

## Constitution and Democracy in Korea

Chongko Choi\*

### I. Foreword

Constitution and Democracy is both an ideal and at the same time a reality, which a state should attain. Through constitution, that is through rule of law, a state can realize democracy. Korea also has strived for realization of democracy through constitution, since the first constitution in modern sense was promulgated in 1897 at the late phase of Yi dynasty. But as a divided nation since 1945, the South and North Korea have gone about their own ways in achieving “democracy”. A divided nation must suffer the sacrifice of full enjoyment of human rights and democratic principles.

This paper focuses on how the South and North Korea have tried to establish “democratic” governments through their constitutions and in what ways they have succeeded and failed, and finally on how to achieve the reunification through constitution. As a South Korean scholar, I have a sincere desire to see a happy democratic unified society in the Korean Peninsula. So, I have tried in this academic approach to avoid any possible prejudice and malaise against North Korean institutions and thoughts.

### II. Constitution and Democracy in South Korea

#### 1. Brief Constitutional History

South Korea has experienced many constitutional changes since its constitution of 1948, nearly half a century ago. Now in the Sixth Republic, South Korea has revised its constitution nine times.

Although I cannot go into detail here about Korea’s history of the constitutional revisions, everytime the republic and political powers have changed,

---

\* Professor of Law, Seoul National University.

the constitution was revised to rebuild the form of government. The First Republic was supposed to establish a cabinet system, but the first President Syngman Rhee(李承晩) opposed this and the presidential system was adapted. The Second Republic (1960~1961) set up a cabinet system through a constitutional revision, but it failed a year later when a coup d'etat occurred (May 16 Overthrow). The rise to governmental power of the military, which became strong after the Korean war, was a social mechanism which could not be avoided. Through the Third Republic's President Chunghee Park(朴正熙), whose rule lasted 10 years, the base for economic growth was built, but this came at the sacrifice of human rights and equality. Many Koreans demanded the freedom of democracy and human rights, but the ruling class suppressed them saying that national security and economic growth were primarily necessary in the nation's divided state. These conditions fundamentally continued into the Fifth and Sixth Republics, but in the Sixth Republic the will of democratization was broadened, and the Korean people now await the presidential election soon. But what form of the Government is more suitable to Korean context is not ultimately decided.<sup>(1)</sup>

In an examination of the relationship between the constitution and democratic politics, we have to admit that Korea has come close to failure in his attempt to realize democratic politics through constitution. As a result of South Korea's continuing situation of defiance against North Korea, the realization of the absolute freedom of speech and human rights may have been impossible. However, I am speaking from South Korea's experience when I say that democratic politics cannot be realized automatically only through a constitutional institution. Because democracy is not just an institution but a way of life or a way of thinking, a democratic consciousness must be a condition of the people's economics, education, culture, and religion to achieve democracy.

---

(1) Fred W. Riggs (Univ. of Hawaii) suggests the cabinet system, not the presidential system for Korea because of the Korea's Confucian tradition and strong bureaucraticism. His paper, *Bureaus Power: Some Paradoxes for Northeast Asia*, at international Symposium on Socio-political changes and Administrative Responses towards the 21st Century in Northeast Asia (Oct. 27, 1992).

For example, if we speak of economic growth, the economy must develop for a material basis of democracy. But if the economy engages in hyper-growth, before one knows it, one may be faced unconsciously with the danger of ignoring the spiritual or moral values of democracy.

As the discrepancy between constitutional norms(*Verfassungsnorm*) and constitutional realities(*Verfassungswirklichkeit*) becomes greater, the rule of law in that country becomes threatened. I believe that for Korea's constitution, at least in terms of norms and structure(system), it can look at itself with pride compared to the rest of the world. Therefore, democracy in South Korea should have bloomed fully, but in actuality it has not. The operation of the constitution seems to depend on the ability and the will of the politicians, the courts, and the representatives of the people to achieve it.

## 2. Democracy in the Current Constitution

The Republic of Korea(ROK) has a democratic form of government based upon a separation of powers and a system of checks and balances. Sovereignty resides in the people, from whom all state authority derives. The people's basic rights—the rights to freedom and the benefits of and participation in government—are guaranteed by the constitution. In order to protect freedoms and rights, the constitution also provides for the independence of the three branches of the government, the executive and the judiciary. The constitution promotes an atmosphere of national unity and harmony and sets its goal as the reunification of South and North Korea. It also respects international obligations, ratified treaties, and the generally recognized rules of international law. The constitution calls for free competition in presidential elections and limits presidential tenure to a single five-year term. The president performs his executive functions through the State Council(國務會議) which is made up of 15 to 30 members. Currently the State Council consists of 19 heads of executive ministers of state. The prime minister is appointed by the President with the approval of the National Assembly. The ROK is administratively divided into 5 special cities and 9 provinces. The provinces are further divided into

counties(郡), cities(市), township(邑) and villages(面). After the formulation of the Local Autonomy Law, there is a new hope for the realization of democracy based on local autonomy.

The judiciary of the ROK consists of the Supreme Court, High Courts, District Courts and Special Courts including a Constitutional Court, a Family Court and a Military Court. The chief justice of the Supreme Court is appointed by the President to a single six-year term with the consent of the National Assembly. Judges at all lower courts are appointed by the chief justice with the consent of the Conference of Supreme Court justices.

The 1987 Constitution of the current 6th Republic introduces the European style of Constitutional Court system. According to the Constitution, the Constitutional Court has the following jurisdictions: 1) to review the constitutionality of laws, 2) to decide on impeachment of high officials including the President, 3) to dissolve political parties on account of their unconstitutional purposes or activities, 4) to decide intragovernmental jurisdictional controversies, and 5) to adjudicate petitions relating to the Constitution, which can be said to be a Korean equivalent of the German "*Verfassungsbeschwerde*" (constitutional petition: 憲法訴願). The Constitutional Court is composed of nine presidentially nominated justices. When the Constitutional Court was opened in Sept. 1988, many lawyers and people were skeptical about the future of this new institution.<sup>(2)</sup> Contrary to the forecasts of many, it turns out so far that the Court has been able to play a significant role to protect the constitutional freedoms and rights. The institution has become a very busy place to deal with the constitutionality of legislation at the request of ordinary courts, of jurisdictional disputes and of constitutional petitions. In particular, the new "Petition" jurisdiction is considered as an epoch-making development of constitutional justice in that a direct procedural route has been created for a citizen to mount a challenge to the constitutionality of an exercise or non-exercise of public power. It is still too

---

(2) James West/Edward J. Baker, 1987 Constitutional Reforms in South Korea; Electoral Process and Judicial Independence, *Harvard Human Rights Yearbook*, vol. 1, Spring 1988, pp. 163-5.

a short history to evaluate the success or failure of this Korean constitutional "judicial activism".

### III. North Korean Constitution and Democracy

On Sept. 8, 1948, the Supreme People's Assembly ratified the first constitution and proclaimed the establishment of the People's Democratic Republic of Korea (PDRK). Kim Il-Song(金日成) was named premier. The information available about North Korean law is scarce and fragmentary at best.<sup>3)</sup>

The new constitution of 1972 consists of 149 articles in 11 chapters and is described as a "socialistic constitution". It enunciates the political ideology of the People's Republic, outlines the formal structure of government, prescribes in detail the economic system, devotes a chapter to "culture", and spells the principles governing the relationship between the state and the people.

The Constitution declares that the PDRK is "an independent socialistic state" (Art. 1). Art. 4 of the Constitution stipulates that the PDRK is guided in its activities by the *Chuche*(主體) ideology (national identity, independence, or self-reliance) of the Korean Worker's Party, which is "a creation of Marx-Leninism to our country's reality." It vests sovereignty of the country in "the workers, peasants, soldiers, and working intellectuals", who exercise power through representative bodies at various levels (Art. 7). It includes a number of provisions concerning the basic rights and the duties of citizens (Art. 49-72), and provides for the popular election of government officials based on the principles of universal, equal and direct suffrage by secret ballot (Art. 74). It also provides for the arrangement of governmental organs with definitions of their powers and accountabilities (Art. 73-146).

All these principles would appear to represent an essentially "democratic" system. In reality, however, there is a great discrepancy between the constitutional form and the actual government in the North Korean political system. In North Korea, the constitution is not the basic law of the land: it

(3) Seungyoon Cho, *Law and Legal Literature in North Korea*, Library of Congress, Washington D.C. 1989; Chongko Choi, *North Korean Law*, Bakyongsa/Seoul, 1993.

is a creation of the Korean Worker's Party and an instrument of the party's dictatorship.<sup>(4)</sup> The constitution of a communist state is not a superstructure as is the constitution of a western democratic state. It is reflection of what has so far been accomplished in society. The communist constitution has more value as an official explanation of the existing political, economic, and social order than as a description of an ideal model, basic principles and programs.<sup>(5)</sup> Kim Il-Song declared that "the new socialist constitution correctly reflects the achievements made in the socialist revolution and building of socialism in our country".<sup>(6)</sup>

The Constitution of North Korea has often been disregarded in practice. The impressive array of political powers given to the Supreme People's Assembly (最高人民會議) and its Standing Committee is largely a facade: the basic rights of citizens guaranteed by the Constitution has little practical meaning. For the North Korean communists, however, the Constitution serves several useful purposes. By prescribing legal and political formalities, the Constitution lends the regime an air of legitimacy and an appearance of popular democracy. By defining in detail the governmental system, the Constitution can facilitate public administration and improve efficiency. It provides the communist leaders with a legal basis for demanding public allegiance. It is maintained that the administrative organization of PDRK is generally based on the principles of the people's participation in the state's management, of "democratic centralism", of socialist planning, of socialist legality and of simplification of the state's organizations. Democratic centralism in the state organization has been generally adopted in the socialistic countries, ever since Lenin insisted "democratic centralism refer to a means to realize control on the ground of regional particularities without destroying identity". Democratic centralism is considered as "a system of unifying the two mutually-related and mutually-dependent aspects, that is, democracy and centralization".

---

(4) Robert Scalapino(ed.), *North Korea Today*, Berkeley, 1983, p. 22.

(5) Julian Towster, *Political Power in the USSR*, Oxford Univ. Press, 1948, p. 19.

(6) *Rodong Shinmun*, Dec. 26, 1972

The North Korean law including the constitution has a prophylactic function.<sup>(7)</sup> Law is to deter the general populace from breaking legal norms. By strengthening the “socialist legal consciousness”, it makes the people law-abiding. Penal sanction is the most potent weapon for deterrence. This emphasis on the deterrent function of law has important ramifications for the administration of criminal law. The North Korean rulers feel it imperative to “prove” constantly that the incidence of crime is steadily decreasing in North Korea. To do otherwise would be tantamount to admitting the failure of “the judicial policy of the party”.

Most recently, it has been reported that the North Korea has revised its constitution of 1972, on April 9, 1992. The new constitution is expanded from 149 to 171 articles, and its *Chuche* ideology is beautified not with a “creative application of Marx-Leninism,” but with “socialism with human face.” Nevertheless, the new constitution does not indicate basic changes or improvement.

## VI. Reunification and the Constitutional Task

As explained above, South Korea, which has changed its constitution nine times because of political instability despite its recent developments in liberal democracy, and North Korea, whose extreme socialist constitution is based on the *Chuche* ideology, have placed the Korean peninsula in a state of antagonism. So what would a unified constitution be like for two countries' unification? Will unification be an absorption (*Beitritt*) model like that achieved in Germany? Or will the joining of the North and South give birth to a third model?

The South Korean government has clarified that they are not hoping for a German-style unification. On Feb. 19, 1992, a Non-Aggression Pact was concluded, and both the North and South entered the UN simultaneously. Looking at this on a large scale, it means that the two countries have made an international promise to realize international peace and democracy.

(7) Pyongchoon Hahm, Ideology and Criminal Law in North Korea, *American Journal of Comparative Law*, vol. 17, 1969, pp.77-95 and also in his posthumous work, *Korean Jurisprudence, Politics and Culture*, Yonsei Univ. Press, 1986, p.201.

However, should the development of democracy and peace not be realized in North Korea, their economy deteriorate, and if an unexpected catastrophe occur, one cannot but predict a German-style unification into the South. In preparation for just such an occurrence, the South Korean government is carrying out administrative measures. However, examination is also being carried out to see what a North-South co-existing, co-operational constitution would be like in light of the current uncertain prospects for unification. We cannot anticipate for certain what form such a constitution would take, but it cannot be one that denies the fact that it must be provided for an order which respects human's fundamental rights, democracy and peace.

The constitution is the basic law of a state, and if the intention of the constitution is to work in the direction of the realization of democracy, all other laws must conform to it. In this aspect, the unification of Korea's legal culture cannot be achieved simply through the unification of a constitutional text, there arduous efforts must be made to overcome the heretofore heterogeneous legal cultures and concepts.

## V. Conclusion

M. Gorbachev said in his book *Perestroika* (1986), "In today's world we are seeing capitalism and socialism passed over to convergence." Unfortunately, Korea still thinks of its political system and constitution after the rigid establishment of capitalism and socialism objectively. "Korea" cannot refer to that which is from the South nor that which is from the North. Koreans must foster the wisdom to make a joint constitution which respects the things Koreans love: the basic values of freedom, justice, and equality. To this end, efforts must be made to overcome any unnecessary emotional antagonism. In the midst of joint discussions in this regard, rational and sympathetic mutual understanding on the part of jurists is necessary.



## 韓國에서의 憲法과 民主主義

崔 鍾 庫\*

### I. 서 론

헌법과 민주주의는 한 국가가 실현해야 할 理想이면서 現實이다. 헌법을 통하여, 즉 法的支配(rule of law)를 통하여 그 국가는 민주주의를 실현할 수 있다. 한국도 구한말인 1897년에 근대적 의미의 헌법을 도입한 이후 헌법을 통하여 민주주의를 실현하려고 노력해 왔으나 1945년부터 남한과 북한으로 분단되어 제각기 자기식 민주주의를 실현하려고 노력하고 있다. 분단국가에서는 기본권이나 민주원리를 충분히 실현할 수 없는 희생을 치르고 있다.

본 논문은 남한과 북한이 헌법을 통하여 어떻게 민주주의를 실현하려고 애써왔고, 그 성과와 실패는 무엇이며, 그리고 통일을 향하여 헌법은 무엇을 추구하고 있는가를 살펴보고 한다. 한 南韓學者로서 본인은 중심으로 한반도에서 진정한 민주주의가 실현되는 사회를 보고싶은 마음이다. 따라서 이 학술논문에서 북한에 대하여 어떠한 선입견이나 악의도 갖고 있지 않음을 밝혀두는 바이다.

### II. 남한에서의 헌법과 민주주의

#### 1. 간략한 헌정사

남한은 1948년에 헌법을 제정한 후 현재 제 6 공화국에 이르기까지 9차례에 걸친 헌법개정을 경험해 왔다. 여기에서 한국의 헌법개정사를 자세히 설명할 수 없지만, 정권이 바뀔 때마다 헌법은 새로운 통치형태를 채택하면서 변천해 왔다. 제 1 공화국은 내각책임제를 채택하려 했으나 이승만박사의 반대로 대통령중심제로 되었다. 제 2 공화국은 내각책임제를 채택했지만 이내 5·16 군사혁명에 의해 전복되었다. 그후 군사통치는 분단국가에서 어찌면 피할 수 없는 사회적 메카니즘이 되어 버렸다. 19년간 계속된 박정희정권은 경제발전을 이룩한 긍정적 평가에도 불구하고 인권과 평등의 억압을 지적받고 있다. 많은 사람들이 민주주의의 자유와 기본권을 요구하였지만 지배자들은 분단국가에서 가장 필요한 것은 국가안보와 국력신장이라는 명분으로 억압하였다.

이러한 상황은 본질적으로 제 6 공화국에 까지 계속되었으며, 국내의 정세의 변화와 함께 비로소 민주화를 지향하고 있다. 곧 대통령선거를 바라보고 있으나, 한국적 토양에 맞는 통치형태가 어떤 것이어야 하는가는 아직도 결정되지 않은 것처럼 보인다.

헌법과 민주주의의 관계라는 관점에서 본다면, 한국의 헌법을 통한 민주주의의 실현은

\* 서울大學校 法科大學 教授

실패에 가깝다고 말하지 않을 수 없다. 북한의 위협에 대항하기 위한 국가안보적 차원에서 언론의 절대적 자유는 불가능하다. 그렇지만 남한의 경험에서 볼 때 민주정치는 헌법을 제도적으로 잘 만든다고 하여 자동적으로 실현되는 것은 아니라는 사실을 말할 수 있다. 민주주의는 단순히 제도만이 아니고 사고방식 내지 삶의 질을 말하기 때문에 국민의 경제, 교육, 문화, 종교에 대한 의식 자체가 그 전제조건이 되는 것이다.

예를 들면, 우리가 경제성장을 얘기할 때 경제는 발전되어야 하지만 그것이 과도하게 강조되면 은연중 민주주의의 정신적, 윤리적 가치를 무시하게 되는 것이다.

헌법규범(Verfassungsnorm)과 헌법현실(Verfassungswirklichkeit)의 간격이 커질수록 법치주의는 위협받게 된다. 한국의 헌법은 적어도 그 제도와 규범의 면에서 보면 세계 어느 나라의 헌법에 못지 않은 수준의 것이라고 믿는다. 그래서 남한에도 민주주의가 꽃피어야 할 것이지만 현실은 그렇지 못하다. 헌법의 시행에는 정치인들의 의지, 국회, 사법부의 역할이 총집결되어야만 한다.

## 2. 현행 헌법에서의 민주주의

대한민국은 권력분립과 견제와 균형의 원리에 근거한 국가형태를 취하고 있다. 주권은 국민에게서 나오며, 국민의 자유권과 참정권이 헌법에 의하여 보장되고 있다. 헌법은 남북통일을 지향하고, 세계평화를 위해 국제법과 국제조약을 존중하고 있다. 헌법은 5년 단임의 대통령제를 채택하고, 15~30인의 국무회의를 규정하고 있다. 전국을 9개 도(道)와 5 특별시, 그리고 군, 시, 읍, 면으로 지방단위를 나누고 있다. 지방자치법의 공포 이후 지방자치에 입각한 민주주의를 실현하려고 노력하고 있다.

사법부는 대법원, 고등법원, 지방법원과 헌법재판소, 가정법원, 군사법원의 특별법원으로 구성되어 있다. 대법원장은 대통령이 임명하고 국회의 인준을 받는 6년 단임제이다.

제 6 공화국의 1987년 헌법은 놀랍게도 유럽식의 헌법재판소 제도를 채택하였다. 이 헌법재판소는 법률의 위헌여부, 대통령을 포함한 고위공무원에 대한 탄핵 등 여러 가지를 관할한다. 특히 헌법소원(Verfassungsbeschwerde)의 제도를 채택하여, 국민의 기본권이 침해되었을 때는 누구나 직접 헌법재판소에 제소할 수 있다. 9명의 재판관으로 구성된 이 헌법재판소는 많은 회의적 견해와 비판에도 불구하고 헌법적 자유와 인권을 신장하는 데에 적극적 기능을 하고 있는 것으로 평가되고 있다. 그러나 이 헌법적 사법적극주의(judicial activism)는 성패를 평가하기에는 4년이란 세월로서는 아직 이르다고 말하지 않을 수 없다.

## Ⅲ. 북한헌법과 민주주의

1948년 9월 8일 북한 최고인민회의는 헌법을 공포하고 조선민주주의인민공화국(People's Democratic Republic of Korea)이라 호칭하였다. 그후 헌법도 7차나 개정되고 적지 않은 법률이 제정·폐지되었지만 남한에서 뿐만 아니라 북한 자체내에서도 잘 알려지지 않고 있다.

1972년에 (제정되다시피) 개정된 「사회주의헌법」은 149조로 구성되었는데, 전 내용이 이른바 주체사상(national identity, independence or self-reliance)에 기초하고 있다. 주체사상은 “맑스·레닌주의를 우리나라의 현실에 독창적으로 적용한 것”으로 설명되는데, 내용은 프롤레타리아독재와 조선노동당의 지배에 지나지 않는다. 어쨌든 북한 헌법도 인민에 의한 민주주의를 표방하면서 통치구조와 기본권을 보장하고 있다.

이러한 모든 원리들은 ‘민주적’ 체제라고 부를 수 있겠지만, 현실에서는 헌법보다도 우선하는 수령의 교시와 노동당의 정책이 작용한다. 공산주의국가에서의 헌법은 단순히 국가기본법으로서의 규범체계가 아니고 정치적, 사회적 성과의 반영이다. 김일성은 “새 사회주의헌법은 우리나라에서 사회주의혁명과 사회주의건설의 성과들을 반영한다”고 하였다. 북한에서는 헌법이 실제에 있어서 종종 무시되고, 헌법의 기본권은 별 의미를 갖지 못한다. 그러나 북한은 이른바 민주적 중앙집권(democratic centralism)에 의하여 민주주의와 중앙집권적 계획주의를 실천해 나가고 있다.

북한에서는 헌법을 포함하여 모든 법이 예방적 기능을 하고 있다. 법은 인민들로 하여금 범법(犯法)하지 않도록 방지하는 것이다. ‘사회주의적 법의식’을 강조함으로써, 여러가지 범법행위를 통하여 인민들은 법을 준수하고 있다.

최근 1992년 4월 9일 최고인민회의 상설회의는 헌법을 다시 개정하였는데, 171조로 구성되어 있다. 큰 변화는 주체사상을 맑스·레닌주의의 창조적 적용이라고 설명하던 것을 인간 중심적 세계관이라고 설명하고 있다는 점이다. 그리고 김일성에서 김정일체제로 넘어가는 권력계승을 위한 통치기구와 군대체제에 관한 조항이 증가되었다. 그러나 ‘문화’에 관한 장(章)을 그대로 두어 철저히 사회주의적 혁명적 인간을 교육시켜 공산주의적 문화국가를 이루겠다는 근본이념은 바뀌지 않고 있다.

#### IV. 통일과 헌법적 과제

9번이나 개정된, 불안정하면서도 자유민주주의를 지향하는 남한 헌법과 주체사상에 입각한 북한의 극단적인 사회주의헌법이 한반도에서 대치상태를 이루고 있다. 이런 상태에서 만일 통일이 이루어 진다면 헌법은 어떠한 모습을 갖추어야 할 것인가? 독일처럼 흡수식(Beitritt) 모델을 취할 것인가 아니면 남북한 헌법을 융합하여 제 3의 모델을 창조해야 할 것인가?

남한정부는 독일 스타일의 통일은 지향하지 않는다고 공식적으로 선언하였다. 1992년 2월 19일에는 남북한 불가침을 약속하는 기본합의서를 체결하고, 동시에 남북한이 UN에 가입하였다. 이것은 어쨌든 남북한이 민주주의와 국제평화를 지향하고 있음을 국제적으로 약속한 것이다.

그렇지만 현실적으로 취약점을 보이고 있는 북한에서 정치와 경제가 어떤 판국을 맞게

될 때 독일에서처럼 돌발적 상황이 전개되지 않으리란 보장도 없다. 이에 대비하여 남한정부는 긴급사태를 위한 대비책을 준비하고 있는 것으로 알려져 있다. 그렇지만 공식적으로는 남북한이 협력하여 통일헌법을 만들어야 한다는 주장이 강하며, 통일헌법은 이데올로기의 색채를 떠나서 인간의 기본권과 민주주의, 평화를 보장하는 질서규범이 되어야 할 것이다. 그러나 헌법은 국가의 기본법이기 때문에 현재의 남북간의 이질화된 법문화와 국민들의 의식구조를 통합하기 위한 노력이 선행되어야 한다는 점도 무시할 수 없다.

#### V. 결 론

고르바초프(M. Gorbachev)는 저서 「페레스트로이카」(1986)에서 “오늘날 세계는 자본주의와 사회주의를 넘어서 수렴(收斂)하고 있다”고 지적하고 있다. 불행히도 한반도는 그렇지 못하고 있다. 그러나 한국은 남한의 것만도 아니고 북한의 것만도 아니다. 한국민은 자유와 정의, 평화와 평등의 기본가치를 존중하는 통일헌법을 만들어내야 할 지혜를 가다듬어야 한다. 이것을 위하여 불필요한 감정적 적대행위는 자제되어야 하며, 서로의 합리적 대화와 상호이해를 위하여 남북 법률가들의 대화도 필요하다고 보인다.