(^\text{(17)}\) North Korea is one of a few countries where religion is most systematically exterminated under the communist party leadership. Evidence of North Korean systematic suppression of Christian religion, Buddhism, and others is too abundant to cite one or two here.\(^\text{(18)}\) Two male and female college students’ liking each other is tabooed on North Korean campus scene by the Party. The former North Korean agent-deserter\(^\text{(19)}\) tells of a number of love affairs between male and female students

\(^{(19)}\) Kim Pu-song, \textit{ibid.}, pp. 230-248. Kim himself as a college student experienced a love affair with his classmate which had to be ended early because of intervention of the college Party cell. His accounts also tell a number of students’ love affairs which met less than happy and, occasionally, tragic ending because of the Party intervention.
which ended in suicide of one or two partners, or in their expulsion from school. Very few love affairs survive to end in marriage after partners’ graduation. This picture is more or less true of the population in general. Marriage and divorce are closely controlled by the Party.\(^{(20)}\) The Party’s approval or at least acquiescence of one’s marriage partner is essential for one’s future happiness and career. In a number of reported cases, wives were pressed upon by the Party cadres to divorce their husband who was criminally charged or sent to jail or labor camp. In such cases wives had no other choice but to reluctantly accept the Party dictation.\(^{(21)}\)

In the Western constitutional ideas liberal aspects are particularly emphasized as to the duties of the citizens listed in the written constitution. Such slogans as no tax without law and no compulsory military service without law, along with that of *nullum crimen nulla poena sine lege*, are an evidence. Such liberal elements are completely missing from the North Korean duties of citizens. Only the duty aspects are disproportionately greatly stressed as glorious.

Similarly, liberal principles and rules of criminal procedure and evidence known in the West are almost totally missing from the North Korean criminal proceedings. North Koreans do not know such liberal principles and rules as presumption of innocence, warrant of arrest, search and seizure, *habeas corpus*, various evidentiary rules of exclusion, privilege against self-incrimination, etc. Confession is the queen of evidence. Torture is legally and illegally widely conducted to elicit confession. Adversary system is not known; inquisitorial trial is the rule.\(^{(22)}\) Yes, there is a statutory law on attorneys. But it is not known how many attorneys there are and what they are doing. Even if there are some attorneys, their functions will be marginal at best either for the finding of justice or for the accused. They will have very little to do in the present North Korean political and social fabric.\(^{(23)}\) It is known that occasionally a


\(^{(21)}\) See, for example, accounts of Min Kyong-tae, *Chayuamui karson, ibid.*, pp. 115ff.


mass trial — trial before the masses — followed by an open execution by a firing squad are intentionally staged not only for politically charged cases but also for other cases for the education of the masses. Former North Korean informants tell that there are various forms of extra-judicial trial including mass meetings for criticism and self-criticism of those who are pinpointed by the Party of the appropriate level as culprits. Many are mobilized to criticize others. Still many others are forced to participate in self-criticism in front of masses and their colleagues. Some are driven to suicide. Many are believed to have been sent to labor camp. Many others simply disappear and are never seen back alive.

It is the social rights that the communists are so proud of. It is connected with their claim that they have totally eliminated exploitation of man by man from earth by communist revolution. But what kind of rights are they? In the first place, they are not matters of judicially claimable or justiciable rights. In the second place, they are less of legal rights, which include some notion of freedom that the choice of whether to enjoy the rights or not entirely depends upon one who exercise them, than matters of political, social, and economic system (the communist system at that) with no room for individual choice. Means of production are owned and controlled by the state. Demand and supply of labor are also centrally controlled by the state. Since capital, land and job are all centrally controlled by the state and since there is no market where capital, land, and job can be freely purchased, what difference does it make whether one has the right to work or a permission to work? What does the right to have education mean since educational system is run totally by the

(24) Kang Koo-chin, *Pukhanbop yonku*, ibid., pp. 254-257; *Pukhan jonso*, ibid., Vol. 2, pp. 334-335. There are numerous accounts of a mass trial followed by an execution by a firing squad before the mass, which are told by former North Koreans. Such a mass trial was staged even in many parts of South Korea by North Korean authorities when they came south for a brief period of time during the Korean War. See, e.g., the account of the former North Korean agent Kim Yong-kyu, "Pyongyangui bimil jiryon" (The Secret Instructions From Pyongyang) carried by *Dong-a Ilbo* in its April 15, 1977 issue.

(25) See the accounts of Kim Pu-song, *Naekapan stankul*, ibid., e.g., from p. 129 to p. 219; of Kim Yong-kyu, "Pyongyangui bimil jiryon," carried by *Dong-a Ilbo* for many days in April-June, 1977.
state and no private schools are available? There is no choice but to accept the kind of labor or education that are made available by the state. This is true for wages, medical service, and welfare system for the old, young and otherwise disabled persons, since distribution of wealth produced, medical service, and their distribution channels and qualifications are all controlled by the state. (26) In job, promotion, and college education beyond compulsory education, individual ability and aptitude count but the political quality of candidates (the Party membership, loyalty to the Party, etc.) count more in North Korea. And individual ambition counts least or almost none. (27) The questions of whether one should be granted admission to what college located where are all determined by the state authorities of the appropriate level and finally by the Party of appropriate level according to the state’s human resources plan. (28) Equally, job assignments are determined by the state according to the state plan. One is supposed to willingly accept whatever assignment, job, or destiny is decided by the state and the Party (at least one has to pretend to do so). Complaints, lukewarmness, and inactive attitudes are classified as undesirable and unworthy of a communist.

There is nothing more to say than that those classified in the third group of rights are not really human rights even in Western constitution but only aspects of legal institutions or public order as we have mentioned. They are aspects of communist political or social institutions. In North Korea there is no private property, especially as concerns the means of production (Article 18, 19, 20, and 21), as in other communist countries. On the other side of the same coin, only consumer goods distributed for eventual individual consumption are allowed to be privately owned (Article 22). In North Korea too, a small space of private lot is allowed individual agricultural cooperative farmers as an incentive

(26) See Pukhan jonso, ibid., Vol. 2, pp.335-429 on education.
(27) See the accounts of the former North Koreans, Kim Yong-kyu, Kim Pu-song, and Min Kyong-tae.
(28) Pukhan chongch’iron, ibid., Chapter 8 on planned economy and labor forces in North Korea, pp.407-460: Pukhan jonso, ibid., Vol. 1, pp. 405 ff.
under the Constitution of 1972 (Article 22). Products from private lot are
privately owned (Article 22). To that extent, the right of inheritance is provided
as protected (29) (Article 22).

Very little is known of copyright and patent rights in North Korea, even
though the Constitution provides for their legal protection (Article 60).
Copyright and patent right may not mean very much in North Korea, even
though there may be ways for individual writers or inventors to have their
rights registered in the copyright or patent right book. Furthermore, it is
extremely doubtful whether one can make profit out of such a right if it is
indeed recognized and protected in reality. If it is not related to private
profit-making, which is likely under the communist rule, what is the use of such
a right? One former North Korean agent deserter tells that he was cited and
awarded an honor title for his invention which he made upon several years of
hard work. Following his petition of patent right for the invention to the state,
however, he found to his great consternation that a man of high ranking in
the hierarchy who was known as familially related to Kim Il-sŏng was patented
for the invention. The explanation given to him was that the man patented
also worked on the same kind of machine. (30)

It does not seem necessary at this point to describe in detail the South
Korean catalogue of constitutionally provided human rights in close, article by
article comparison with the North Korean ones. It includes all the major human
rights known in the Western liberal democratic constitutions: equal protection
of law; the right to be secure in their persons and houses against unlawful
arrest, detention, search and seizure; freedom of movement; freedom of religion
and conscience; freedom of speech, press, assembly, and association; the prop-
erty right; the right to vote and to hold public office; the right to open, fair and
speedy trial; the privilege against double jeopardy, and other rights and

(29) See Pukhan chongch’iron, Chapter 9 on peasants and collective farms. ibid.; Pukhan jonso.
ibid., Vol. 1, pp. 405-406: Kim Dae-hwan, “Pukhan sintojibopui sahoeakjok pyongka” (A

privileges of the criminally accused; the workers' right to association, collective bargaining and collective action; etc.

The constitution also provides for such Western structural and procedural principles of constitutional government as plural party system, separation of power, independent judicial department, judicial review of state actions, the state's liability for tortious acts of governmental officials, and the compensation for the taking of private property for public purpose. No doubt, such structural and procedural means are the prerequisites of the human rights in the Western sense in that they make the constitutionally provided human rights the meaningful, legal rights that are judicially vindicable. Equally no doubt, the Western democratic values and beliefs such as the respect for human dignity, the respect for individual creativity, the belief in limited government and the ideal of welfare state are expressly underlying the Constitution of South Korea.

The behavioral reality simply does not always live fully up to the constitutionally provided ideals. Consequently the problems arising are necessarily associated with the question of why or with that of what accounts for the reality.

As a matter of forms of government, the Constitution of 1948 provided for a presidential system mixed with many features of parliamentary system, the Constitution of 1960 for a classical form of parliamentary government, the Constitution of 1962 for a presidential pattern, and the Constitution of 1972 for a presidential system of the French Fifth Republic's de Gaulist nature. Throughout, judicial review of legislation has been an indispensable part of constitution. The Constitution of 1948 provided for a constitutional council empowered to judicially review legislation, the Constitution of 1960 for a constitutional court of German creation, the Constitution of 1962 for judicial review of American form, and the Constitution of 1972 for a constitutional council empowered to judicially review legislation.

3. A Political Analysis

South and North Korea had been one traditional society for many centuries.
until Korea was taken by force by the newly emerged Japan as their colony. In 1945 when Korea was thought to have been finally liberated from the most repressive Japanese rule, Koreans still helplessly found their country divided into two parts respectively occupied by the U.S. army in South and the Soviet troops in North. The South envisioned Korea’s future in the image of Western liberal democratic society and the North built their future after the Soviet communist model of society imposed there by the Soviet occupation army.

The very first and most important of the difficulties and great damages Koreans suffered was the forced and merciless remodelling of Korean society in North after the Soviet Stalinist image of society. In the process, innumerable and indescribable human sufferings and losses began to be recorded. However, the North Korean communist rulers did not have to account for human sufferings. Communist theories and teachings including constitutional provisions justify North Korean rulers’ lack of attention to and also outright disregards of the human sufferings and losses on a massive scale in the name of revolution and of building socialist society.

Also communist theories and teachings in great part led the North Korean rulers to wage the fratricidal war (the Korean war) in the name of liberating South, had help them build North Korea as one of the most fortified and militarily totally mobilized societies in the world, and had led them to engage in incessant armed provocations along the DMZ line, in the air and in open sea and to engage in subversive activities in South so that Korea became one of the most dangerous spots in the world. Many Koreans came to identify North Korean communist rulers with nothing more than destruction, mass killing, and war left in their wake.

It is most difficult for many Koreans to understand how many of left-leaning intellectuals are so easily attracted by communist theories and promises and how they are so ignorant of the real practices of the communist rulers. This is particularly so when Koreans find that such foreign intellectuals, unaware of Korea’s history, people, and politics, have naive but romantic ideas about North
Korea, comparable with the naive but romantic notion of Uncle Ho’s North Vietnam vis-a-vis South Vietnam.

Such intellectuals are very critical of some cases of human right violations in American allies including South Korea, Taiwan, and South Vietnam a few years ago. They remain very silent, however, on what happened on the massive scale to Cambodian people under the Pol Pot regime. They seem unaware that many of the former South Vietnamese are even now escaping the communist controlled South Vietnam by a small fishing boats at great risks. Probably they do not know that 5 million Koreans came south from north while only 120 to 130 thousands went north from south during the 1945-1953 period from Korean liberation to the end of the Korean War.

It seems that only the West has all the luxuries and traditions to have both socialism and human rights together. It is extremely difficult for a newly emerging traditional society to achieve all of these at once; they critically lack political, social and economic bases and traditions to do so. History amply teaches that a traditional society which takes the Soviet model of society is likely to become a communist dictatorial society with no human rights and dignity. Moreover, such a society may be able to achieve industrialization much faster up to a certain stage than another similarly underdeveloped society taking Western model. In those cases, moreover, the communist model has certain advantages over the Western model: Under the communist rhetoric and organizational tools, it is much easier for communist leaders to keep popular political and economic expectations far below while launching industrialization. They do not have to pay much attention to the niceties of human rights.

However, communist history tells us that beyond a certain initial stage progress of industrialization in a society taking a communist model falls behind that of a society taking a Western model of development, because stagnation sets in. That is exactly what happens in the Korean peninsula.

A traditional society taking a Western model may fall behind a society taking communist model in class ideologies, and it may find it more difficult to over-
come the difficulties involved in the first take-off stage of industrialization; political leaders have to pay a greater attention to human rights, and they may not be able to wield stronger leadership in modernization efforts because of weakness in a liberal democratic process (e.g., election process, riots and demonstrations, and oppositions). Before reaching a stage of full development, such a society is likely to be beset with a host of malady such as governmental inefficiency, instability, corruption, election rigging, riots and demonstrations, high unemployment rate, etc. And the very liberal democratic process albeit imperfect is partly responsible for the malady in such a society.

In such a society taking a Western model, popular expectation, political and material, are rising so high that society's ability to meet them usually lags behind the expectations, thus leading to explosive popular frustrations expressed in riots and demonstrations. They in turn lead to governmental instability which in turn keeps the level of governmental legitimacy (and leadership efficiency as well) low, make government leaders to try hard to stay alive, for example, even resorting to election rigging or to a high-handed authoritarian rule by declaring martial law. However, its record of human rights is far better than a society taking communist model. Because of many factors involved including its liberal democratic form of government with a Western liberal democratic written constitution, such a society cannot freely resort to such drastic measures as communist mass killing, brainwash, and gulag to eliminate or suppress actual and even potential dissidents.

The South Korean record of human rights is falling short of the Western ideal. At times there is a number of political dissidents who were arrested on criminal charges and sentenced to prison terms. Some of them became even internationally well-known because of Western newspaper coverage. No doubt, however, the South Korean record of human rights is far better than that of North Korea. More than that, the North Korean record does not begin to compare with that of South Korea. A closer, long-term observation of Korean political and constitutional developments in the South will reveal that there is abundant evidence of the Western rule of law slowly but steadily growing on
the Korean traditional soil with no previous democratic past and with the bitter experience of the oppressive Japanese rule. The first and most important evidence is the South Korean commitment to the liberal values of individual rights and human dignity embedded in their way of life. Certainly liberal education thus far contributed to the growth of commitment to these liberal values. Other evidence is that there is growing constitutionalism involved in a written constitution based on the Western values of individual rights and human dignity, around which theories and practices of the separation of powers, independent judiciary, judicial review of legislative and administrative activities, and the court decision on human rights have been evolving. The South Korean experience with the popular overthrow of an unpopular regime, that of Rhee in 1960, most vividly attests to the fact, albeit acquired by an extra-constitutional law method. In comparison, there is absolutely no record of popular overthrow of an unpopular government in the communist world. There are growing judicial precedents not only in conventional civil and criminal matters but also in constitutional and administrative law matters. There is a growing number of professional practicing lawyers who actively participate in the governmental-judicial process. All these developments have to do with the liberal democratic constitutional document. Its letter may not be precisely followed. But it is there, and constitutional and political developments are evolving around it. Above all, it significantly contributes to the inculcation of liberal democratic values in the Korean mind. Thus, there is a liberal trend emerging on the social horizon in the South, recently dramatized by the amnesty proclaimed by the South Korean government in December, 1978, and by the events that followed.

Paradoxically, it is precisely because of presence of the liberal democratic values and constitution that popular, especially intellectual, democratic expectations are high and their frustrations are also high because political performance is not able to live up to the expectations. For the same reason there are political dissidents able to bravely speak out against the government. In
North, on the other hand, both liberal democratic expectations and frustrations are contained and no political dissidents can openly speak out against their government. If there is something of political dissidents in the Western sense today, they will be systematically and thoroughly eliminated from their roots long before they become visible. Thus, North Korea does not have political dissidents. It is a highly disciplined society in that sense.

There is a number of political, social, economic and cultural factors that tend to militate against the full realization of Western liberal democracy on the South Korean soil. The first factor is related to the fact that Western democracy in South is only 30 years old under the various unfavorable internal and external conditions. It took several hundred years for Westerners to master democracy! How can one expect such a mature form of political system requiring sophisticated political skills as democracy grow overnight on a traditional political and social soil lacking tradition of liberal democracy? Moreover, the immediate past history of Korea is that of most repressive form of government under the foreign ruler. Koreans learned Western law through Japan but only its most repressive aspects uncheked by any of liberal democratic institutions and practices under the Japanese rule. Koreans did not have democratic education before.

Secondly, the hardship on democracy in Korea comes in great part from the presence of one of the most militant and militarily readied regime, North Korea, eyeing every chance to overthrow a democratic form of government in South and to place the South under its communist iron rule, and lying just across the DMZ line. It gave many forms of hardship on South Korean democracy: the Korean War (1950-53), various North Korean sabotage activities in South, provocation of tensions along the DMZ line, kidnapping South Korean fishing boats, the great human and financial burdens of maintaining the necessary armed forces to defend South from North Korean communist takeover,

verbal and real threats by disposition of troops to invade South of the North to chase off prospective foreign investors from the South, etc. The DMZ line is only 25 miles away from Seoul, the capital city of South Korea. No country lacking long liberal democratic tradition, probably including many Western countries too, may be able to practice liberal democracy if it faces such a hostile and militarily readied group as North Korea 25 miles away from its capital. As for South Korea the survival as a liberal system is at stake precisely because of the presence of North Korea. Security problem looms so large that anything can be justified on that ground.

In conventional international law theory, South Korea is still in the state of war with North Korea and China; in Korea, simply hostility has ceased but technically hostility can be resumed in any time (as cease-fire agreement was entered but no peace conference has ever been held to conclude the state of war by the warring powers). As we have mentioned, North Korea is not only well prepared to launch armed attack on South, it is logistically speaking neighbored by two friendly superpower communist countries by land whereas South has its supporters (the U.S. and Japan), unpredictable in many instances, across the ocean. Since the war threat is ever present, it is only natural that the South Korean Constitution has a number of crisis government provisions including those on presidential power to proclaim necessary measures (Article 53) or martial law by decree in emergency (Article 54).

Thirdly, in an emerging society with Western model, not only liberal political democratic expectations but also material expectations (e.g., for a high standard of living, social justice, social welfare policy, etc.) came too early for society in general and for the governmental leaders in particular to learn to be able to meet the expectations. Society lacks the industrial base to satisfy them, and governmental ability and performance may fall short of meeting them. The frustration proves destructive even for social order. Naturally, willing, efficient and strong governmental leadership determined to find solutions for the problem be necessitated even for survival of society. It is likely that willing, efficient and
strong governmental leaders in such a society did not have time to be able to learn to observe all the democratic process in their conduct of governing with efficiency and stability. It may be an unavoidable cost to pay for effective and strong government in such a society, although it is desirable that all the democratic process be fully observed. This was precisely the case in South Korean industrialization in the 1970's. With no great natural resources, with no accumulated capital, and with no industrial technology and skills, South Korea came to rely heavily on the strong governmental leadership to start its rapid industrialization.

The fourth factor is related to timing. The factors above, liberal democratic experiment, confrontation with the most hostile communist regime, war, following devastation, industrial revolution, and realization of social justice came all at the same time within three decades. The democratic way of governing is yet to be mastered, and confrontation and threat of war with North Korea are yet to be overcome. Realization of social justice necessitates greater governmental intervention in private sectors. Moreover, they came all before society as a whole and political leaders in particular sufficiently learn to be able to adequately meet them in liberal democratic ways. In the West, democratic experiment, industrial revolution, demand for social justice, wars, and other major problems came with some measure of leisure. Naturally, it is understandable that liberal democracy in South Korea is at times under strain. However, South Korea is far freer and becoming far more so than North.

Finally, it is related in part to the openness of society. How is such a communist totalitarian society as North Korea possible on earth? How is such a repressive communist dictatorial regime on the top of which the Kim Il-sŏng’s family kingdom is mounted possible in this enlightened world today? Some of answers to these questions may be found in the closedness of society practiced in North. Probably the North Korean regime will crumble overnight if North Korean society is as extensively and as intensively exposed to the outer world as South Korea is. One of the main reason why North did not intend to continue South-North dialogues in the early 1970’s any more which were once
launched with hail of hopes at least among South Koreans was exactly the fear of disintegration of the society that might have resulted from its exposure to the outer world. It is widely known that a shock wave was considerable when a very small segment of North Korean society was only limitedly exposed to liberal ways of life lived in South during the South-North talks which was still continuing for sometime. The North Korean xenophobic ways of dealing with foreign visitors and Korean expatriates from Japan are well-known. Foreigners, whether foreign delegates or visiting journalists, are systematically segregated from the North Korean population other than selected few. The Korean expatriates from Japan are settled in such a dispersed way that they cannot form a group. As we have seen, domestic travels are allowed for ordinary citizens only on the basis of a special permit issued by the regime. A foreign trip is out of question for the most North Koreans. Ways for the most North Koreans to get information from outside sources beyond what the regime says are absolutely closed. North Korea is a highly, officially stratified society in the sense that those North Koreans amounting to the half of the population, who are officially designated as having undesirable family backgrounds, fill the bottom systemically prevented from moving upward in all walks of life and that the Party members and others familiarly or otherwise related to them occupy the upper stratum. Kim Il-sŏng and his relatives and close associates are placed on the zenith of the hierarchical structure. Purges are a well-known mechanism to accommodate downward mobility in North.

South Korea shows, however, a completely opposite picture for a country having the same socio-historic background until three decades ago. It is as open a society as is possible for the country, although it may not be so open as a Western democracy. Freedom of foreign as well as domestic travels is taken for granted in South, although there have been some necessary restrictions deriving largely from the security grounds as a nation facing a fierce form of communism north and from the want of foreign currencies. Free flow of people and ideas in and out is further pronounced recent years as industrialization
successfully progresses and the volume of international trade phenomenally increases. The high rate of upward and downward mobility has been rather a pronounced fact for South last 30 years. Only very recent years, there appears a sign of stability in socio-economic stratification. It is that the kinds of openness that are practiced in South is greatly responsible for the chain effects of high expectations, explosive frustrations, instability of society and political stagnation.

For example, the “demonstration effects” of the very high standards of democratic performance and of material living in western societies are considerable as a factor contributing to the social instability of a traditional society taking Western open societal model like South Korea. Needless to add, a written constitution of Western model providing for the civil rights, among others, is an expression of the very high expectations of political performance for such a society.

4. Concluding Remarks

North Korea has a written constitution which has the provisions of the civil rights. However, it is one of a different order from that of Western democracy. It is a constitution of communist totalitarian society. In North Korea there is nothing that can be called the human rights of Western sense from the beginning. There are only semantic civil rights there. Communist theories and practices are such that it is least necessary to pay close attention to the human rights.

On the other hand, the South Korean Constitution is a Western democratic constitution in the sense that the basic ideas, practices and theories, values and ideals of Western democracies including the human rights are fully incorporated in the written document. Only the reality falls short of the ideals. Because of the very presence of liberal democratic constitution, more than anything else, it is necessary to pay close attention to the human rights of Western sense. Perhaps, it is paradoxically more necessary to do so to realize
the ideals than a Western society since democratic ways of life are already part of the social fabric of society in the West whereas they are not so in a non-Western traditional society. The problems arising are therefore related to the question of what the political, social, economic and cultural conditions beyond that of having a democratic written constitution are for the realization of Western democracy in a non-Western traditional society lacking a democratic tradition. A full treatment of this question is beyond the scope of inquiries in this paper. Certainly, however, having a written constitution of Western democracy is at least a necessary, albeit not sufficient, step toward the goal of full-fledged democracy of Western sense. It is our contention that a written constitution of liberal democracy does make a significant difference at least between South Korea and North Korea. And we must also note the probable long-term contributions to liberal democratic education, among others, that such a constitution makes in South Korea. Our implication is that a hasty short-term evaluation of political performance in a non-Western traditional society taking a Western model like South Korea with a few human rights incidents is to see a few dead trees while losing sight of the whole forest. What the liberal American intellectuals behind the human rights policy linked with the planned military pull-out miss are the healthy young liberal forces which are slowly but steadily growing in South Korea.

Instead of suggesting the prerequisites of Western democracy in a non-Western traditional society in this paper, a number of the countervailing factors hindering its full realization in South Korea are noted above. They include the lack of previous liberal democratic tradition, the persistent armed confrontation with, and the threat of takeover from North Korea, the resulting state of precarious peace prevailing in the Korean peninsula, industrialization efforts, social instability, timing, and societal openness required by the written constitution.

As a final analysis, it must be mentioned that a legal tradition (or legal culture) in which the major problems, conflicts and disputes arising in a particular society are traditionally resolved there by way of resorting to the law as-
an inviolable one seems necessary, more than a mere constitutional instrument, for constitutionalism in a non-Western society lacking such a legal culture. We have not dealt with this point, but the kind of legal tradition may be as important as the “requisites of democracy” or more so for constitutionalism. With other than the kind of legal tradition a good politics or even democracy may be possible but constitutionalism may not be so. Thus, one important problem is related to that of social change involving the kind of legal culture in which a full-fledged constitutionalism is possible. And there is evidence that that kind of constitutionalism is taking root in South Korean indigenous soil.
