REASSESSING KOREAN LEGAL CULTURE
AND THE RULE OF LAW
LEGAL HISTORY, CONSTITUTIONAL REVIEW AND NEGOTIATIONS IN CROSS-BORDER FINANCE

C.D. KWON

PhD

THE UNIVERSITY OF SYDNEY
2006
Copyright in relation to this thesis*

Under the Copyright Act 1968 (several provision of which are referred to below), this thesis must be used only under the normal conditions of scholarly fair dealing for the purposes of research, criticism or review. In particular no results or conclusions should be extracted from it, nor should it be copied or closely paraphrased in whole or in part without the written consent of the author. Proper written acknowledgement should be made for any assistance obtained from this thesis.

Under Section 35(2) of the Copyright Act 1968 'the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work'. By virtue of Section 32(1) copyright 'subsists in an original literary, dramatic, musical or artistic work that is unpublished' and of which the author was an Australian citizen, an Australian protected person or a person resident in Australia.

The Act, by Section 36(1) provides: 'Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright'.

Section 31(1)(a)(i) provides that copyright includes the exclusive right to 'reproduce the work in a material form'. Thus, copyright is infringed by a person who, not being the owner of the copyright, reproduces or authorises the reproduction of a work, or of more than a reasonable part of the work, in a material form, unless the reproduction is a 'fair dealing' with the work 'for the purpose of research or study' as further defined in Sections 40 and 41 of the Act.

Section 51(2) provides that "Where a manuscript, or a copy of a thesis or other similar literary work that has not been published is kept in a library of a university or other similar institution or in an archives, the copyright in the thesis or other work is not infringed by the making of a copy of the thesis or other work by or on behalf of the officer in charge of the library or archives if the copy is supplied to a person who satisfies an authorized officer of the library or archives that he requires the copy for the purpose of research or study'.

*‘Thesis’ includes ‘treatise’, dissertation’ and other similar productions.
Reassessing Korean Legal Culture and the Rule of Law
Legal History, Constitutional Review and Negotiations
in Cross-Border Finance

Chan Doo Kwon

Thesis submitted in fulfilment of the requirements of the PhD in Law
The University of Sydney
2006
ABSTRACT

This thesis reveals particular dimensions of the legal culture of Korea. It does not profess to delineate all aspects of contemporary Korean legal culture. Instead it highlights important aspects of Korean legal culture challenging conventional views that Confucian ideas dominate the legal culture so as to hinder achieving the rule of law. Many commentators have assumed that the traditional legal culture of Korea is inconsistent with the rule of law concept. They view Korean history, tradition and culture as unhelpful to achieving the rule of law in Korea.

This received wisdom is challenged by developing a different approach to studying the legal history and legal culture of Korea. Reassessing historical materials allows an alternative perspective on Korea’s legal history. Also, there is more than one way of understanding the concept of legal culture. Chapters 2 and 3 of thesis ask some basic questions relating to the concept of legal culture and to Korean legal history, including: What do we exactly mean by legal culture, and what is its relevance to Confucianism? Such basic questions enable us to devise a suitable framework for reassessing conventional claims that Korean legal culture is mainly characterised by Confucian ideas.

This thesis then finds that many aspects of Korean legal culture in fact support key precepts of the rule of law. Further, it argues that such findings (as well as findings - or at least persistent perceptions - that point to the opposite conclusions) have considerable practical importance for the legal system and the legal profession in Korea. Chapter 4 of the thesis examines constitutional review in Korea, which is seen as the chief means of safeguarding the rule of law in Korea and which has attracted tremendous attention in recent years. The thesis shows that constitutional review is influenced by the Korean Constitutional Court’s view on aspects of Korean legal culture supporting the rule of law. It points out that the Court’s interpretation of Korean legal culture will often have a direct bearing on the Court’s decisions, which in turn often impact directly on the ongoing evolution of the rule of law in Korea.

Further perspectives on Korean legal culture are important not only within Korea, but also when Korean parties are negotiating with foreign parties in cross-border transactions. Drawing on the author’s professional specialisation, Chapter 5 of this thesis examines these ideas in the context of financing transactions, which also provide a paradigm case for contemporary globalisation of the economy and of law. The thesis shows how foreign parties’ assumptions about Korean legal culture - rightly or wrongly - can influence their negotiation strategies, and how this may be critical to the deals. In the long run, the perspectives of foreign parties will influence globalisation as it affects Korea and potentially other countries too.

Korea is the focus for this thesis mainly because it continues to attract a strong conventional view about legal culture being dominated by Confucianism. But a similar treatment may be extended to other Asian countries, such as China and Japan. Constitutional review and negotiations in cross-border financing transactions have been chosen partly because they vividly illustrate the potential influence of legal culture, in significant areas of public and private governance respectively. But a similar study may be made of other areas of law and legal practice. The overall aim of this thesis is to open up new directions for ongoing research and current debate about legal culture and the rule of law in the context of today’s accelerating globalisation process.
ACKNOWLEDGEMENTS

I began this thesis encouraged by the late Professor Alice Tay, who supervised my thesis for six years until the time of her passing. She thought it would be a good idea for me to draw on my Korean background and write a dissertation on Korean legal culture. She considered this an under-researched area, and thought someone with an understanding of both Korean and Western legal culture would be an appropriate candidate for the work. And so I began writing this thesis since 1998. Later, Professor Ian Brownlie of Oxford University Law Faculty inspired me to incorporate a cross-border element into the thesis, which is reflected in Chapter 5 (negotiations in cross-border financing transactions) and which significantly broadens the scope of the thesis.

After Professor Tay’s passing, Dr. Luke Nottage agreed to supervise my work. Thanks to his interest and dedication, I was able to keep the momentum that I desperately needed to complete my thesis. He has provided me with extremely helpful comments, always in a timely manner and with great enthusiasm for the subject. I also thank Professor Terry Carney, Director of Research at Sydney University Law School, for his advice, comments and encouragements throughout this project.

On Chapter 5 alone, I have spent many years. I have been practising cross-border structured finance law at Sidley Austin Brown & Wood, Simmons & Simmons and DLA Piper Rudnic Gray Cary based in Hong Kong. During my practice, I have tried to develop model pre-negotiation inquiry to test the hypotheses in my thesis on Korean legal culture in cross-border contexts. This inquiry forms the basis of Chapter 5 of the thesis. For this, I especially thank Ms. Vivienne Bath (associate supervisor since 2005), Professor Jeswald Salacuse of Tufts University (associate supervisor in 2004), and many of my work colleagues for their encouragement and comments.

My most heartfelt thanks go to my wife Cynthia, for her patience and encouragement. Finally, I am grateful to God for favourable life circumstances that have allowed me to complete my thesis; given my demanding work commitments in Hong Kong, these cannot be taken for granted.
NOTE ON STYLE AND OTHER MATTERS

• In general, this thesis follows the style recommended in Help Manual & Style Guide 2005 for Postgraduate Research & Coursework Student (The University of Sydney, Faculty of Law, 2005).

• Unless indicated otherwise, references in this thesis to Korea are references to South Korea. But in so far as the Korean legal culture up to 1953 is concerned, the same situation would apply equally to North Korea.

• All translations are mine, unless the context indicates otherwise.

• Korean names are written in the Korean-style (surnames first) except in citations.
# GENERAL TABLE OF CONTENTS

Chapter 1: Introduction: Conventional Views on Korean Legal Culture and the Rule of Law ........................................................................................................................................... 1

Chapter 2: The Concept of Legal Culture ............................................................................................................................................. 37

Chapter 3: Korean Legal History and Legal Culture ............................................................................................................................... 110

Chapter 4: Constitutional Review ......................................................................................................................................................... 197

Chapter 5: The Legal Culture of Korea and Negotiations in Cross-Border Finance ........................................................................ 233

Chapter 6: General Conclusions ......................................................................................................................................................... 309

References ......................................................................................................................................................................................... 312
DETAILED TABLE OF CONTENTS

ABSTRACT ........................................................................................................... ii

ACKNOWLEDGEMENTS ..................................................................................... iii

NOTE ON STYLE AND OTHER MATTERS ....................................................... iv

GENERAL TABLE OF CONTENTS ................................................................... v

Chapter 1 Introduction: Conventional Views on Korean Legal Culture and the Rule of Law

I. INTRODUCTION.................................................................................................. 1

1. Confucianism and the Rule of Law .................................................................. 1

2. Studying the Legal Culture of Korea ................................................................. 2

3. Outline of the Rest of this Chapter ................................................................... 8

II. CONVENTIONAL VIEWS, THE RULE OF LAW, CONFUCIANISM AND KOREAN LAWS SUPPORTING THE RULE OF LAW ................................ 8

1. Conventional Views on Korean Legal Culture .................................................. 8

   A. Attitudes towards Law
   B. Religion and Law
   C. Discretionary, Rather Than Rule-Based, Decision-Making
   D. Hierarchical Social Order
   E. Collectivism, Respect and Honour
   F. Women
   G. Justice
   H. Aversion to Litigation
   I. Lack of the Concept of Rights

2. Conventional Views and the Rule of Law ......................................................... 15

3. The Concept of the Rule of Law ..................................................................... 17

   A. The Rule of Law – A Contestable Concept
   B. Elements of the Rule of Law
      i. Generality
      ii. Prospectivity
      iii. Capacity
      iv. Efficiency, Conformability and Clarity
      v. Stability
vi. Supreme Authority
vii. Impartiality, Natural Justice and Democracy
viii. Notice or Publicity
ix. Non-Contradictoriness
x. Congruence
xi. Property Rights

4. Confucianism ........................................................................................................... 22
5. Official Laws of Korea that Support the Rule of Law ............................................. 25

III. LEGAL HISTORY, CONSTITUTIONAL REVIEW AND NEGOTIATIONS IN CROSS-BORDER FINANCE ................................................................. 27
1. Legal History ........................................................................................................... 27
2. Constitutional Review ............................................................................................ 30
3. Negotiations in Cross-Border Financing Transactions ........................................... 32
4. Globalisation .......................................................................................................... 33
5. Conclusions: Hypotheses about Korea’s Normative Legal Culture ....................... 35

Chapter 2 The Concept of Legal Culture

I. INTRODUCTION ........................................................................................................ 37
1. Background ............................................................................................................. 37
2. Outline of This Chapter ......................................................................................... 38

II. CULTURE, LAW AND LEGAL CULTURE ............................................................. 39
1. The Concept of Culture ......................................................................................... 39
   A. Meaning of Culture
   B. Transformation of Culture
   C. Culture and Power
   D. The Tensions of Culture
2. Law and Culture ..................................................................................................... 44
   A. The Concept of Law
      i. What is Law?
      ii. Theories of Law
      iii. Theories of Law and Legal Culture
   B. Law and Culture
### 5. Ascertain Legal Culture

| A. Basic Characteristics of Normative Legal Culture |
| B. Non-Normative Legal Culture |
| C. Why Use the Concept of Normative Legal Culture? |
| i. More Likely to Have Determinative Influence on Law and be Seen as Source of Law |
| ii. Normative Legal Culture and Legitimacy of Transplanted Laws |
| iii. Practical Significance for Legal Practice |

### 6. Masaji Chiba’s Approach

| A. Chiba’s Theory |
| B. Comparing Chiba’s Theory to Other Approaches |
| C. Can Unofficial Law Become Law? |

### IV. METHODOLOGIES FOR STUDYING LEGAL CULTURE

| 1. Unofficial Law? – Analysis |
| 2. Conceptual Framework for Studying the Legal Culture of Korea |
| A. Certain Assumptions |
| B. Normative Legal Culture Supporting Legal Rules |
| C. Existence of Unofficial Law? |
| D. Indigenous Cultural Norms |
| E. Non-Legal Rule Supported by Normative Legal Culture |
| F. Non-Legal Rules Supported by Normative Legal Culture – In Turn Support Legal Rules? |
| G. A System of Cultural Norms or Legal Norms? |
| H. ‘Lack of Law’ Situations |

### 3. Proposed Methodology for Studying Legal Culture

| A. Ascertain the Legal Culture of Korea Before and After the Reception of Foreign Laws |
| B. Ascertain the ‘Quality’ of the Legal Culture |
| C. Ascertain the Normative Legal Culture and the Non-Normative Legal Culture of Korea |
| i. Normative or Non-Normative Legal Culture? |
| ii. Presumption in Favour of the Existence of Normative Legal Culture |
| iii. The Normative Unofficial Law and the Unofficial Law of Korea |

---

ix
Chapter 3  Korean Legal History and Legal Culture

I.  INTRODUCTION ........................................................................................................... 110

II. KOREAN LEGAL HISTORY AND INDIGENOUS LEGAL CULTURE PRIOR TO THE MODERN PERIOD ................................................................. 112

1. Introduction .............................................................................................................. 112

2. Outline of Korean History prior to the Modern Period ......................................... 112

3. Korean Legal History and Legal Culture prior to the Modern Period ............... 113

   A. Religion and Law – Ancient Times
   B. Old Chosun Laws
   C. Laws in the Confederated Kingdoms Period
   D. Law during the Three Kingdoms Period
      i. The Hwabaek Institution
      ii. Legal Consciousness in the Three Kingdoms Period
   E. Laws in the Unified Silla Period
   F. The Laws of the Koryo Dynasty
   G. Laws and Legal Culture during the Chosun Dynasty
      i. Introduction
      ii. Government and Politics of the Chosun Dynasty
      iii. Confucian Legislation
      iv. Laws of the Chosun Dynasty
      v. Mistaken View about Traditional Korean Society

III. NORMATIVE LEGAL CULTURE OF KOREA ......................................................... 124

1. Introduction .............................................................................................................. 124

2. Principles for Interpreting Existing Laws .............................................................. 126

   A. Codified Laws
   B. Principle of Respect for the Royal Ancestor’s Constitution
   C. Values imbedded in the Principle of Respect for the Royal Ancestor’s Constitution
      i. Clarity of the Law
      ii. Supreme Authority of the Law
      iii. Stability of the Law
   D. Principle of Respect for the Royal Ancestor’s Constitution – Normative Legal Culture?
   E. Principle of Respect for the Royal Ancestor’s Constitution and the Concept of Constitutional Review
i. Confucianism and the Concept of Constitutional Review

ii. Normative Legal Culture Supporting the Concept of Constitutional Review

3. The Lawmaking Process and Application of Law ........................................... 133

4. Social Classes and the Law ........................................................................ 135
   A. The Yangban and Non-yangban
   B. Social Status Distinctions - Normative Legal Culture?
   C. Korea’s Modern Legal Culture and Social Status Distinctions

5. Laws Relating to the Family System ............................................................. 140
   A. Indigenous Laws of Korea and the Chinese Confucian Laws
   B. Resisting Adaptation of the Chinese Patrilocal Marriage System
   C. Equal Distribution of Inheritance

6. Women in Korea ......................................................................................... 144
   A. Discrimination against Women – Normative Legal Culture
   B. Resistance to Patrilocal Marriage System and the Normative Legal Culture
      Supporting Equality between Women and Men
   C. Korea’s Inheritance System and Women
   D. Interaction and Conflict between Korea’s Normative Legal Culture and
      Confucianism
      i. Resisting Confucianism
      ii. Women and the Criminal Law
      iii. Punishment of Male Representatives for Women’s Misbehaviour
   E. Korea’s Modern Legal Culture on Gender Equality

7. Ownership .................................................................................................. 152
   A. Individual and Communal Ownership
   B. Land Ownership

8. Legal Proceedings ...................................................................................... 156
   A. The Judicial System during the Chosun Dynasty period
   B. Korean’s Traditional Attitudes towards Litigation
   C. Korea’s Modern Legal Culture and Litigation
   D. Normative Legal Culture towards Litigation
      i. Litigiousness, Rights-Consciousness, Efficient and Low Cost Litigation
      ii. The Western, Chinese and Japanese Litigation Systems Compared
      iii. Conclusions

9. Summary ................................................................................................... 165

IV. MODERN LEGAL HISTORY AND LEGAL CULTURE OF KOREA .......... 166
1. Legal History and Legal Culture of Korea during 1866-1945................................. 166
   A. Introduction
   B. Korea's Reception of Foreign Laws
      i. Korea's Initial Encounter with Western Laws
      ii. Discontinuation of Indigenous Laws
      iii. Transplanting Japanese Laws
      iv. The Rule of Law and Legitimacy of Legal Transplant
   C. Attitudes towards Western Law
   D. Colonialism, Globalisation and the Rule of Law

2. Legal History of Korea from 1945 until the Present........................................... 178
   A. Modernisation and Social Changes
   B. The United States Military Government
   C. Modern Laws of Korea
      i. Modern Legal History
      ii. Constitutional Law
      iii. Administrative Law
      iv. Civil Law
      v. Commercial Law
      vi. Criminal Law
      vii. Civil and Criminal Procedures
      viii. Other Laws
      ix. The Judicial System

3. Modern Korean Legal Culture and the Rule of Law.............................................. 185
   A. Introduction
   B. Authoritarianism or the Rule of Law?
   C. Surveys of Korean Legal Culture
      i. Survey by Yonsei University
      ii. Surveys by the Korea Legislation Research Institute

V. CONCLUSIONS ............................................................................................................. 195

Chapter 4 Constitutional Review

I. INTRODUCTION........................................................................................................... 197

1. Globalisation and the Rule of Law........................................................................... 197
   A. Colonialism, Globalisation and Conventional Views on Indigenous Legal Cultures
   B. Globalisation and Constitutional Review

2. Korean Legal Culture and Constitutional Review .................................................. 200
A. Korean Official Law and Modern Legal Culture Supporting the Rule of Law
B. Cultural Debates in Constitutional Law Cases
C. Practical Implications of Deeply Rooted Legal Culture in Legal Practice

3. Outline of this Chapter .................................................................................................................. 203

II. CONSTITUTIONAL REVIEW IN KOREA ................................................................................. 203
1. The Concept of Constitutional Review ......................................................................................... 203
2. The Constitutional Court of Korea ................................................................................................. 205
3. Constitutional Review in Korea ....................................................................................................... 209

III. REVIEW OF CONSTITUTIONAL LAW CASES .................................................................. 213
1. Introduction ..................................................................................................................................... 213
2. Same Surname - Same Origin Marriage Ban Case ......................................................................... 213
   A. Outline of the Facts and the Decision of the Case
   B. Analysis of the Case
   C. Confucianism and the Rule of Law
3. Family Ritual Standards Act Case ..................................................................................................... 218
   A. Outline of the Facts and the Decision of the Case
   B. Analysis of the Case
4. Special Law on the Establishment of a New Capital City Case ....................................................... 221
   A. Outline of the Facts and the Decision of the Case
   B. Analysis of the Case
   i. Majority and Dissenting Views
   ii. Elements of Customary Constitutional Rules
   iii. History and (Old and Current) Official Law as Evidence of Legal Culture
   iv. Judge Kim Young II’s Judgment
5. Conclusions ....................................................................................................................................... 229

Chapter 5 The Legal Culture of Korea and Negotiations in Cross-Border Finance

I. INTRODUCTION ................................................................................................................................. 233

II. GLOBAL AND LOCAL LEGAL CULTURE IN RELATION TO CROSS-BORDER FINANCE .... 238
1. Korean Legal Culture in the Areas of Commerce and Finance ........................................... 238

2. Structured Finance Transactions and Global Legal Practice ........................................... 243
   A. Structured Finance Transactions
   B. Deal Structure
   C. Global Financial Law Created by Global Legal Practice
   D. Negotiations in Structured Finance Transactions
   E. Legal Culture in Negotiations

3. Global Legal Culture and Local Legal Culture ............................................................. 256
   A. Global Legal Culture
   B. Local Legal Culture Shaping Global Legal Culture
   C. The Rule of Law and Cross-Border Finance

III. MODEL PRE-NEGOTIATION INQUIRY ......................................................................... 261

1. Introduction ......................................................................................................................... 261

2. Outline of the Model Pre-Negotiation inquiry ................................................................. 265
   A. Introduction
   B. Four Areas of Practice
      i. Due Diligence
      ii. Contractual Documentation
      iii. Interaction between Due Diligence and the Negotiation of Contractual Documentation
      iv. Deal-Specific Issues
   C. Four Stages of Inquiry for Negotiations
      i. Stage 1 – Identify the Relevant Cultural Issues for Negotiation
      ii. Stage 2 – Identify the Applicable Findings on Legal Culture
      iii. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations
      iv. Stage 4 – Devising Negotiation Strategies
   D. Conclusions

3. Due Diligence ...................................................................................................................... 270
   A. Introduction
   B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation
      i. Relationship versus Substance and Trust versus Power
      ii. Source of Funding of Y Corporation
      iii. Communication with the Ministry of Y
      iv. Rapport and Trust between the Parties
   C. Stage 2 – Identify the Applicable Findings on Legal Culture
      i. Lack of Law Situation or Relational Approach?
      ii. Collectivist and Hierarchy-Based Type of Relationship or Rights-Conscious and Individualistic Approach?
D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations
   i. The Small Business Corporation (SBC) of Korea Case – Outline
   ii. SBC’s Relationship with Government Organisations
   iii. Government Support
E. Stage 4 – Devising Negotiation Strategies
   i. Letter of Comfort
   ii. Commitment Letter
   iii. Letter of Acknowledgement
   iv. Assessment

4. Contractual Documentation ........................................................................................................ 283

A. Introduction
B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation
   i. Power Differences
   ii. Cultural Understanding of the Role of Contract
C. Stage 2 – Identify the Applicable Findings on Legal Culture
   i. Clarity, Supreme Authority, and Stability of Law, or the Confucian Li?
   ii. Cultural Issues or Simply Lack of Expertise?
   iii. Individualism, Social Status, and Strong Sense of Entitlement
D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations
   i. Samsung Life RMBS Case – Outline
   ii. Mortgage Loan Transfer Agreement
   iii. Perfection of Title Clause
   iv. Representations and Warranties Clauses
E. Stage 4 – Devising Negotiation Strategies

5. Interaction between Due Diligence and Negotiation of Contractual Documentation ........................................................................................................ 295

A. Introduction
B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation
   i. Issue of ‘Face’
   ii. Responsibility Statements
C. Stage 2 – Identify the Applicable Findings on Legal Culture
D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations
   i. Responsibility Statements Given by Korean Originators in Recent Transactions
   ii. Responsibility Statement Given by Samsung Life
E. Stage 4 – Devising Negotiation Strategies
   i. Taking into Account Cultural Issues
   ii. Suitable Compromise?

6. Deal-Specific Issues ...................................................................................................................... 302

A. Introduction
B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation
C. Stage 2 – Identify the Applicable Findings on Legal Culture
   i. Chaebol
   ii. Legal Fees
D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations
   i. Chaebol – LG Card Crisis
   ii. Legal Fees – JPMorgan and SK Group Dispute
E. Stage 4 – Devising Negotiation Strategies
   i. Chaebol
   ii. Legal Fees

IV. CONCLUSIONS ................................................................. 307

Chapter 6 General Conclusions.............................................. 309

REFERENCES........................................................................ 312
Chapter 1 Introduction: Conventional Views on Korean Legal Culture and the Rule of Law

I. INTRODUCTION

1. Confucianism and the Rule of Law

Achieving the rule of law is often seen as one of the key issues facing many Asian countries, from their own perspective, and that of other countries and organisations such as the World Bank.\(^1\) The implication is that the rule of law has not been sufficiently attained in many Asian countries and so they must work at it harder, just as they have focused (albeit more successfully) on their economic development. Such a view perceives the rule of law as helping a country to achieve a greater level of economic growth, freedom, justice and democracy.\(^2\) The World Bank, among others, seems to continue to take such a view, although, to be sure, many commentators dispute the direct relevance between the rule of law and economic growth.\(^3\)

One of the obstacles to achieving the rule of law for Asian countries may be that the ideals of the concept are often seen to be in conflict with their legal culture.\(^4\) This may be true, particularly for some of those North East Asian countries that share Confucian traditions\(^5\) – notably, Japan,\(^6\) China\(^7\) and Korea.\(^8\) There exist certain conventional views that

---


4 It has been argued that there is a close relationship between culture and the achievement of the rule of law. See, for example, Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, 'Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance' William Davidson Institute Working Paper Series 2003-605 at 1. Contrast this to the US position where it has been said that the Americans' legal culture supports and 'evokes the notion of the rule of law'. See Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (The University of Chicago Press, 1990) at 12.
associate the legal culture of these countries with such notions as lack of legal consciousness, aversion to litigation, and 'rule by men' (or 'rule of men') rather than the rule of law.

But is this true? What aspects of the legal culture of these Asian countries relate to Confucianism in such a way that the culture fundamentally conflicts with the rule of law? Assuming that there exist aspects of legal culture that are closely related to Confucianism, do these really bear the influence assumed by many commentators? In other words, do these aspects of legal culture matter? If so, how? To be more specific, how do they matter in real life—say, for lawyers in legal practice? Do the conventional views focus on mere cultural variables or legal cultural variables—assuming that one can distinguish between the two?

These are clearly difficult questions to answer, and one needs a workable starting point for seeking the answers. It is difficult enough to explore these questions in relation to a single country. Hence, an attempt to explore these questions in relation to all the North East Asian countries mentioned would probably be too wide in scope for a thesis of this type. But research that focuses on one of the countries may also provide a useful reference for examining similar issues in respect of the other North East Asian countries.

2. Studying the Legal Culture of Korea

As a starting point, this thesis examines several significant aspects of the legal culture of Korea. The reasons for choosing Korean legal culture are many. Firstly, Korea is seen by many as the country most influenced by Confucianism. Also, there exist strong

---

5 It has been said that, ‘[c]ulturally, North-East Asia was, to a large extent, influenced, if not dominated, by ancient China, whose history, culture and philosophies (with those of her cousins, Japan and Korea) have been the subject of much study’. See Poh-Ling Tan, ‘Introduction’ in Poh-Ling Tan, *Asian Legal Systems: Law, Society and Pluralism in East Asia* (Butterworths, 1997) at 1.


8 See, for example, Pyong-choon Hahn, *The Korean Political Tradition and Law* (Hollym, 1967).

9 For a discussion of this concept, see, for example, *Marbury v. Madison* (1803) 5 U.S. 137 at 163 (discussing the concept of ‘government of laws’ as compared to ‘government of men’); Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ *Cardozo Law School, Public Law Research Paper* No. 36 (2001) at 12 (Rosenfeld says that the ‘rule of men’ generally connotes unrestrained and potentially arbitrary personal rule by an unconstrained and unpredictable ruler); and Dae Kyu Yoon, *Law and Political Authority in South Korea* (Kyungnam University Press, 1990) at 20 (discussing the concept of ‘rule by men’ in the context of Confucianism).

10 For a discussion of the concept of Confucianism, see Part II.4 below.

11 Kevin E. Davis argues that variables that refer to characteristics of non-legal norms should not qualify as legal variables in the World Bank’s consideration of whether the rule of law is achieved. See Kevin E Davis, ‘What Can the Rule of Law Variable Tell Us about Rule of Law Reforms?’ (2004) 26 *Mich J Int’l L* 141 at 146.

conventional views about Korean legal culture being based on Confucianism (see Part II.1 below). Therefore, findings of this thesis may provide a useful reference for reassessing the legal culture of countries with similar Confucian influences. Secondly, the author is fluent in Korean and is therefore able to research original Korean materials and provide a cross-cultural perspective. Thirdly, the author’s experience in cross-border financing transactions involving Korean entities is directly relevant to some of the issues explored in Chapter 5.

A methodology for studying the legal culture of Korea has been developed, as a starting point, in Chapter 2. To be sure, the use of this methodology may not be restricted to the study of Korean legal culture, but may be applicable to other legal cultures, particularly those in North East Asia. The methodology attempts to highlight those aspects of a legal culture that, in the author’s view, matter as legal culture more than others, for certain purposes. The basic assumption is that some aspects of legal culture may have more impact than others on laws. Using this methodology, certain areas of Korean legal history, legal culture and judicial precedent will be studied.

By and large, the findings and conclusions made in respect of the legal culture of Korea in this thesis indicate the following: although a considerable Confucian heritage exists in modern-day Korea, the way in which it forms part of, and influences, the legal culture of Korea differs significantly from what some of the common assumptions in respect of Korean legal culture would suggest. There are significant aspects of Korean legal culture that are consistent with the rule of law concept. Korea’s cultural heritage may not necessarily be, as some argue, a hindrance to its modern development, including its achievement of the rule of law.

---

13 It is a significant advantage to be an ‘insider’ who has experienced the relevant culture. In this regard, David Nelken argues that the external observer is entitled to make his or her claim about the effects of a legal transfer and legal culture. He says that if determining the aim of legal interventions and policies is difficult enough in the domestic context, it becomes doubly difficult when one comes to consider cross-cultural transfers. This is why the ‘internal’ observer’s view regarding the effects of a legal transfer (and this includes the ability to comprehend the relevant original material) becomes so valuable. See David Nelken, ‘Beyond the Metaphor of Legal Transplants? Consequences of Autoptotic Theory for the Study of Cross-Cultural Legal Adaptation’ in Jiri Friban & David Nelken (eds), Law’s New Boundaries: The Consequence of Legal Autopoiesis (Ashgate, 2001) at 287.


15 For a discussion of the conventional views, see Part II.1 below.
This goes a step further than the recent views expressed by commentators who agree that the rule of law now plays a strong role in Korean law and society but who assume that this is a ‘lagged’ reaction to, or an evolution from, a Confucian system antithetical to the rule of law. It also differs from those who assume such a system, but who counter the conventional view as represented by the World Bank by asserting that the very tension with strict rule of law may have contributed to economic growth, or that the ‘Asian’ version of the rule of law is necessarily different from that of the West. What this thesis argues is that many aspects of the indigenous legal culture of Korea themselves support the rule of law.

This is not to say that such a conclusion is completely determinative of the status of the legal culture of Korea. Korea’s legal culture is, just like other legal cultures, constantly changing. Further, it is doubtful whether there is one Korean legal culture (the same applies to other countries), because culture tends to come in plural forms. But, on the other hand, one cannot ignore the real possibility that the culturally determinative ideas referred to here

---


17 For example, see Frank K. Upham, ‘Speculations on Legal Informality: On Winn’s “Relational Practices and the Marginalisation of Law”’ (1994) 28 Law and Society Review 233 at 241. But compare Harald Baum, ‘Emulating Japan?’ in Harald Baum (ed), Japan: Economic Success and Legal System (Walter de Gruyter, 1997) at 1-24, where Baum is critical of this proposition (particularly given the poor performance of Japan’s financial sector), but nevertheless acknowledges that certain aspects of traditional Japanese culture may have contributed to Japan’s economic growth.


20 For a discussion of how ‘cultural determinism’ leads to narrow views on people’s behaviour and values, see, for example, Chai-Sik Chung, ‘A Korean Confucian Encounter with the Modern World’ Korea Research Monograph (Institute of East Asian Studies, University of California, Berkeley Center for Korean Studies, 1995) at 2 (says that other than culture, interests, institutions and various social forces shape history in a complex way), and Kun Yang, ‘Law and Society Studies in Korea: Beyond the Hahn Thesis’ (1989) 23 Law & Soc’y Rev 891 at 894-896 (saying that political and economic circumstances, as well as cultural factors, determine people’s attitudes towards law).

21 For a similar argument in the Japanese context, see Veronica L. Taylor, ‘Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan’ (1993) 19 MULR 352 at 353.
may have a real bearing on shaping today’s legal culture. History, after all, matters today, and there may be some aspects of culture that are deeply rooted in a national culture. Chapters 3 (legal history), 4 (constitutional review) and 5 (negotiations in cross-border deals) of this thesis reveal that deeply rooted legal culture may be a real issue in current/historical matters, private/public governances and national/cross-border contexts in Korea. That is, the impact of such a legal culture may be far-reaching geographically and in various areas of legal practice, influencing both public and private rights and obligations, in a reasonably continuous manner throughout history.

This thesis argues that conventional views on Korean legal culture (see Part II.1 below) affect the legal system and legal practice of today – even if such views are inaccurate. More specifically, not just conventional views but one’s view or assumption of a particular legal culture (whatever such views may be) may fundamentally affect many aspects of legal practice. The consequence of this may be more significant than one may expect. This is particularly well illustrated in the constitutional review context, as discussed in Chapter 4. In many recent Constitutional Court cases, the Korean Constitutional Court attempted to identify aspects of Korean legal culture that were deeply rooted in Korea. Once those aspects of Korean legal culture were identified, the Court often made its decisions based on them. In other words, the Court’s view of what constitutes the deeply rooted legal culture of Korea has often been directly relevant to its judgments, and its judgments in turn have been directly relevant to shaping Korean laws.

Assumptions about deeply rooted legal culture are relevant not only in areas of legal practice within Korea but also in cross-border financing transactions, as discussed in Chapter 5. Like constitutional review, cross-border financing transactions are one of the most contemporary areas of legal practice that significantly contribute to the rapid globalisation process (see Part I of Chapter 5). Whereas constitutional review represents an aspect of ‘local legal culture’, cross-border financing transactions represent what some refer to as a ‘third culture’. Also, whereas the former largely concerns public governance issues, the latter deals with private governance issues. The point is that one’s assumptions about what constitutes deeply rooted legal culture can play a significant role in various areas of law and legal practice. In Chapter 5, this thesis shows that such assumptions can influence the way in which foreign parties devise their negotiation strategies when they negotiate with Korean parties in these deals. Such negotiation strategies may often be so crucial that they may critically affect the deal structures and outcomes. In some cases, the deals may close or break depending on those negotiation strategies.

Since one’s understanding of what constitutes the deeply rooted legal culture of Korea may be crucial, it is important that one’s understanding is reasonably accurate and balanced. While a comprehensive and in-depth examination of Korean legal culture is beyond the scope of this thesis, it may nevertheless be helpful to look carefully at Korean legal history with the

---


23 Id at 2.

24 For a detailed discussion on this idea, see Part III.5.C of Chapter 2.

25 See, for example, Jan Dalhuisen, _Dalhuisen on International Commercial Financial and Trade Law_ (Hart Publishing, 2004) at 3.

26 See, for example, David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken & Johannes Feest (eds), _Adapting Legal Cultures_ (Hart Publishing, 2001) at 31.
above concerns in mind. Writers who represent conventional views on Korean legal culture (associating it with Confucianism) tend to focus initially on the culture of the Chosun Dynasty period (1392-1910). They then discuss more recent Korean history, when a series of authoritarian regimes of Korea suppressed the fostering of the rule of law, notably between 1948 until 1987. The arguments tend to be as follows: the recent experience in Korea was evidence of the Confucianism-based legal culture that was deeply rooted in Korea during period of the Chosun Dynasty. But the problems with these arguments are that, firstly, they tend to ignore the legal culture of Korea prior to the Chosun Dynasty. Secondly, they also often ignore the fact that Confucianism as legal culture was often resisted by the majority of the Koreans during the Chosun Dynasty. Thirdly, the discussion is mainly about popular customs and traditions, rather than legal history: there is in fact very little discussion on Korean legal history.

Accordingly, Chapter 3 of this thesis examines Korean legal history dating back prior to the Chosun Dynasty to unearth the deeply rooted legal culture of Korea. The main focus of the research has been the legal rather than the general cultural history of Korea. This merits emphasis: it is legal culture that is relevant for the present inquiry. People’s attitudes towards law are what matters. People’s general attitudes may not be relevant if they do not influence their attitude towards law. This distinction is not by and large clearly made in the literature that is indicative of the conventional view about Korean legal culture. To elaborate on this kind of distinction, one must discuss the concept of legal culture itself – Chapter 2 contains such discussion.

While Chapters 3, 4 and 5 discuss various aspects of Korean legal culture, this thesis does not profess to have covered comprehensively and proved definitively Korean legal culture. But this thesis does attempt, in Chapter 2, to show different ways of studying legal culture by formulating a concrete methodology for examining legal culture. The methodology is then applied in three distinctive areas of study drawn together by the threads representing past/present, private/public and domestic/cross-border interfaces. Chapter 5 in particular, discusses an area of practice that is not very often discussed when examining the legal culture of Korea (or other countries), and it brings to light new issues that might be relevant in this context. Although each chapter focuses on different topics, they are connected by the same methodology set out in Chapter 2, and contain consistent arguments that form the basis of the current thesis. The interconnected aspects of each chapter collectively present a challenge to conventional views on Korean legal culture and its relations with the rule of law. Figure 1-1 illustrates the way in which Chapter 3 (with Part IV

---

27 Two of the most prominent scholars who represent the conventional position on Korean legal culture are Hahn Pyong Choon and Yoon Dae Kyu. See Pyong-Choon Hahn, The Korean Political Tradition and Law (Hollmy, 1967) and Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990). For a detailed discussion of their (and other commentators’) arguments, see Part II.1 below.


29 See William Shaw’s similar comments in William Shaw (ed), Human Rights in Korea: Historical and Policy Perspectives (Harvard University Press, 1991) at 3 (saying that Hahn’s book, in particular, ‘fails to mention, much less analyse, a single traditional Korean source of law, legal commentary, or case book’).

30 See, for example, Pyong-Choon Hahn, The Korean Political Tradition and Law (Hollmy, 1967) and Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990). See also the writings of other commentators who take conventional views on Korean legal culture listed in Part II.1 below.
dealing with the modern legal culture of Korea), Chapter 4 and Chapter 5 interconnect to reveal together significant aspects of Korean legal culture.

![Diagram](image)

**Figure 1-1**

To sum up, in examining the legal culture of Korea, diverse topics are examined in this thesis as opposed to accepting a uniform or generalised conception of legal culture based mainly on certain events. These topics are necessarily selective given the scope of this thesis. But they cover reasonably representative areas that reveal the legal culture of Korea. Collectively, they allow one to assess Korean legal culture from various angles and contexts. This is an appropriate method of study for dealing with far-reaching concepts such as legal culture, Confucianism and the rule of law.

Before proceeding any further, therefore, it will be helpful to summarise the two main arguments of this thesis:

(a) Significant aspects of the deeply rooted legal culture of Korea are not inconsistent with the rule of law; rather, in many cases, they strongly support the notion of the rule of law. This conclusion is supported by, among other factors, Korean legal history, the current laws of Korea, survey results, constitutional review and cross-border finance.

---

31 See, generally, Chapter 3.
33 See Part IV.3.C of Chapter 3.
34 See, generally, Chapter 4.
35 See Part II.1 of Chapter 5.
(b) Findings made in respect of the deeply rooted legal culture of Korea may have significant practical applications in certain areas of legal practice, particularly given that one's view of the findings is likely to influence the way in which one carries out his or her legal practice. This point is illustrated in Chapters 4 and 5 on constitutional review and negotiations in cross-border financing transactions respectively. These examples in turn tend to support the argument in paragraph (a) above. Also, it broadens one's understanding of the role of Korean legal culture in the current globalisation process (see Part III.4 below).  

3. Outline of the Rest of this Chapter

Before moving on to discuss the concept of legal culture and the methodology for studying legal culture in Chapter 2, one must ascertain, as a starting point, what exactly is the conventional view about Korean legal culture. It is discussed in detail in the following Part II of this chapter. The broad conclusion is as follows: conventional views suggest that the deeply rooted legal culture of Korea is not consistent with the rule of law concept, with Confucianism seen as the main reason. This in turn implies that the deeply rooted legal culture of Korea is not consistent with many of the current official laws of Korea. This is because current official law largely supports the rule of law (discussed in Part II.5 below). The Constitution of Korea is a good example of such official law.

In all of these discussions, many of the central themes relate to the rule of law. Hence, the concept of the rule of law is briefly discussed in Part II.3 below. Confucianism, which is thought to contain ideas that oppose the rule of law, is discussed in Part II.4 below. The idea of globalisation, which also emerges as a common theme that connects many key ideas in this thesis, is also examined (see Part III.4 below). Finally, this chapter provides an outline of the hypotheses for the findings to be made in the other chapters in respect of the legal culture of Korea. The hypotheses may be tested throughout this thesis to evaluate the relationship between Korean legal culture, Confucianism and the rule of law.

II. CONVENTIONAL VIEWS, THE RULE OF LAW, CONFUCIANISM AND KOREAN LAWS SUPPORTING THE RULE OF LAW

1. Conventional Views on Korean Legal Culture

Not surprisingly, there is no definitive 'authority' on what constitutes the deeply rooted legal culture of Korea. Opinions on this matter vary; the quality and focus of the discussions are also diverse. But given the focus and scope of this thesis, it is appropriate to identify a wide-ranging set of views on Korean legal culture, views that perceive Korean legal culture and Confucianism as forming a kind of consensus in certain respects. Relevant writers include Choi Chongko, Hahn Pyong Choon, Yoon Dae Kyu, Chon Pong Dok, Chang Gyung

36 It also shows something of 'global legal culture'. For discussions on this concept, see Lawrence M. Friedman, 'Erewhon: The Coming of Global Legal Order' (2001) 37 Stan J Int'l L 354 and Part IV.3.D of Chapter 2.

37 For a discussion of the concept of official law and unofficial law, see Parts III.6.C and IV.1 of Chapter 2.

38 See, for example, Chongko Choi, Hankukpopinmun [Introduction to Korean Law] (Bak Young Sa, 1994).

39 See, for example, Pyong-Choon Hahn, The Korean Political Tradition and Law (Hollym, 1967); Pyong-Choon Hahn, Korean Jurisprudence, Politics and Culture (Yonsei University Press, 1986), and
Hak, Suh Don Gak, Im Hong-Geun, Yang Seung Doo, Hahn Chaihark, Kim Kyong Dong, Choi Daekwon, Michael C. Kalton, Cho Kuk, David I. Steinberg, Song Sang Hyun, Kim Chan Jin, and Julia Tonkovich, to name a few. An extensive review of materials both Korean (in respect of which those who are not fluent in Korean may have limited access) and English reveals that these writers seem to agree that the deeply rooted legal culture of Korea is not consistent with the rule of law concept. To be sure, some commentators take opposing views or doubt conventional views, but they are small in number. For present purposes, conventional views about Korean legal culture are summarised below under several different headings that represent various aspects of legal culture.

A. Attitudes towards Law

Some writers argue that traditional Korean political philosophy has been based on Confucian precepts, and that law and legal institutions have as a result been undervalued and despised


See, for example, Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990).

See, for example, Pong-Dok Chon, 'Chontong-Jok Sahoe Wa Popsasang [Traditional Korean Society and Legal Thought]' (1978) 19 No.1 Pophak 52 at 52-66.

For this and the next two writers, see, for example, Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, 'Discussion: Korean Legal Traditions' in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 212.

See, for example, Pyong-Choon Hahn & Seung-Doo Yang, 'The Attitudes of the Korean People Toward Law' in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 160.

See, for example, Chaihark Hahn, 'Constitutionalism, Confucian Civic Virtue, and Ritual Propriety' in Daniel A. Bell & Chaibong Hahn (eds), Confucianism for the Modern World (Cambridge University Press, 2003).

See, for example, Kyong Dong Kim, 'Understanding the Korean Mind and Behaviour' in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 116.

See, for example, Dae-Kwon Choi, Popsahweihak [Legal Sociology] (Seoul National University, 1989) at 63.

See, for example, Michael C. Kalton, 'Korean Ideas and Values' in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 100-101.

See, for example, Kuk Cho, 'Korean Criminal Law and Democratisation' in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 81.

See, for example, David I. Steinberg, 'The Republic of Korea: Pluralising Politics' in Larry Diamond, Juan J. Linz & Seymour Martin Lipset (eds), Politics in Developing Countries: Comparing Experiences with Democracy (Lynne Reiner, 1995) at 397.

See, for example, Sang-Hyun Song, 'A Survey on the Korean People's Attitude Towards Law' in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 138.


See, for example, Julia Tonkovich, 'Changes in South Korea's Legal Landscape: The Hermit Kingdom Broadens Access for International Law Firms' (2001) 31 Law & Pol'y Int'l Bus 571 at 580.

See, for example, Byung Ho Park, Hankookyeupop [Law of Korea] (Sechongdaewang Kinyeum Sayeuphwai, 1985) and William R. Shaw, 'Social and Intellectual Aspects of Traditional Korean Law, 1392-1910' in Chun, Shaw & Choi, (eds), Traditional Korean Legal Attitudes, Korea Research Monograph No.2 (Institute of East Asian Studies, University of California/Berkeley, 1980).

by Koreans. Many Koreans tend not to trust in law’s fairness, believing that it is often biased. They do not want to be involved with the law. This is because formalised rules and regulations are not considered desirable in, or compatible with, Confucian culture. There has been a traditional aversion to, and low expectations about, law. Law has been seen mainly and merely as a set of rules for punishment, or a device for enforcing predetermined Confucian norms of authority, one that benefits primarily the rulers, not the ruled. In such an environment, it is difficult for notions like judicial review or constitutional review to develop successfully.

Followers of Confucianism believe that a person should regulate his or her conduct not by fear of punishment but according to the Confucian code of propriety – known as li – which is based on human decency. So long as he or she lives by that code, a person need not be concerned with legal norms. Law is something that should be the concern of those unable to regulate their own conduct according to li. Certain commentators have argued that such an attitude towards law is deeply rooted and persists in Korea.

---

55 See generally Pyong-Choon Hahm, The Korean Political Tradition and Law (Hollym, 1967) and Chongko Choi, Hankukpopinmun [Introduction to Korean Law] (Bak Young Sa, 1994) at 3. To be sure, Confucianism does not necessarily entail that law should be undervalued and despised. For a discussion of Confucianism, see Part II.4 below.

56 Chongko Choi, Hankukpopinmun [Introduction to Korean Law] (Bak Young Sa, 1994) at 232.

57 Pyong-Choon Hahm & Seung-Doo Yang, ‘The Attitudes of the Korean People Toward Law’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 162. Other commentators have said: ‘Koreans still can’t realise that they must live with law.’ See Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, ‘Discussion: Korean Legal Traditions’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 212.


59 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 17.


61 Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 12. See also Alexis Dudden, Japan’s Colonisation of Korea: Discourse and Power (University of Hawaii Press, 2005). (Dudden describes how the Japanese used this argument to legitimise its colonisation of Korea.)

62 It has been said that li is a behavioural norm that operates by being internalised by the person, so that it becomes part of his or her entire being. See Chaihark Hahn, ‘Constitutionalism, Confucian Civic Virtue, and Ritual Propriety’ in Daniel A. Bell & Chaibong Hahn (eds), Confucianism for the Modern World (Cambridge University Press, 2003) at 43-45. Hahn Chaihark argues that li is closely related to the idea of disciplining oneself and returning to ritual propriety, and that on the political, or constitutional, side, li is concerned with the notion of restraining the government and of a regime’s legitimacy. For a discussion of the role of li as a norm that regulated the throne during the time of imperial China, see Howard J. Wechsler, Offerings of Jade and Silk: Ritual and Symbol in the Legitimation of the T’ang Dynasty (Yale University Press, 1985).

B. Religion and Law

During the period of the Chosun Dynasty, Confucianism became popular among the ruling class, and it consequently became the state religion. It eventually was used by the ruling class as a political tool for exerting harsh authoritarian control over the populace.64

As for the general populace, beliefs and practices were based on a mix of shamanism, Mahayana Buddhism and Taoism (the latter practiced as a folk religion but not as a system of philosophy). It is sometimes argued that, because of their religious beliefs, Koreans tend to have a 'formalistic morality' and non-rational and humanistic attitudes about law.65 Rationality has not been a feature of this culture.66 Koreans prefer to resort to humanity and sympathy rather than to law.67 As some commentators have put it, there has been an emphasis on internalised norms, rather than formal norms, as the primary tool of social regulation.68

C. Discretionary, Rather Than Rule-Based, Decision-Making

It has also been said that the rule of law has never been a positive ideal for Koreans.69 Rather, Korean officials tend to make formal decisions according to human discretion, ideally based on the Confucian li. The attitude is that there is no need to invoke law to lend legitimacy to the decisions of the state.70 Also, Korean judges do not adjudicate according to formal rules; instead they adjudicate with a considerable degree of discretion.71 The Korean approach to formal decision-making thus does not place much emphasis on 'rational rules'; rather, it gives considerable weight to the circumstances of each particular case. Law has not been rigorously separated from other value systems such as ethics, religion, or politics; Koreans have preferred to leave the boundary of the law ambiguous.72

---

64 Kyong Dong Kim, 'Understanding the Korean Mind and Behaviour' in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Su, 1996) at 116.
65 Ibid.
66 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 31.
67 Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, 'Discussion: Korean Legal Traditions' in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 212.
69 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 23.
70 Id at 18. However, it should be noted that even in the United States, where the rule of law is an ideal that guides fundamental aspects of people's lives, it may be the case, as one commentator has suggested, that the 'judges overwhelmingly follow their political preferences when the opportunities present itself'. See Frank K. Upham, 'Ideology, Experience, and the Rule of Law in Developing Societies', Papers Presented at the University of Michigan Law School Conference on Japanese Law (April 2001) at 15.
72 Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, 'Discussion: Korean Legal Traditions' in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 212.
D. Hierarchical Social Order

It has also been argued that the hierarchical structure (meaning a domination–subordination relationship) of Korean society has undermined the growth of law. This is because the distinctions of social status and official position and the force of social conventions preclude the possibility of predictability in judicial decision-making. Traditionally, the king was the symbolic head of every family; it was unthinkable to betray the king. What the king said was law; the notion of an intergovernmental check on the highest power was foreign to traditional Confucian thought. Nowadays, people tend to submit to authority without question, which is a result of the tradition of having an elaborate and a carefully defined hierarchical order in society. Koreans would generally not defy the wishes of an official, even when they know that the official is acting wrongly or illegally. The Korean culture is one of authoritarianism, extensive bureaucratic discretion and elitism. Such a culture clearly contrasts with liberal assumptions of formal equality.

E. Collectivism, Respect and Honour

It has been argued that Koreans tend to think that one exists not as an atomically isolated individual unit, but as a member of a transgenerational family, which is in turn a link in the chain of life that stretches both into the past and the future. Thus, Koreans lack personalistic traits of legal culture, failing to appreciate the inherent rights of individuals. Instead, special relationships and connections between individuals are thought to be crucial.

While the Western view of human dignity is that it is something inherent in each individual, the Confucian approach looks upon it as something arrived at by the quality of one’s relationship with other human beings. In Confucian cultures people are in fact not

---

74 Ibid.
75 Ibid.
77 Dae-Kwon Choi, *Popsahweilhak* [Legal Sociology] (Seoul National University, 1989) at 63.
80 Id at 6.
84 Michael C. Kalton, ‘Korean Ideas and Values’ in Sang-Hyun Song (ed), *Korean Law in the Global Economy* (Bak Young Sa, 1996) at 105. It has been argued that this kind of culture creates ‘families’ and ‘emotionalism’. Further, regional solidarity and school ties become important. See, Dae Kyu Yoon, *Law and Political Authority in South Korea* (Kyungnam University Press, 1990) at 29.
85 Id at 31. Some writers suggest that these attitudes arise largely out of to Korea’s tradition of agricultural and clan society, where people had to work closely together. See, for example, Young Woo Han, *Dashichateun Wooriyeoksa* [Korean History Revisited] (Kyoungsewon, 2005) at 24.
equal in dignity, and accordingly not all people deserve the same degree of respect and honour.  

*Yeui* (禮儀) (decorum or manner) emphasises the rules of proper and polite behaviour. It may be seen as a necessary element in observing the Confucian doctrine of the ‘Five Relationships’. Koreans have traditionally regarded *yeui* as being of great importance, such that the Chinese referred to Korea as the ‘dongbang yeui jiguk’ (the Eastern country of yeui). An implication of *yeui* is that Korea’s indigenous legal culture does not call for strong protection of individual rights. *Yeui*, instead, forms part of indigenous legal culture. Given the collectivist nature of Korean society, asserting personalistic rights is not considered acceptable, particularly if to do so would be inconsistent with *yeui*.

**F. Women**

It has been argued that in Korea women generally have enjoyed a lower social status than men, and that the law has tended to discriminate against women. Under Confucian doctrines, the role and the status of women tend to be treated as inferior to those of men – a notable example being the Confucian doctrine of the ‘Three Followings’. Gender inequality and bias is deeply rooted in Korean culture.

**G. Justice**

As suggested above, law in Confucian society was a set of secular norms designed to serve purely political purposes, making notions such as the public good and justice inconceivable.

---

88 See Part II.4 below on the discussion of this teaching, which is related to the doctrine of *samgang oryun*.
89 *Yeui* has been described in the following terms: ‘In Korea many interactions of daily life are graced by the presence of little rituals which express something: whether it is the inevitable shuffle in a doorway as companions try to get one another to go first, the proffering, refusal, and repeated urging on a friend or guests of a cigarette or dish of food, the careful tending to and refilling of a companion’s wine glass, or simply the manner of handing something to someone, *yeui* provides innumerable ways of smoothing relationships and making them pleasant by small indications of goodwill, respect, or friendship. By contrast, American informality may well be crude and frustrating to one who is accustomed to having these means of expression at his disposal’. See Michael C. Kalton, ‘Korean Ideas and Values’ in Sang-Hyun Song (ed), *Korean Law in the Global Economy* (Bak Young Sa, 1996) at 102-103.
91 The Confucian doctrine of the ‘Three-Followings’ stipulates that when a woman is young, she should follow her father; when she marries, she should follow her husband; when her husband is dead, she should follow her eldest son. See Part II.4 below.
It has been argued that this Confucian conception of the law has shaped Korean legal culture.\(^{93}\) The view has been, as already stated, that law exists not to protect individual rights and freedom but to serve as a political tool,\(^{94}\) with the state as the single moral authority, dispenser of justice and final arbiter of justice.\(^{95}\) In such a context, order is inevitably preferred over freedom.\(^{96}\)

H. Aversion to Litigation

It has been argued that one of the features relating to the lack of, or low level of, legal consciousness on the part of Koreans is that they have a preference for mediation and compromise over adjudication.\(^{97}\) The real purpose of dispute resolution in Korea is not to resolve disputes but to resolve relationships.\(^{98}\)

This may be due to the fact that the black-and-white designation of one party to a dispute as right and the opponent as wrong is seen as repugnant to the fundamental value given to harmony. Adversariness would interrupt the swift restoration of broken social harmony and thereby contravene Confucian ideals.\(^{99}\) Many Koreans in fact find the suggestion of going to court to resolve disputes insulting.\(^{100}\) They thus favour social norms as the primary regulatory mode.\(^{101}\)

I. Lack of the Concept of Rights

It has been argued that there was no real concept of rights in the traditional Korean society, except perhaps for certain implicit rights.\(^{102}\) Protection of property and commercial rights of

---


\(^{94}\) Chongko Choi, *Hankukpopinnun* [Introduction to Korean Law] (Bak Young Sa, 1994) at 240 and Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, 'Discussion: Korean Legal Traditions' in Shin-Yong Chun (ed), *Legal System of Korea* (International Cultural Foundation, 1975) at 204.


\(^{97}\) Julia Tonkovich, 'Changes in South Korea's Legal Landscape: The Hermit Kingdom Broadens Access for International Law Firms' (2001) 31 *Law & Pol'y Int'l Bus* 571 at 580. But similar arguments/suggestions have been made in respect of the 'Western' approach to litigation as well. See Part III.8.D.ii of Chapter 3.


\(^{99}\) Chongko Choi, *Hankukpopinnun* [Introduction to Korean Law] (Bak Young Sa, 1994) at 234.


ordinary people was not in the least considered. As such, it has been said that Koreans are very timid in asserting legal rights of ownership.

2. Conventional Views and the Rule of Law

It may be observed from the preceding discussion that the common assumption about Korean legal culture is that it is largely based on Confucian ideas. Examination of the conventional views indicates that there is a fundamental disagreement between the alleged legal culture of Korea on the one hand and the rule of law concept on the other. Koreans have a legal culture that (a) supports gender bias, (b) regards law as mainly a political tool and (c) gives priority to individual discretions over objective rules — it all points to the rule of law occupying a very small place in the legal culture of Korea.

Writers have suggested that this lack of respect for law presents an enormous barrier to social change and advancement in Korea — and that there must be a 'renewed determination among the Korean people to promote a law-abiding spirit'. According to Hahm Pyong Choon, the rule of law concept conflicts with the cultural values and historical traditions of Korea, and the prospect for the rule of law in Korea is not bright. Yoon Dae Kyu also attributes the apparent failure of the rule of law during the post–World War II period largely to the traditional legal culture of Korea, arguing that Korea never knew concepts such as democracy and the rule of law. Hence, rather than the rule of law, more appropriate for Korea might be 'rule by man' or 'rule by law'.

Assuming that these views are accurate, what are the implications of such a legal culture? One implication is that, as Kim Chan Chin argues, Koreans must somehow work

---

103 Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, ‘Discussion: Korean Legal Traditions’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 204.
105 As already mentioned, some argue that among the Asian countries with Confucian heritages, Korea has been the one most influenced by Confucianism. See, for example, Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at viii and Byung-Nak Song, The Rise of the Korean Economy (Oxford University Press, 1997) Chapter 3.
108 Pyong-Choon Hahm, The Korean Political Tradition and Law (Hollym, 1971) at 205-217. See also Jong Hyo Chung, Yeoksokeummin [Civil Law in History] (Koyukkwhakasa, 1995) at 15.
110 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at vii.
111 Id at 3.
112 Id at 20.
towards changing their legal culture, so that the rule of law is achieved. But given the fact that such legal culture is (allegedly) ‘deeply rooted’ in Korea, this may not be easily achievable. Others suggest that even though Korean legal culture may conflict with the rule of law, the Confucian tradition may be of help, having in fact assisted Korea to achieve economic growth. But economic growth is not the same as achieving the rule of law, even though they may be related.

Other commentators suggest changing official laws to suit Korea’s Confucianism-based legal culture. Perhaps their view (although it is not always explicitly mentioned) is that one should not have a narrow view of the rule of law. That is, the rule of law is, in one sense, achieved if there is an ‘inner acceptance’ by people of the official law. The implication is that if the legal culture tends to contradict the official law, then the official law should be modified to fit in with legal culture. This, so the argument goes, results in an ‘inner acceptance’ referred to above, with the rule of law, somewhat paradoxically, being achieved. Proponents of this approach have included Hahn Pyong Choon and Yang Seung Doo. The suggestion has been that ‘Confucian legislation’ be enacted to suit Korea’s legal culture. But what does this exactly entail? Does it mean that official laws should be modified to support, for example, ideas such as the following: (a) state officials should be given a large discretion to make formal decisions vis-à-vis having the power vested in courts or governed by legal procedures; (b) in principle, laws that allow discrimination based on sex and status should, if necessary, be permitted; (c) laws or legal reasoning do not need to be ‘just’ or reasonable; it is permissible that they are used merely as political tools; and (e) it is more important for the law to protect harmony between people than individual’s rights?

Although it is probably unrealistic to think that such changes to official laws could be attempted in Korea today, a logical argument based on the conventional views could result in the above scenarios (although, to be sure, there are those who have made ‘less radical’ suggestions than the above). Further, there are precedents in Korea for such scenarios occurring, with drivers of change including the ruling class of the early Chosun Dynasty, and

---


118 For a discussion of the concept of ‘Confucian legislation’, see Part II.3 G.iii of Chapter 3.

119 See Pyong-Choon Hahn & Seung-Doo Yang, ‘The Attitudes of the Korean People Toward Law’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 184 (suggesting that ‘[w]e must take steps to have a law that may be less scientific, less modern and less rational, but closer to the jural values of the people... We may even have to make the punishment for adultery more severe than it is now. We may have to punish the female involved in adultery more heavily than her partner.’).

120 For example, it has been suggested that both political leaders and citizens should receive more education based on the Confucian li – particularly political leaders. See Chaibhark Hahn, ‘Constitutionalism, Confucian Civic Virtue, and Ritual Propriety’ in Daniel A. Bell & Chaibong Hahn (eds), Confucianism for the Modern World (Cambridge University Press, 2003) at 31-53. Hahn suggests (at 52) that Korean political leaders should be disciplined by ‘being lectured to all the time and by being under constant surveillance’ in order to internalise in them the notion of Confucian li.”
the later Presidents Rhee Syngman, Park Chung Hee and Chun Doo Hwan (see Part IV.3.B of Chapter 3). As it is easy to appreciate, the consequences of enforcing the conventional views may be quite serious in practice - or, as Veronica Taylor suggests, it may turn out to be 'sentimental nonsense' 121

In any event, current official law in Korea is fundamentally different to the types of changes referred to above. They would be almost impossible to effect in practice. Even a brief discussion of some of the current official laws of Korea (see Part II.5 below) reveals that they now strongly support the rule of law; there can be no going back to the times of Confucian regulation. But before considering Korean official law further, it is necessary to define, or describe, what constitutes the rule of law.

3. The Concept of the Rule of Law

A. The Rule of Law - A Contestable Concept

To examine the relationship between Korean legal culture, the rule of law and Korean official law, which supports the rule of law, it is important to discuss first what the concept of the rule of law entails. It is particularly important to know what the rule of law means if one is to ascertain whether or not Korean legal culture is consistent with the rule of law concept.

When writers suggest that Korean legal culture conflicts with the concept of the rule of law,122 they may be referring to the concept of the rule of law in loose terms or in slightly different terms as among each other. This is because the rule of law may be seen as an 'essentially contestable concept' and different meanings can be given to it depending on the context of its usage.123 Hence, it is probably not practical or possible to find out what those writers exactly meant when they were referring to the concept of the rule of law. The better approach, it seems, would be to start from the other end of the issue. That is, one needs to define or describe the rule of law in the first place, and then examine whether Korean legal culture fundamentally conflicts with the rule of law concept, without attempting to find out

122 See, for example, Pyong-Choon Hahn, The Korean Political Tradition and Law (Hollym, 1967) at 205-217; Dae Kyu Yoon, Law and Political Authority in South Korea (Kyoungnam University Press, 1990) at 3; Chan Jin Kim, 'Korean Attitudes Towards Law' (2000) Pac Rim L & Pol'y I.
what the writers taking the conventional view meant when they were referring to the rule of law.

What is the rule of law concept? One of its earliest formulations comes from A. V. Dicey, who held that the rule of law means that (a) no man or woman is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land; (b) all are equal before the law, no one being above it whatever his or her rank or condition; and (c) the general principles of the constitution arise from judicial decisions. Since then, there have been continuous use of and reference to the concept of the rule of law. It is now a global phenomenon (see Part III.4 below).

B. Elements of the Rule of Law

The concept of the rule of law being contestable, there are conflicting views on what constitutes the rule of law. Such views include the idea that the rule of law concept may be insufficient to ensure good governance or democracy, and may even be of little relevance to the latter. Still others argue that the rule of law may not be a principle of universal importance regardless of cultural values even though the concept is sometimes invoked to...

---


126 See, for example, Thomas M. Frank, 'Democracy, Legitimacy and the Rule of Law: Linkages' *NYU Law School, Public Law and Legal Theory Working Paper* No. 2 (1999) at 17. Frank argues that the concept of 'good governance' rather than the rule of law concept is becoming increasingly recognised at the international level. But he seems to be using a narrow definition of the rule of law. For a discussion of the rule of law in the 'narrow sense', see Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' *Cardozo Law School, Public Law Research Paper* No. 36 (2001) at 12-13. Rosenfeld argues (at 13) that 'for the rule of law to measure up to the requirements of a legitimate constitutional democracy, it must be more than the rule of law in the narrow sense'.

127 Id at 3. Rosenfeld argues (at 3) that 'constitutionalism and democracy may not always be in harmony, with the consequence that the rule of law may clash or come in tension with democracy'.

create ‘civilized nations.’ It is beyond the scope of this thesis to discuss and examine in detail these diverse arguments. For present purposes, it suffices to summarise some of the main elements of what is commonly understood as the rule of law, as follows.\textsuperscript{130}

\textbf{i. Generality}

Roughly, there must be rules, cognisable separately from (and broader than) specific cases, such that the rules can be applied to specific cases, or specific cases can be seen to fall under or lie within them.\textsuperscript{131}

\textbf{ii. Prospectivity}

The rules must exist prior in time to the actions being judged by them.\textsuperscript{132}

\textbf{iii. Capacity}

There must be capacity of legal rules, standards or principles to guide people in the conduct of their affairs – people must be able to understand the law and comply with it.\textsuperscript{133}

\begin{flushright}
\end{flushright}

See, for example, Sally Merry’s discussion of Hawai‘i’s decision to adopt Anglo-American laws to create a ‘civilized nation.’ She argues that law is an ‘ideological cornerstone of the civilizing process.’ See Sally E. Merry, Colonizing Hawai‘i: the Cultural Power of Law (Princeton University Press, 2000) at 4 and 8.

\begin{flushright}
Friedman says that ‘there are many definitions of the “rule of law”, but they have certain traits in common.’ See Lawrence M. Friedman, ‘Frontiers: National and Transnational Order’ in Karl-Heinz Ladeur (ed), Public Governance in the Age of Globalisation (Ashgate, 2004) at 48. The elements of the rule of law set out below are loosely defined for present purposes. They include both procedural and substantive aspects of the rule of law, and they concern both predictability and fairness. But there are differing views as to what should constitute the rule of law. For a discussion of such differing views, see Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ Cardozo Law School, Public Law Research Paper No. 36 (2001) at 5, and Gerald L. Neuman, ‘The U.S. Constitutional Conception of the Rule of Law and the Rechtsstaatsprinzip of the Grundgesetz’ Columbia Law School, Public Law and Legal Theory Working Paper No. 5 (1999) at 2.
\end{flushright}

\begin{flushright}
For a discussion of the elements of the rule of law in these subheadings, including the concept of generality, see generally Lon L. Fuller, The Morality of Law (Yale University Press, 1964) Chapter 2. For the concept of generality of law, see also Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) 69 Boston University Law Review 781 at 785. Basically two kinds of issues may be relevant in respect of the concept of generality of rules. Firstly, rules can be over-inclusive or under-inclusive with respect to subjects. Secondly, rules may be too general or vague to guide people’s conduct. For a detailed discussion of the concept of ‘norm-subjects’ (relevant to the first kind of issue) and ‘norm-act’ (relevant to the second kind of issue), see Andrei Marmor, ‘The Rule of Law and Its Limits’ (2003) USC Law and Public Policy Research Paper No. 03-16 at 11-18 and G. H. Von Wright, Norm and Action (Routledge, 1963).
\end{flushright}

\begin{flushright}
Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) 69 Boston University Law Review 781 at 785. But retroactive laws are sometimes justified to correct a mistake created by the law itself. See Lon L. Fuller, The Morality of Law (Yale University Press, 1964) at 53-54. For judicial decisions that overturn ‘settled laws’, Dworkin makes a distinction between judicial decisions based on ‘policy’ and those based on ‘principle’. He argues that unlike the former, the latter would not violate the requirement to avoid retroactivity. See Ronald Dworkin Taking Rights Seriously (Duckworth, 1977) at 82-85.
\end{flushright}

\begin{flushright}
Richard H. Jr. Fallon, ‘‘The Rule of Law’ as a Concept in Constitutional Discourse’ (1997) Colum L Rev 1 at 8. Also, on the one hand, compliance with the law must not be morally too costly, and on the other hand, the standards of conduct required by the law must not be unrealistically too high. See
\end{flushright}
iv. Efficiency, Conformability and Clarity

The law must be efficient, such that it should actually guide people, at least for the most part. People should be ruled by the law and obey it. Also, the law must be clear and understandable by those who are expected to obey it. The addressees must be able to conform their behaviour to the rules.

v. Stability

The law must be reasonably stable to facilitate planning and coordinated action over time.

vi. Supreme Authority

The legal authority must be supreme, such that the law should rule officials, including judges, as well as ordinary citizens. Government in all its actions is bound by rules fixed and announced beforehand.

vii. Impartiality, Natural Justice and Democracy

There must be instrumentalities of impartial justice – courts should be available to enforce the law and should employ fair procedures. There must be structures for achieving truths and correct enforcements - for example, trials, hearings, rules of evidence and due process. It has been said that the rule of law implies the principle of equality before the law. Also, it


F. A. Hayek, The Road to Serfdom (University of Chicago Press, 1944) at 72.


Wolfgang Friedmann, Legal Theory (Stevens & Sons, 5th ed, 1967) at 422.
has been said that an ideological or political conception of the rule of law entails the idea of democracy.\textsuperscript{144}

\textit{viii. Notice or Publicity}

Notice or publicity of the law constitutes an important element of the rule of law. In other words, those who are expected to obey the rules must be able to find out what the rules are.\textsuperscript{145}

\textit{ix. Non-Contradictoriness}

The rules must not contradict each other, such that those who are expected to obey the rules must not simultaneously be commanded to do both A and not-A.\textsuperscript{146}

\textit{x. Congruence}

The explicitly promulgated rules must correspond with rules inferable from patterns of enforcement by functionaries (for example, courts and police).\textsuperscript{147}

\textit{xi. Property Rights}

The law must recognise individuals' rights to exclude others from interfering with one's acquisition, possession, use and transfer of limited resources.\textsuperscript{148} The rule of law recognises the rights to economic freedom.\textsuperscript{149}

\textsuperscript{144} Wolfgang Friedmann, \textit{Law and Social Change in Contemporary Britain} (Stevens & Sons, 1951) at 282. For a discussion of the relationship between democracy, legitimacy and the rule of law, see Thomas M. Frank, 'Democracy, Legitimacy and the Rule of Law: Linkages' \textit{NYU Law School, Public Law and Legal Theory Working Paper} No. 2 (1999). But the German Rechtsstaat (as compared to the Anglo-American 'rule of law') may be compatible with a government that is monarchic as with one that is democratic. See Donald Kromer, \textit{The Constitutional Jurisprudence of the Federal Republic of Germany} (Duke University Press, 1997) at 36. Rosenberg argues that, to become legitimate, the rule of law should be democratically accountable. See Michel Rosenberg, 'The Rule of Law and the Legitimacy of Constitutional Democracy' \textit{Cardozo Law School, Public Law Research Paper} No. 36 (2001) at 13.

\textsuperscript{145} Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 \textit{Boston University Law Review} 781 at 785. This aspect of the rule of law supports the need for public scrutiny, open deliberation and critical appraisal of the law by the people, which are critical values over and beyond its role in securing the normative efficiency of the law. See also Andrei Marmor, 'The Rule of Law and Its Limits' \textit{USC Law and Public Policy Research Paper} No. 03-16 (2003) at 18-24.

\textsuperscript{146} Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 \textit{Boston University Law Review} 781 at 785. As well as such a direct inconsistency in the law, pragmatic inconsistency of the law may be more common. For example, pragmatic inconsistency would occur if different laws promote conflicting policies or aims between each other. See also Joseph Raz, \textit{The Authority of Law: Essays on Law and Morality} (Oxford University Press, 1979) at 201.

\textsuperscript{147} Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 \textit{Boston University Law Review} 781 at 785.

\textsuperscript{148} O. Lee Reed, 'Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study' (2001) 38 \textit{Am Bus L J} 441 at 451. See also, generally, Douglas C. North, \textit{Institutions, Institutional Change and Economic Performance} (Cambridge University Press, 1990). Ohnesorge says that the 'property rights-rule of law' branch can be divided into at least two separate strands. That is, the first strand focuses on property rights for their role in the functioning of a market economy, whereas the second strand focuses on the effective enforcement of statutory law creating and protecting more particular economic rights, such as statutes on intellectual property or competition law. See John K.M. Ohnesorge, 'The Rule of Law, Economic Development, and the Developmental States of
The above list of what may constitute the rule of law is not exhaustive, but it gives a fair idea of the meaning of the rule of law. Basically, it is the idea that people ought to be governed by law. It requires political authorities to rule by law, and the law must be such that it can actually guide human conduct.\(^{150}\) As may be seen, the concept of the rule of law stands in sharp contrast against the concept of rule by men.\(^{151}\) Under the Western approach to the rule of law, there is, it has been argued, a fundamental distrust, a refusal to accept that human nature can rule justly in the place of the law.\(^{152}\) On the other hand the Confucian approach, it is argued, places human beings at the centre of all endeavours, and in doing so emphasises just rule, in observance of various Confucian teachings. The next section sets out a brief discussion of Confucianism.

4. Confucianism

Writers frequently refer to the concept of Confucianism, particularly when discussing aspects of Korean culture, but without providing a clear definition of Confucianism.\(^{153}\) Partly this is because it is difficult to define Confucianism. There is very little agreement about what Confucianism means.\(^{154}\) Some commentators even question the usefulness of ‘Confucianism’ as a unifying category.\(^{155}\)

Nevertheless, it may be possible to trace aspects of Confucianism that are particularly relevant for this thesis. The part of Confucianism that is most relevant to the Chosun Dynasty and Korea is so-called ‘Neo-Confucianism’, in respect of which Chu Hsi (1130-1200) is generally regarded as the great synthesiser. Neo-Confucianism was a Confucian revivalism that took place in China during the Song Dynasty (1127-1279).\(^{156}\) In this thesis,

Northeast Asia’ in Christoph Antons (ed), Law and Development in East and Southeast Asia (RoutledgeCurzon, 2003) at 94.


150 Joseph Raz, The Authority of Law: Essays on Law and Morality (Oxford University Press, 1979) at 212-214. But as Raz points out, this is not literally true because people are governed by human beings, and not just by law.


152 Aristotle, The Politics (translated and with an introduction by T. A. Sinclair) (Penguin, 1962) at 139. Hence, it has been said that the rule of law is ‘an unqualified human good’. See E. P. Thompson, Whigs and Hunters (Allen Lane, 1975) at 266.

153 Such writers often simply assume the meaning of Confucianism by selecting and hypostatizing certain doctrines or practices that happened to be salient at a given point in time (usually in the late nineteenth century). See Chaihark Hahn, ‘Law, Culture, and the Politics of Confucianism’ (2003) 16 Columbia Journal of Asian Law 253 at 256-257.

154 Id at 268. Hahn (at 268) says that, therefore, it is almost a futile exercise to try to isolate or identify in abstract terms the so-called uniquely Confucian features of East Asian culture.

155 See, for example, Benjamin A. Elman, John B. Duncan & Herman Ooms ‘Introduction’ in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 20.

156 Chaihark Hahn, ‘Law, Culture, and the Politics of Confucianism’ (2003) 16 Columbia Journal of Asian Law 253 at 280. Although Chu Hsi’s views were temporarily banned during his own lifetime, his commentaries on the Confucian classics were ultimately given state sanction, when they were
the terms 'Confucianism' and 'Neo-Confucianism' will be used interchangeably when referring to Korea's Confucianism. The use of these two terms as separate concepts has been criticised due to their lack of historical specificity. Further, today's understanding of Confucianism (which is sometimes referred to as 'New Confucianism') may be different from these two concepts altogether.

Neo-Confucianism provided a simple, practical ethical concept of Confucianism with a metaphysical backing that amounted almost to a religion. Confucian virtues and relationships were seen not merely as being good for pragmatic reasons, because they worked, but as manifestations of the nature of the universe itself. The changeless hierarchical society governed by a bureaucracy with a monarch at the top that Confucius had envisioned thus came to be seen as ordained by the very nature of reality. In the sixteenth century, the most innovative Confucian philosophy in the Chu Hsi tradition was being written in Korea by scholars such as Yi T'oegye (1501-1570) and Yi Yulgok (1536-1584).

Applying theories developed by scholars such as Yi T'oegye and Yi Yulgok, the Chosun Dynasty's Neo-Confucianism is said to have had two objects: 'the reverence for and cultivation of man's [and women's] nature' and 'the investigation of truth'. An essential element of the Neo-Confucian idea that was at work during the Chosun Dynasty was the doctrine of the three cardinal relationships (samgang). This doctrine provided human society with a fundamental and unchangeable structure: the relationship between ruler and subject, father and son, and husband and wife. These three relationships were reinforced by five

proclaimed as the basis for the civil service examination. Also, his interpretations became the basis of the orthodoxy for later dynasties in China.

See, for example, Benjamin A. Elman, "Rethinking "Confucianism" and "Neo-Confucianism" in Modern Chinese History" in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 518-554.


Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 194.

Ibid.

Ibid.

It has been observed that, for Yi T'oegye, 'human nature, as principle, has been an active, not passive, thing capable of manifesting itself in self-cultivation. Unlike Chu Hsi who emphasised the rationalistic "investigation principles," [Yi] has a strong tendency for the self-realisation of principle. And his conviction was to take principle as the ultimate foundation of the Neo-Confucian learning for sagehood.' See Edward Y. J. Chung, The Korean Neo-Confucianism of Yi T'oegye and Yi Yulgok: A Reappraisal of the 'Four-Seven Thesis' and Its Practical Implications for Self-Cultivation (State University of New York Press, 1995) at 124.

Yi Yulgok's thesis, on the other hand, developed the concept of ch'eng, or sincerity. Thus, it has been noted that 'the concept of ch'eng also contains an imperative, for it states that only one particular relationship between humanity and the cosmos is in fact fully good and harmonious, and it pictures humanity and the cosmos as involved in a process of mutual self-perfection leading towards the establishment of this ideal relationship, its ch'eng, as the agency of the realisation'. See Young-Chan Ro, The Korean Neo-Confucianism of Yi Yulgok (State University of New York Press, 1989) at 94.


Ming-hong Choi, A Modern History of Korean Philosophy (Seong Moon Sa, 1980) at 15.

moral imperatives (oryun) that guided interpersonal relationships: righteousness between sovereign and subject; proper rapport between father and son; separation of functions between husband and wife; proper recognition of sequence of birth between elder and younger brothers; and faithfulness between friends.\(^{167}\)

These relationships were maintained by the need to observe proper ritual behaviour, which was considered to make people's minds firm and receptive to order.\(^{168}\) Law had to give way to the need to observe proper ritual behaviour to maintain the three cardinal human relationships according to the five moral imperatives. Therefore, law in the Chosun Dynasty intruded into various aspects of the relationships between the government and the people, father and son, and husband and wife to carry out a social reform based on Neo-Confucian ideas. For these reasons, modern intellectuals in China, Japan, Korea and Vietnam in the early twentieth century condemned Confucianism as a symbol of cultural backwardness and called for new cultural, economic, political and social solutions.\(^{169}\)

It should, however, be noted that the above conception of Confucianism may constitute a narrow view. This is because, for example, the commentaries of Chu Hsi (1130-1200) make it clear that he did not reject penal law in favour of the power of moral example. Rather, he regarded them as two complementary aspects of an integrated whole, where neither aspect could be unilaterally discarded.\(^{170}\) Also, the Confucian li may be interpreted as supporting the notions of open participation and transparency, which are not inconsistent with the rule of law concept.\(^{171}\) Hence, Neo-Confucianism in its strict sense was capable of co-existing with a legal system that was not Confucianism-oriented in its substance.

More recently, there has been a resurrection of Confucian teachings by 'New Confucians' who attribute Asia's economic success to Confucianism and find cultural dynamism in Confucianism,\(^{172}\) which arguably contains concepts such as trust, diligence, rationalism and education.\(^{173}\) Such debates indicate that Confucianism, whether in its original meaning or in its applications, is a complex and evolving concept.\(^{174}\) It has been said

---

\(^{167}\) Ibid.

\(^{168}\) Ibid.


\(^{171}\) Herbert Fingarette, Confucius: The Secular as Sacred (Harper and Row, 1971) at 16.

\(^{172}\) See, for example, Hao Chang, 'New Confucianism and the Intellectual Crisis of Contemporary China' in Charlotte Furth (ed), The Limits of Change: Essays on Conservative Alternatives in Republican China (Harvard University Press, 1976) at 276-302.

\(^{173}\) Benjamin A. Elman, John B. Duncan & Herman Ooms, 'Introduction' in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 14.

\(^{174}\) In the context of Korean culture, it has been suggested that the place of Confucianism in Korean culture is constantly being renegotiated and readjusted. See Chaihark Hahn, 'Law, Culture, and the Politics of Confucianism' (2003) 16 Columbia Journal of Asian Law 253 at 258. Hahn says that this is
that, rather than ‘monolithic paradigms’, ‘a picture of a complex arena of shifting fields of intellectual and popular culture’ based on Confucianism is emerging.\textsuperscript{175} Also, apparently common Confucian ideas may have differing validity depending on historically contingent social, economic, and political circumstances.\textsuperscript{176} Thus, for example, whereas the Chosun elites tried to reform society through Confucianism, the Japanese used Confucianism as a conservative social ideology to legitimate their rule during their occupation of Korea.\textsuperscript{177}

Therefore, it is perhaps inappropriate or inaccurate to draw a strict dichotomy between Confucianism or Neo-Confucianism on the one hand and the rule of law on the other because the essence of Confucianism or Neo-Confucianism is complex and cannot easily be reduced to certain fixed ideas.\textsuperscript{178} Nevertheless, even though the essence of Confucianism may be difficult to pin down, Confucianism as understood by those who hold conventional views about Korean legal culture is clear: it refers to those aspects of Confucianism that are thought to be inconsistent with the rule of law.\textsuperscript{179} Hence, the terms Confucianism and Neo-Confucianism are referred to in this thesis as rather loose terms, denoting certain Confucian ideas that tend to contradict, or are seen to conflict with, the rule of law concept.

5. Official Laws of Korea that Support the Rule of Law

Having discussed Confucianism and the rule of law, it is now appropriate to compare some of the current official laws of Korea. Many of these laws highlight the alleged ‘tension’ between Korean legal culture (as understood by holders of the conventional view) and the official law of Korea. This is because the current Korean law, being modelled after the European civil law, largely reflects the rule of law tradition of the West. Presently, Korea has a fairly developed and well functioning legal infrastructure.\textsuperscript{180} Confucianism, on the other hand, is not a main feature of it. Within the Constitution of Korea and other legislation, the rule of law is an essential feature. Examples of some of the relevant provisions of the laws are set out below:

---

\textsuperscript{175} Benjamin A. Elman, John B. Duncan & Herman Ooms ‘Introduction’ in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), \textit{Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam} (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 2.

\textsuperscript{176} Id at 3.

\textsuperscript{177} Id at 6.

\textsuperscript{178} Hence, Confucianism can be seen to hinder or support the rule of law and/or economic developments. See, for example, Tom Ginsburg, \textit{Judicial Review in New Democracies: Constitutional Courts in Asian Cases} (Cambridge University Press, 2003) at 14 and Cal Clark & K. C. Roy, \textit{Comparing Development Patterns in Asia} (Lynne Reiner, 1997) at 61-93.

\textsuperscript{179} See Part II.1 above.

\textsuperscript{180} Pistor says that such a ‘fairly developed and well functioning’ legal infrastructure is necessary for reforms in developing countries in the areas of accounting standards, securities legislation, insurance regulation and corporate governance. See Katharina Pistor, \textit{The Standardization of Law and Its Effect on Developing Economies} (2002) 50 \textit{Am J Comp L} 97 at 99-100.
(a) The Preamble, Article 1 and Articles 11(1) and (2) of the Constitution guarantee democracy and equality.\textsuperscript{181}

(b) Article 12 of the Constitution guarantees personal liberty.\textsuperscript{182}

(c) Article 13 of the Constitution prevents citizens from being punished under a rule that did not exist at the time of committing the wrong.\textsuperscript{183}

(d) Article 44 of the Administrative Procedures Act supports the requirement of notice and publicity of the law.\textsuperscript{184}

(e) Article 2(2) of the Civil Petitions Treatment Act allows petitions to be brought by any individual who alleges that an administrative act infringes his or her rights or provides 'inconvenience and burden' to citizens.\textsuperscript{185}

(f) Article 23(1) of the Constitution guarantees the right to own and transfer private property.\textsuperscript{186}

\textsuperscript{181} The Preamble of the Constitution states that the purpose of the Constitution is, among other things, to strengthen the basic free and democratic order of the country. Article 1 also states: 'The Republic of Korea shall be a democratic republic'. Thus, the idea of democracy, which is embodied in the concept of the rule of law, is regarded as a fundamental value in Korea. Articles 11(1) and (2) of the Constitution state: 'All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status. No privileged caste shall be recognised or ever established in any form.' Hence, the Constitution clearly upholds the rule of law ideal of equality before the law. Egalitarianism is guaranteed by the Constitution. Such official law is, on the other hand, in direct conflict with the alleged legal culture of Korea that allows a hierarchical and discriminatory treatment of different people based on sex and social status.

\textsuperscript{182} Article 12 of the Constitution states: 'All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by the Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labour except as provided by the Act and through lawful procedures...'. This provision contains elements of the rule of law that Dicey himself suggested discussed in Part II.3 above. It also guarantees the supreme authority of the law as it treats the law as being the final guarantor of a citizen's liberty. Such official law of Korea is in direct conflict with the alleged legal culture of Korea that suggests that the Koreans lack respect for the law.

\textsuperscript{183} Hence, the rule of law concept of the prospectivity of the law discussed in Part II.3.B.ii above is being upheld.

\textsuperscript{184} Act No. 5421 (31 December 1996). This provision requires administrative agencies in Korea to announce in advance proposed legislation that affects the rights and duties of citizens or affecting the daily lives of citizens, and it allows public comment on the proposed legislation. This conforms with the rule of law concept that requires notice and publicity of the law so that citizens can know the law that they must obey. To a certain extent, this also contributes to the requirements of the rule of law relating to congruence, efficiency, stability and the egalitarian nature of the law, because the public input will be taken into account in enacting new laws.

\textsuperscript{185} Act No. 5368 (22 August 1997). This law upholds the rule of law concept relating to impartiality of the law and natural justice, and it is in a direct conflict with the alleged legal culture of Korea that upholds the rule of men concept. This law also recognises the personalistic nature of the law (as opposed to the alleged collectivistic nature of the legal culture of Korea) by emphasising the role of the law to protect individual rights, which cannot be infringed upon by improper exercise of the discretion of government officials.

\textsuperscript{186} Article 23(1) of the Constitution states that '[t]he right of property of all citizens shall be guaranteed'. Hence, the rule of law that requires the law to recognise the rights relating to the ownership and transfer of private property is being upheld.
A more detailed discussion of the current official law of Korea that further support the rule of law is set out in Part IV.2.C of Chapter 3. What is clear from this discussion is that current Korean law strongly supports the rule of law. Hence, there is a major conflict between the alleged deeply rooted Korean legal culture (as suggested by the conventional view) and Korean law today. Or, is there really such a conflict?

The current legal cultural climate in Korea suggests that such a conflict, by and large, cannot be easily seen. Currently, the rule of law is being rigorously pursued by various bodies (both public and private) in Korea, including, notably, the Constitutional Court. Chaebol dominance (see Part II.1 of Chapter 5), which is seen as being based on a Confucian model, is disappearing. Also, human rights activists are strongly backed by the political regime. One leading law professor in Korea has even commented that the Confucian culture has either disappeared from or been rendered irrelevant in the modern-day Korea.

But what about the 'deeply rooted' legal culture of Korea? Has it changed? If it has, since when, and what caused such a dramatic change? If it could change so suddenly (because it was probably only since 1988 that this kind of 'new' culture became visible to the Korean public), was it really a 'deeply rooted' culture? Further, the disappearance of the old culture is one thing – but how did Korea acquire the new culture? Is the concept of modernisation sufficient to explain the dramatic change in fundamental attitudes?

Modernisation and globalisation must no doubt have contributed to the current attitudes of the Koreans. Still, it is argued in this thesis that the traditional legal culture of the country must also be relevant in explaining current Korean attitudes. The argument proposed is that there are several aspects of the indigenous legal culture of Korea that actually support the notion of the rule of law, and that these may also have contributed to Koreans’ current attitudes towards law. The next Part III summarises some of the key points of the remaining chapters in this regard.

III. LEGAL HISTORY, CONSTITUTIONAL REVIEW AND NEGOTIATIONS IN CROSS-BORDER FINANCE

1. Legal History

Chapter 3 is on Korean legal history. Since the aim is to determine whether there is any 'deeply rooted' Korean legal culture, the inquiry goes as far back as the ancient history of Korea.
Korea. Records on ancient Korean laws are scarce. But certain basic characteristics of the laws may be ascertained. The historical inquiry in Chapter 3 addresses the entire legal history of Korea, up to the present day.

To investigate Korea’s deeply rooted legal culture based on its legal history, one needs a methodology for studying legal culture. A methodology for studying the deeply rooted legal culture of Korea is developed in Chapter 2. In that chapter, firstly, the concept of legal culture is discussed in detail. It is argued that some aspects of legal culture may be more relevant for finding out the deeply rooted legal culture of a country than others. The basic argument is that ‘legal culture’ may include, firstly, an attitude that believes in (or rejects) the legal legitimacy of a rule, and secondly, an attitude that is indifferent to the legal legitimacy of a rule. Although both aspects of legal culture may be called legal culture, the former may have more relevance for the present purposes. For the sake of convenience, the former type of legal culture is called ‘normative legal culture’ and the latter type is called ‘non-normative legal culture’ (for an exact description of these terms, see Part III.4 of Chapter 2). It should be noted that in this thesis, the terms ‘normative legal culture’ and ‘deeply rooted legal culture’ are sometimes used interchangeably where the context is appropriate. This is so despite the fact that they are not exactly the same – the former being more of a technical term unique to this thesis, and the latter being a non-technical term. But the two terms are similar, as is explained in the following paragraphs.

When one considers the deeply rooted legal culture of a country, it may be helpful to consider the normative legal culture of the country. For example, suppose that people in a given society tend to discriminate women vis-à-vis men, culturally or traditionally. Is it necessarily accurate to say that such culture is part of their (deeply rooted) legal culture? They may discriminate against women because of, for example, religious or political reasons or pressures. And they may, at the same time, not believe that the law should discriminate women vis-à-vis men. Of course, this is not to say the culture of discriminating women does not matter. But what is important as a matter of legal culture are the people’s attitudes towards law – not their attitudes towards certain traditions or customs. Put simply, culture and legal culture may be different. Many of the writers representing the conventional view of Korean legal culture do not tend to make such distinctions.

Since the current inquiry is about finding out the ‘deeply rooted’ legal culture of Korea, the concept of normative legal culture also entails legal culture that had existed for a considerably long time. Applying this, Chapter 3 attempts to identify aspects of Korean legal culture in existence for a long time that reflect an attitude that believes in (or rejects) the legal legitimacy of particular law. Although the available records are scarce, many aspects of the laws prior to the Chosun Dynasty (1392-1910) contain remarkably egalitarian elements. For example, women and men had equal inheritance rights, and the rules about matrilocal marriage had afforded women strong financial independence. During the Chosun Dynasty, the elite sought to reform society through Confucian legislation. The idea was to spread

---

191 The concept of legal culture itself can be quite vague unless one defines the relevant scope and context of its use. Hence, the matter becomes one of setting parameters depending on the kinds of the definition of legal culture that one has selected. See II.3 of Chapter 2.

192 An obvious example arises in examining the length of time in which a particular legal culture has survived. But this thesis focuses on dynamism in legal culture, rather than concentrating on culture as a collection of static traits and customs. See Kevin Avruch, 'Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators' (2004) 9 Harv Negotiation LR 391 at 393.
Confucianism as the national religion and ideology. But there had been considerable resistance against such legislation, and it is doubtful whether it ever gained the inner acceptance of the people.

Despite the existence of the Confucian legislation, many remaining laws in the Chosun Dynasty were consistent with the rule of law concept; the Confucian legislation could not be accepted so suddenly and in its entirety. Take, for example, the ‘Principle of Respect for the Royal Ancestor’s Constitution’ of the Chosun Dynasty. Under this principle, old laws had to be respected and could not be amended unless they were irrational or contradictory in some way. Even the king could not amend the law, and so the principal acted as an instrument of checks-and-balance between the king and the high offices of government. Such laws reflect aspects of Korea’s ‘indigenous legal culture’. It should be noted that the term ‘indigenous legal culture’ is used in this thesis to contrast ‘modern legal culture’. These terms are not strict technical terms (like ‘normative legal culture’), and they are used to discuss the past and the present dimensions of Korean legal culture. The relationship between ‘indigenous legal culture’, ‘modern legal culture’ and ‘normative legal culture’ is examined in Part IV.3.D of Chapter 2.

It must be stressed here that such historical evidence is not new nor really subject to controversy. Authoritative materials (both in Korean and English) on Korean general and legal history all contain ample discussion on the historical evidence. These include the works of Park Byung Ho, William Shaw, Han Young Woo, Carter J. Eckert (and co-authors), Han Woo Keun and Martina Deuchler. Surprisingly, those who take the conventional view of Korean legal culture rarely refer to these sources in coming to their conclusions about Korean legal culture. They often tend to focus narrowly on Confucian traditions applied in relation in various social issues, and make rather abstract connections between them. This is an unsatisfactory way of ascertaining the deeply rooted legal culture.

---

193 For a discussion on this principle, see Part III.2 of Chapter 3.
196 Young Woo Han, Dashiachateun Wooriyuksa [Korean History Revisited] (Kyungsewon, 2005); Hankuksa Teukangpyunchanweonhwewha [Committee for Preparing Special Lectures on Korean History], Hankuksa Teukang [Special Lectures on Korean History] (Seoul National University, 2005).
of Korea. While legal history is not the same as deeply rooted legal culture, there is an inevitable connection between the two, and the latter cannot be meaningfully examined without discussing the former. Further, the way in which history should be understood is not fixed either. As Lawrence Friedman and others have suggested, written history and its analysis are, to a large extent, subjective, and one's understanding of a particular legal culture and law will depend on his or her normative position and intellectual formation. This is particularly the case with Korean historiography, which remains ‘highly politicised and passionate.’

Thus, the legal history of Korea may be read in a different light now, in contrast to the old views that Confucianism overshadowed the Korean legal system. In other words, even though the legal history written by the above-mentioned writers (and others) was not unknown, it deserves a closer look now. It is submitted that it has a renewed significance in revealing the deeply rooted legal culture of Korea at a time when Confucianism or authoritarianism no longer presents a barrier to the rule of law. A discussion of the Korean legal history thus forms an important element of this thesis.

If one considers the historical evidence, it is not surprising to find that Confucianism is no longer (or ever had been) the main feature of the modern legal culture of Korea. A critical examination of the recent authoritarian regimes of Korea together with a brief look at some of the surveys on Korean legal culture, both in IV.3 of Chapter 3, reinforce this conclusion. The picture that emerges is that the Confucian legislation that was used to try to change the legal culture during the period of the Chosun Dynasty was an exception rather than the norm in the history of Korea. An undue focus on such Confucian elements of the law does not do justice to other aspects of Korean law and legal culture that have existed for a long time.

Moreover, one needs to remember that the conventional view that focuses on Confucianism may have practical effects on aspects of today's legal practices. This could, in turn, have a significant impact on various rights of Koreans. This is perhaps most visible in those Constitutional Court cases where the Court has tried to ascertain aspects of Korea's deeply rooted legal culture, which in turn will often shape the rule of law environment in Korea. For these reasons, Chapter 4 discusses the Constitutional Court and some of its decisions; the next section provides a preliminary discussion.

2. Constitutional Review

Whatever the 'deeply rooted' legal culture of Korea is, it was argued in Part II.5 above that the modern legal culture of Korea arguably supports the rule of law. The most visible evidence of this is probably the judicial review conducted by the Constitutional Court. The Constitutional Court was established in 1988, and since then, the Court has shown remarkable judicial activism. As at 30 April 2005, a total of 11,283 cases had been filed with the Court. The Court has heard and decided some landmark cases, including the

203 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at viii. Buzo says that '[t]he history of Korea, whether written by traditionalists, nationalists, chauvinists, revisionists or Marxists, remains contentious, tendentious and as confused and complex as the Korean response to modernity itself'. (Ibid.)
impeachment proceedings of President Roh Moo Hyun, as well as other cases that have contributed to the achievement of the rule of law in Korea. The Court has had tremendous public and political support, and its judgments have been well respected and complied with. All this is significant evidence that the current legal culture of Korea supports the rule of law.

This conclusion in turn supports the assertions made earlier in respect of Korea's deeply rooted legal culture. The argument is that the recent success of the Court may (at least partly) be explained by a deeply rooted legal culture that supports the rule of law. A country's modern legal culture must constitute some of the best evidence of the country's deeply rooted legal culture. A close look at Korean history suggests that along with the 'Confucian legislation' of the Chosun Dynasty period, there had been several occasions in Korea where the spirit of the rule of law in Korea was suppressed. Notable events include the illegal constitutional amendments made by Presidents Rhee Syngman, Park Chung Hee and Chun Doo Hwan. These authoritarian regimes and their suppression of citizens' rights hindered the achievement of the rule of law in Korea. Once the authoritarian regimes disappeared, the country's deeply rooted legal culture could, at least theoretically, reappear.

The establishment of the Constitutional Court in 1988 was an event that especially signified the end of authoritarian regimes in Korea. The result has been, as already stated, a tremendous success in achieving and firmly establishing the rule of law in Korea. The continuous and consistent support of the public has contributed to the success of the Court; public support has created an environment in which the Court's authority cannot be challenged even by those in the highest office of government. The sheer number of cases filed with the Court and the level of public's interest in the Court's decisions indicate how Korean legal culture supports the rule of law. This aspect of Korean legal culture is consistent with the findings made in Chapter 3 in respect of Korea's deeply rooted legal culture.

The deeply rooted legal culture is relevant in other aspects of constitutional review as well. In the Special Law on the Establishment of a New Capital City Case, the Court said that other than the written provisions of the Constitution themselves, unwritten 'customary constitutional rules' may exist in Korea. The Court's formulation for ascertaining customary constitutional rules involves, put simply, examining whether the deeply rooted legal culture supports such rules. In ascertaining the deeply rooted legal culture of Korea, the Court in the above-mentioned case primarily examined the history of Korea and relevant public opinion. This case shows that the Court's findings on Korea's deeply rooted legal culture may directly affect its judgment. In fact, the case has the effect of equating certain aspects of Korea's deeply rooted legal culture to provisions of the Constitution themselves.

This is particularly significant for the future direction of Korea's legal system. If the Court adopts some of the conventional views on Korean legal culture, one cannot preclude the possibility of the revival of 'Confucian legislation'. For example, if the Court takes the view that discrimination based on social status is part of Korea's deeply rooted legal culture, then there may be no objection in upholding the validity of statutes that discriminate against

204 Modernisation may not necessarily mean an automatic change in legal culture, but modern legal culture reflects aspects of deeply rooted legal culture of a country. See, for example, Takao Tanase, 'The Empty Space of the Modern in Japanese Law Discourse' in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 190-193 (Tanase argues, among other things, that Western law was not a precondition of Japan's modernisation).

people based on social status. On the other hand, the opposite conclusion may be expected if the Court takes the view that discrimination based on social status distinction is not part of Korea's deeply rooted legal culture, albeit part of Korea's 'general culture'.

Clearly, the findings in respect of the deeply rooted legal culture, or more precisely, the 'normative legal culture' may be of practical relevance to some of the fundamental aspects of legal practice in Korea. Such practical relevance of the concept of normative legal culture is not limited to the 'domestic' situations. Its relevance extends to commercial fields in cross-border contexts. To demonstrate this, Chapter 5 discusses the relevance of the normative legal culture of Korea in the contexts of negotiations in cross-border financing transactions.

3. Negotiations in Cross-Border Financing Transactions

Other than Japan, Korea has had the highest growth in cross-border structured financing transactions in Asia in recent years.\(^{206}\) Not only has the volume of the transactions been high, but the deal structures have also become highly sophisticated,\(^{207}\) which largely reflects the ability of Korean parties to absorb complex legal structuring in such transactions. Although such transactions are mainly governed by either English or New York law, legal validity and enforceability under Korean law are of critical importance for international investors. International investors now tend to find that, other than certain political risks (mainly due to political tension between South and North Korea), the level of general legal risks associated with Korean deals is acceptable. Neither Korea's current legal system nor Korean business culture fall short of the expectations of international investors. Korean legal practice in cross-border deals indicates the existence of a stable, clear and workable legal system in Korea. All this is yet another indication of Korean legal culture supporting the rule of law – even in commercial fields.

But the main aim of Chapter 5 (and to some extent Chapter 4) is related to the second, rather than the first, of the two main arguments set out in Part I.2 above. That is, it attempts to show how the findings about Korean legal culture made in the earlier chapters may be applied in legal practice. Hence, the emphasis is on the more practical aspects of the study of legal culture, rather than its theoretical aspects. For this, the author has developed a 'model pre-negotiation inquiry', which may be used in negotiations in cross-border financing transactions involving Korean parties. This inquiry identifies cultural issues that may be relevant in transactions of this nature, and suggests how the findings about Korean legal culture may be applied to such issues to devise negotiation strategies. This inquiry illustrates that, depending on the parties' view about aspects of Korean legal culture, different negotiation strategies may result from them. To be sure, legal cultural issues are not the only relevant issues to take into account in such negotiations. But the point is that legal cultural issues often form a significant element in the negotiations, and depending on the circumstances of the transaction, they may have a critical influence on the deal.

The model pre-negotiation inquiry thus illustrates how the 'global legal culture' prevailing in cross-border financing deals may be shaped by aspects of deeply rooted local

\(^{206}\) See, for example, Rob Davis, 'International ABS Issuance on the Rise in Korea' Finance Asia (6 November 2001) from www.financeasia.com.

legal culture. The relevant 'global legal culture' is largely based on how Anglo-American law firms handle these transactions (see Part II.3.A of Chapter 5). But such global legal culture will be ‘modified’ by local legal cultures, thus ‘shaping’ the regional legal culture prevailing in these cross-border transactions. Figure 1-2 illustrates, firstly, the way in which Korea’s deeply rooted legal culture is ascertainable (partly) from Korea’s legal history (Chapter 3). Secondly, it shows how Korea’s deeply rooted legal culture influences both national and global legal culture (Chapters 4 and 5).

**Figure 1-2**

4. **Globalisation**

From the illustration shown in Figure 1-2 emerges another theme that is common to many of the key issues discussed in this thesis: globalisation. Globalisation is an ambiguous and complex concept. According to Lawrence Friedman, globalisation of culture forms the essence of globalisation. It is a powerful process that no nation state may escape from.

---

208 Jose E. Alvarez, ‘Globalisation & Erosion of Sovereignty in Honour of Professor Lichtenstein: The New Treaty Makers’ (2002) 25 BC Int’l & Comp L Rev 213 at 215 (arguing that ‘globalisation’ is a contested term). Globalisation may be described as ‘the integration of finance, markets, nation states and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations and nation states to reach around the world further, faster, deeper and cheaper than ever before, and in a way that is producing a powerful backlash from those brutalised or left behind’. See Christopher J. Whelan, ‘Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?’ (2001) 34 Vand J Transnat’l L 931 at 931 (quoting Thomas Friedman’s statement). Also, John Flood says that globalisation may be interpreted as ‘particular world regions interacting financially in defiance of diurnal rhythms to enhance global capital, which may eventually lead to greater globalisation’. See John Flood, ‘Capital Markets: Those Who Can and Cannot Do the Purest Global Law Markets’ in R. P. Appelbaum, W. L. F. Felstiner & V. Gessner (eds), Rules and Networks: The Legal Culture of Global Business Transactions (Hart Publishing, 2001) at 249.

209 Lawrence M. Friedman, ‘Frontiers: National and Transnational Order’ in Karl-Heinz Ladeur (ed) Public Governance in the Age of Globalisation (Ashgate, 2004) at 27 (stating that ‘globalisation is about messages; it is about ideas; it is about global culture. From this, everything else follows.’) (Original emphasis.)

210 Maxwell O. Chibundu, ‘Globalising the Rule of Law: Some Thoughts at and on the Periphery’ (1999) 7 Ind J Global Leg Stud 79 at 79 (saying that the concept of globalisation is used with the implication that no force can change it). See also Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Strauss, Giroux, 1999) at 7 (opining that globalisation represents ‘the overarching international system shaping the domestic politics and foreign relations of virtually every country’).
Globalisation is closely related to the rule of law. Friedman says that the rule of law is ‘a global ideology in a global age’. The rule of law is seen as an element of the ‘globalisation creed’. Hence, as already mentioned, organisations such as the World Bank and the International Monetary Fund tend to emphasise the need for ‘rule of law reforms’ as a condition for providing loans to developing nations. It has been said that funding for rule of law programs has become the fastest-growing type of international aid.

The rule of law/globalisation theme is directly relevant not only in international funding and financing but also to constitutional review. There is a global trend for constitutional review, which is said to be one of the most significant developments in late twentieth- and early twenty-first-century government. Chapter 4 shows how the Korean Constitutional Court’s views about Korea’s deeply rooted legal culture influences this process. Again, this can be seen as local legal culture contributing to aspects of the globalisation process relating to constitutionalism (see Figure 1-2). The practice of the Court shows that, rather than being regarded as an obstacle, Korea’s deeply rooted legal culture often forms an indispensable part of the Court’s constitutional review.

The same rule of law/globalisation idea is also relevant to the discussion in Chapter 3. Part IV.1.D of Chapter 3 shows how the experience of colonialism (under Japanese rule) created ‘cultural spaces’ in which Korea’s indigenous legal culture and the imposed norms interacted. There, the rule of law rhetoric provided the main justification for the colonising power. The idea was that the indigenous laws and legal culture of Korea were not ‘civilised’ enough, requiring better laws to be transplanted. Although colonisation/imperialism is not the same as globalisation, they share significant similarities. Such similarities include the fact that they both often tend to incorporate

---

213 Maxwell O. Chibundu, ‘Globalising the Rule of Law: Some Thoughts at and on the Periphery’ (1999) 7 Ind J Global Leg Stud 79 at 83. Thomas L. Friedman argues that within globalisation, the rule of law served as a basic component of unstoppable modernism. See Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999) at 239.
214 It has been said that ‘[e]fforts by international organisations, such as the United Nations and the World Bank, to improve laws and legal systems around the world have heightened the practical and theoretical importance of rule of law analysis in the global age’. See David P. Fidler, ‘Introduction: The Rule of Law in the Era of Globalization’ (1999) 6 Ind J Global Leg Stud 421 at 421.
219 Sally Merry argues that both globalisation and colonialism (a) are global processes in which smaller countries are swept up in larger economic and political changes; (b) contain powerful forces toward homogenisation; involve resistance movements; and (c) are driven by economic forces that inexorably link people together closely and generate increasing levels of economic inequality. See Sally Engle Merry, ‘Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia’ (2003) 28 Law & Soc Inquiry 569 at 570.
social reform movements to promote the rule of law.\textsuperscript{220} For colonialism, the rule of law became the sign of civilisation, and it still remains implicit measures of civilisation for globalisation’s narratives.\textsuperscript{221} Also, for both colonialism and globalisation, the rule of law, if wrongly applied, may be seen as ‘a prevalent and universalist justification for what might otherwise appear to be self-interested prescriptions of policy’.\textsuperscript{222}

What does this rule of law/globalisation theme in Chapters 3, 4 and 5 indicate? What is its significance to the two main arguments of this thesis? The significance seems to be that it suggests a larger and more complex picture of the rule of law/Confucianism debate relating to Korean legal culture. It shows that the conventional view about Korean legal culture is not only concerned with the very details of Korean legal culture themselves, but it is engaged with a more holistic phenomenon and idea. The debate is part of a larger process in which power plays a real role in defining cultures. The rule of law rhetoric, whether genuine or simply convenient, forms a core message of the globalisation process.

Such a message requires responses from local parties. This is because globalisation is not a one-sided process. Local culture also shapes global culture. This thesis is concerned with aspects of such local responses regarding Korean legal culture. It attempts to provide findings about Korean legal culture relevant from the perspective of the ‘rule of law reformers’. And it illustrates how Korean legal culture dynamically interacts with global legal culture in the fields of cross-border finance and constitutional review.

5. Conclusions: Hypotheses about Korea’s Normative Legal Culture

To sum up, Korea’s legal history reveals certain aspects of Korea’s deeply rooted legal culture. There are significant grounds to challenge conventional views on Korea’s deeply rooted legal culture. The country’s contemporary legal culture, in terms of recent history, survey data, the activities of the Constitutional Court and cross-border financing activities, back up this argument. Korea’s deeply rooted legal culture could not have changed overnight. Unless it can be convincingly rebutted, the presumption should be that Korea’s contemporary legal culture, which largely supports the rule of law, also reflects the country’s deeply rooted legal culture.

The deeply rooted legal culture of Korea or one’s view on it may influence many areas of legal practice. Judicial review by the Constitutional Court is one such example, and negotiations in cross-border financing transactions is another. Hence, first and foremost, it is important to correctly identify the deeply rooted legal culture, or more precisely, the normative legal culture of Korea. But before proceeding further in ascertaining and examining the normative legal culture of Korea, it is helpful to set out certain hypotheses about the normative legal culture of Korea that contradict the conventional views. In this way, it will be easier to focus on the findings on Korean legal culture made in subsequent chapters and test them against the hypotheses. The main hypotheses are as follows:

(a) Many aspects of Korea’s normative legal culture support notions of clarity, supreme authority and stability of the law.

\textsuperscript{220} Id at 570-571.
\textsuperscript{221} Id at 588.
\textsuperscript{222} Maxwell O. Chibundu, ‘Globalising the Rule of Law: Some Thoughts at and on the Periphery’ (1999) 7 Ind J Global Leg Stud 79 at 83-84.
(b) The concept of Confucian li may not be supported by, or may not constitute, Korea’s normative legal culture; although it may be part of the general culture of Korea.

(c) Many aspects of Korea’s normative legal culture support individualistic and personalistic traits of legal culture. Koreans tend to be considerably rights-conscious.

(d) Significant aspects of Korea’s normative legal culture support the notion of gender equality, although many aspects of Confucian culture create gender inequality.

These hypotheses have largely been drawn from some of the studies on Korean legal history discussed in Chapter 3. The hypotheses will be further elaborated and tested against the aspects of modern legal culture discussed in Chapters 4, and then applied in the model pre-negotiation inquiry in Chapter 5. Those who hold the conventional view about Korean legal culture may view the hypotheses with scepticism. Nevertheless, the hypotheses provide a helpful starting point for considering Korean legal culture and its relationship with the rule of law. Given the importance of the deeply rooted legal culture in legal practice, this is a significant exercise, one which it is hoped will open up future research in this field.

The following chapter will discuss the methodology used in this thesis to study the deeply rooted legal culture of Korea. In arriving at such a methodology, some of the basic questions relating to legal culture are asked. These include: What is culture? What is legal culture? What is the difference between the two? How is legal culture different to law? What is meant by ‘deeply rooted legal culture’? These questions are fundamental to studying a country’s legal culture. Without clarifying these matters, any discussion on the legal culture of a country will be too general, and will mostly be unhelpful in practice.

---

223 See generally Part III of Chapter 3.
Chapter 2 The Concept of Legal Culture

I. INTRODUCTION

1. Background

The concepts of ‘law’ and ‘culture’ are significantly uncertain and vague. Both concepts are difficult to explain and define. Not surprisingly, the concept of ‘legal culture’ may also be regarded as an essentially vague concept, unless one determines the relevant boundaries of and limits to, together with a purposeful description of, its use. This is why some writers take the rather extreme view that the term ‘legal culture’ does not have an independent meaning of its own.¹

Nevertheless, the term ‘legal culture’ is widely used, and an increasing number of scholars are making serious attempts at exploring this concept as a concept in great depth. Particularly relevant to this thesis are the theories proposed by such writers as Chiba and Friedman. These theories are described, analysed and, where relevant, criticised in detail in this chapter.

The view is taken here that these theories may in fact provide an inadequate basis for studying the legal culture of Korea in the way this thesis contemplates. This thesis places particular emphasis upon aspects of Korean legal culture that reveal their support in favour of either Confucianism or the rule of law concept. As such, a more specific methodology for studying Korean legal culture may be desirable.

Chiba’s theory in particular seems to assume that the legal culture of an Asian country that has received Western law² may support significant aspects of ‘unofficial law’.³ Further, according to Chiba, such unofficial law would be closely related to the indigenous customs and traditions of the country. But what if the legal culture of such a country in fact generally supports the official law of that country? What if the legal culture of the country generally supports the notion of the rule of law? On what basis does one call a rule ‘unofficial law’? These kinds of questions are not clearly explained in Chiba’s model of legal culture. To be sure, since Chiba first formulated his theory, significant progress has been made in the study of the concept of legal culture. Thus, this chapter will discuss some of the other developing ideas on the concept of legal culture.

In view of the recent Korean Constitutional Court decision in the case of the Special Law on the Establishment of a New Capital City,⁴ a concept that is similar to ‘unofficial law’ may be particularly relevant in the Korean context. In this case, the Court recognised the existence in Korea of what is called ‘customary constitutional rules’. This is clearly an important Constitutional Court case for Korea and it is therefore discussed in detail in Part III.4 of Chapter 4. It is possible that this decision might be referred to in the courts of other

¹ See, for example, Roger Cotterrell, ‘The Concept of Legal Culture’ in David Nelken (ed), Comparing Legal Cultures (Dartmouth, 1997) at 26.

² ‘Western law’ in this sense (and as used in this thesis) means European civil law and Anglo-American common law.

³ For a discussion of the concept of ‘unofficial law’, see Parts III.6.C and IV.1 below.

Asian countries with similar legal historical backgrounds; the recent judicial activism of Korea's Constitutional Court may inspire similar approaches amongst its Asian neighbours.

2. Outline of This Chapter

As a starting point, this chapter describes concepts such as 'culture', 'law' and 'legal culture'. It then tries to compare these concepts against each other. The aim is to try to refine the concept of legal culture as a concept. Having done so, several theories about the concept of legal culture are discussed. Some of the arguments made by writers such as Friedman, Nelken, Priban, Cotterrell, Teubner, Tanase and Legrand are discussed. Following this, the concept of legal culture is redefined for the purposes of this thesis.

Basically, Friedman's definition of legal culture - 'the ideas, values, attitudes and opinions people in some society hold, with regard to law and the legal system' is adopted (with modifications) in this thesis. This definition is not a term of art, but it provides a useful starting point for further refining the concept.

This thesis then further elaborates this definition by asking this question: Can there be a distinction between, on the one hand, 'strong' legal culture, and on the other hand, not so strong legal culture? In other words, are any kinds of attitudes, values, ideas and opinions with regard to a particular law relevant for present purposes? Or are attitudes, values, ideas and opinions of those who take a firm position on what a particular law should be more relevant for present purposes? People who, for some reason, take social status distinctions seriously may tolerate, or even approve of, a rule that, for example, discriminates against people based on status. That is clearly an attitude or opinion in respect of a particular law - that is, it is legal culture. But the same people may not firmly believe that that is what the law should be. They may say, 'we do not mind that law, and in fact we quite like it. But we do not think that that is what the law should be'.

This thesis terms this 'strong' type of legal culture 'normative legal culture' and the weaker type 'non-normative legal culture'. The distinction can be useful because it can be used to indicate a group's internalisation or inner acceptance of a rule. Those people who did not mind the discriminatory law, but did not believe that is what the law should be, are less likely to accept the law. There may be no inner acceptance of the discriminatory rule by these people. 'Not minding' the rule is non-normative legal culture. Then, in finding out the 'deeply rooted' legal culture of a people, should one search out the normative or non-normative legal culture of the people?

This chapter also elaborates on the concept of legal transplant. At several stages throughout its history, Korea has adopted foreign laws, and current Korean legal system is

---

5 Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) 7 Ratio Juris 117 at 118. Friedman also says that legal culture refers to 'public knowledge of and attitudes and behaviour patterns toward the legal system'. See Lawrence M. Friedman, The Legal System (Russell Sage Foundation, 1977) at 193.
6 For a detailed discussion of the concept of normative legal culture, see Part III.4 below.
7 This question is directly relevant for the first of the two main arguments of this thesis set out in Part I.2 of Chapter I.
8 See Part III.3 below.
essentially based on Western law. More than any other development in its history, Korea’s reception of Western law has triggered extensive debate within the country as to its legal culture. The crux of the debate is whether Western-type law is appropriate for Korea. Can there be an *inner acceptance* by Koreans of such law? The debate has helped trigger the emergence of conventional views on Korean legal culture. Proponents of the conventional view argue that the received Western law does not quite fit into the legal culture of the Korea because of conflict between the rule of law and Korean legal culture. In this regard, a discussion of the various theories on the concept of legal transplant is relevant to this thesis.

The methodology for ascertaining Korea’s normative legal culture involves examining various aspects of Korean legal culture. Not only is the legal culture of a people relevant, but the people’s view of the legal culture of other people also becomes relevant. This is linked to the idea that the conventional view of Korean legal culture is actually concerned with a viewpoint regarding Korean legal culture. This may influence the way in which aspects of legal practice are carried out, as is demonstrated in Chapters 4 and 5.

Legal culture is difficult to measure, but legal history, survey results and actual legal practice discussed in subsequent chapters demonstrate that it is possible to ascertain legal culture with some degree of clarity. The starting point for examining legal culture in those chapters is often the identification of official law. A useful working hypothesis to apply here is that official law evidences the normative legal culture of a people unless proven otherwise. Of course, normative legal culture may not support official law, in which case there is likely to be pressure towards changing official law to suit normative legal culture. It will be a question of fact whether or not normative legal culture supports official law, and reasonable inferences in this respect may be drawn from, for example, the circumstances of enacting a particular law.

This chapter discusses some of these and similar issues that arise when considering the relationship between official/unofficial law and normative/non-normative legal culture. The discussion leads to devising a more concrete methodology for studying legal culture (see Part IV.3 below), as well as an additional hypothesis regarding Korean legal culture (see Part IV.3.C.iii below), both of which will be applied in subsequent chapters.

II. CULTURE, LAW AND LEGAL CULTURE

1. The Concept of Culture

A. Meaning of Culture

Culture is ‘one of the two or three most complicated words in the English language’. The apparent difficulties in defining culture is reflected by, for example, the fact that culture is not homogenous, nor uniformly distributed among members of a group (and different depending

---

9 See Part IV.2 of Chapter 3 for a discussion on the current Korean legal system and how it has been modelled after the Continental legal system.

10 For a detailed discussion of this concept, see Part III.5.C below.

on their age, education and occupation, etc.). Also, culture may not necessarily be the same as custom; and it is not timeless, but it evolves, develops and changes.\textsuperscript{13}

Culture might be described as a society's 'common knowledge',\textsuperscript{14} or a 'historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate and develop their knowledge about and attitudes toward life'.\textsuperscript{15} From this definition, it may be seen that there is a close relationship between culture and history,\textsuperscript{16} and that the concept of culture envisages that aspects of historical facts that are 'inherited' and 'rooted' in a society.\textsuperscript{17} A historical investigation may therefore be relevant to determining a country's culture.

Culture is context as opposed to cause, the 'buffer' created between people and their environment,\textsuperscript{18} and (speaking metaphorically) the 'lens' through which causes are refracted.\textsuperscript{19} Therefore, it may be said that culture provides a context for a group's behaviour. Cultural understandings explain why someone acted as he or she did.\textsuperscript{20} Similarly, legal culture can provide a particular context of a particular value system in which the elements of a particular legal system can operate.

The concept of culture may include elements such as behaviour, attitudes, norms and values.\textsuperscript{21} In negotiations (see Chapter 5), culture frames the context in which conflict occurs — and within this cultural context, the parties comprehend their respective positions, interests, and values.\textsuperscript{22} Culture may have different definitions in anthropology and in social psychology, and sometimes the term 'culture' is used to describe the aggregate level whereas


\textsuperscript{15} Clifford Geertz, The Interpretation of Cultures (Basic Books, 1973) at 89.

\textsuperscript{16} It is said that 'cultural meanings are central to historical change'. See Sally E. Merry, Colonizing Hawai'i: The Cultural Power of Law (Princeton University Press, 2000) at 259.

\textsuperscript{17} It has thus been said that culture can be understood as 'historical forms of consciousness or subjectivity, or the subjective forms we live by'. See Richard Johnson, 'What is Cultural Studies Anyway?' (1986) 16 Soc Text 38 at 43.

\textsuperscript{18} Leopold Pospisil, Kapauku Papuans and Their Law (Yale University Publications in Anthropology, No. 54, 1964) at 248.


\textsuperscript{20} Sally E. Merry, Colonizing Hawai'i: The Cultural Power of Law (Princeton University Press, 2000) at 259.

\textsuperscript{21} Jeswald W. Salacuse, 'Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch?' (2003) 9 NAFTA L & Bus Rev Am 33 at 43. Salacuse says that the process of understanding a specific culture is similar to peeling an onion, the outermost layer of the onion being the behaviour, then attitudes, then norms and, finally, values. While such a concept is a useful concept, this thesis takes a slightly different approach to explaining the concept of legal culture. See Part III.3 below.

\textsuperscript{22} Kevin Avruch, 'Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators' (2004) 9 Harv Negotiation LR 391 at 396.
the term ‘attitude’ is used to refer to the individual level.‘Cultural studies’ provides a rich
ground in which to learn aspects of culture that are evolving and covering an extremely
diverse agenda. In this regard, law may be a relative latecomer to cultural studies and
cultural analysis.

B. Transformation of Culture

Within the discipline of anthropology, the meaning of culture has been further developed.
Hence, instead of a notion of a fixed and stable set of beliefs, values and institutions, culture
has been redefined as a flexible repertoire of practices and discourses created through
historical processes of contestation over signs, meanings, images and symbols. Cultural
forms and practices are locally expressed but connected to global systems of economic
exchange, power relations and systems of meaning. They are constructed and transformed
over historical time through the activities of individuals as well as through larger social
processes. Transformation occurs through particular historical events rather than through
gradual social evolution. Thus, culture is continuously produced and reproduced at particular
historical times in specific places situated within global movements of people and capital.

Terms such as ‘cultural production’ and ‘cultural appropriation’ are sometimes used instead
of terms such as ‘culture’ and ‘cultural change’.

Legal culture, which is discussed in detail below (Part II.4 onwards), may also be seen
as locally as well as globally connected. With the globalisation of law, legal culture is being
transformed into an increasingly global phenomenon. Nevertheless, arguably, there may be
aspects of culture and legal culture that appear deeply rooted in the national tradition of a

24 Cultural studies combines methods and issues from economics, politics, sociology, media and
communication studies, education, literature, law, science, anthropology and history, with a particular
focus on gender, race, ideology, sexuality, and class in everyday life. See Toby Miller, ‘Approach to
the Cultural Study of Law: What It Is and What It Isn’t: Cultural Studies Meets Graduate Student Labour’
(2001) 13 Yale J L & Human 69 at 69. It is a huge topic on its own and there is extensive
international literature on it. See, for example, Simon During (ed), The Cultural Studies Reader
(Routledge, 1993); Morag Shiach (ed), Feminism and Cultural Studies (Oxford University Press,
1999); John Hartley & Roberta Pearson (eds), American Cultural Studies (Oxford University Press,
2000); John Frow & Meaghan Morris (eds), Introduction to Australian Cultural Studies: A Reader
(Allen and Unwin, 1993); Jill Forbes & Michael Kelly (eds); French Cultural Studies: An Introduction
(Oxford University Press, 1996).
25 Austin Sarat & Jonathan Simon, ‘Introduction: Beyond Legal Realism?: Cultural Analysis, Cultural
26 On the question of whether ‘practice’ should be included in the concept of legal culture, it has been
said that legal culture may also refer to, among other things, ‘behaviour patterns’ manifested toward the
See also Part II.3.C.iii below.
27 Sally Engle Merry, ‘Tenth Anniversary Symposium: New Direction: Law, Culture, and Cultural
28 Ibid.
29 Id at 577-578.
30 Ibid.
31 It is said that ‘cultural production’ ‘draws on already existing cultural elements drawn from the
reservoirs of lived culture or from the already public fields of discourse’, and that ‘cultural
appropriation’ means ‘adopting a cultural product in terms of local meanings and practices’. See Sally
country. Chapter 5, in particular, highlights these dimensions of culture. It describes how locally expressed Korean (legal) culture connects and interacts with, and, to an extent, shapes, the global (legal) culture in deal-making processes in cross-border financing transactions.

C. Culture and Power

Culture and systems of power have a close and significant relationship. The maintenance of relations of power depends on retaining particular cultural meanings. Therefore, political resistance includes redefinitions of cultural meanings, as well as more direct forms of resistance such as non-cooperation, sabotage, foot-dragging, petty thievery and refusal to conform to gender or class expectations. It is said that '[c]ulture involves power, and helps produce asymmetries in the abilities of individuals and social groups to define and realise their needs'. Culture may also operate as a constraint.

Legal culture can undergo a dramatic change through the adoption of new laws that may have been purposely aimed at changing the legal culture in the first place. Redefinition of cultural meanings can, and often does, take place through the influence of changes in the power structures of a country. A good example of this is when certain elite groups in the Chosun Dynasty (1392-1910) took over power and Confucianism was subsequently adopted as the national culture in Korea. The Korean people’s resistance to Confucian legislation may be seen as a power struggle as much as a cultural struggle. Also, the cultural struggle during the Japanese occupation period (1919-1945) shows the complexity of cultural hegemony.

D. The Tensions of Culture

To sum up, culture should be understood as historically produced rather than static; unbounded rather than bounded; integrated; contested rather than consensual; incorporated within structures of power; rooted in practices, symbols, habits, patterns of practical mastery and practical rationality within cultural categories of meaning rather than in any simple dichotomy between ideas and behaviour; and negotiated and constructed through human action rather than super-organic forces – although systems of power can have a significant influence on culture. Thus, there is an inherent difficulty in pinning down a culture, or the

---

37 Gi-Wook Shin & Michael Robinson, 'Rethinking Colonial Korea' in Gi-Wook Shin & Michael Robinson (eds), Colonial Modernity in Korea (Harvard University Press, 1999)
38 Sally Engle Merry, 'Tenth Anniversary Symposium: New Direction: Law, Culture, and Cultural Appropriation' (1998) 10 Yale J L & Human 577 at 580. Merry argues that 'classic conceptions of bounded, coherent, stable, and integrated systems clearly are inadequate'. See Sally E. Merry, Colonizing Hawai‘i: The Cultural Power of Law (Princeton University Press, 2000) at 28. There is an increasing number of critiques of the traditional, unified, reified, civilizing idea of culture. See Austin
culture of a group of people. An attempt to do so may soon be resisted with counterarguments and conflicting views.

In one sense, culture may be viewed as the semantic space, the field of signs, in which human beings construct and represent themselves and others, and hence, their societies and histories – as mentioned above, culture may be the context in which people behave. Therefore, one may talk of ‘Korean culture’ in the sense that it is the semantic space and context in which Koreans behave. On the other hand, culture is never a closed and entirely coherent system but contains within it polyvalent, contestable messages, images and actions. Thus, it may be difficult to speak of a single Korean culture, since culture comes in plural forms. But degrees of homogeneity in culture may be found within a nation-state.

It is said that the fields of interaction between competing cultural logics can be described as contact zones. (They are further described as ‘social spaces where disparate cultures meet, clash and grapple with each other, often in highly asymmetrical relations of domination and subordination’.) Culture in contact zones 'consists of contested and shifting signs and practices'. The same thinking may be applied where different legal cultures interact with each other. Tanase’s description of the reception of Western law by the Japanese as the ‘empty space of the modern’ (inferring Japanese indigenous culture as resisting the modern, in the form of Western law) suggests this kind of contact zone, one which is not being filled meaningfully because of the gap between the host and received legal cultures. Similar issues are relevant to Korean legal culture. Important questions for this thesis can be framed thus: What happens in the ‘contact zone’ where the indigenous legal culture of Korea and received Western legal culture meet? What happens when Korean legal culture meets global legal culture in negotiations in cross-border financing transactions?


Ibid.


Mary Louise Pratt, Imperial Eyes: Travel Writing and Transculturation (Routledge, 1992) at 4. It is noted that ‘subcultures’ may exist under culture which is ‘opposed to, derivative of, and informing official, dominant, governmental, commercial, bureaucratically organised forms of life’. See Toby Miller, ‘Approach to the Cultural Study of Law: What It Is and What It Isn’t: Cultural Studies Meets Graduate Student Labour’ (2001) 13 Yale J L & Human 69 at 70.

Sally E. Merry, Colonizing Hawai‘i: The Cultural Power of Law (Princeton University Press, 2000) at 29. Merry argues that unlike the term ‘cultural frontier’, which privileges a centre and an edge, the term ‘contact zone’ focuses on intersections among equally centered entities (ibid).


‘Western legal culture’ in this context has a broad meaning encompassing European and Anglo-American legal culture.

Note Sally Merry’s argument that ‘the combined impact of technology, tourism, global capitalism, and migration are blurring and redrawing cultural boundaries at a rapid rate’. See Sally E. Merry, Colonizing Hawai‘i: The Cultural Power of Law (Princeton University Press, 2000) at 30.
Having discussed the concept of culture, the next inquiry is into the nature of legal culture. What is the difference between culture and legal culture? Before examining the concept of legal culture, the concept of law and the relationship between law and culture is briefly discussed.

2. **Law and Culture**

A. **The Concept of Law**

   i. **What is Law?**

Just as it is challenging to determine the meaning of 'culture', the difficulty of defining 'law' is well known.\(^48\) Law may be defined as the 'regime that orders human activities and relations through systematic application of the force of politically organised society, or through social pressure, backed by force, in such a society', and such regime may be in the forms of (a) the aggregate of legislation, judicial precedents and accepted legal principles, (b) a body of authoritative grounds of judicial and administrative action and (c) a set of rules or principles dealing with a specific area of a legal system.\(^49\) When references to 'law' are made in this thesis, it is with this definition of law in mind.

This definition, however, may be seen as too narrow, particularly when it comes to 'primitive cultures'. To cover these cases, a more functional definition of law should be used, it is argued, rather than applying law as a descriptive concept.\(^50\)

   ii. **Theories of Law**

Several theories of law exist to explain the nature of law. For example, the legal positivist school would argue that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society and not because they are grounded in morality or in natural law.\(^51\) As Lon L. Fuller has said:

---


\(^{49}\) See Black's Law Dictionary (West Group, 1999) at 889.

\(^{50}\) Leopold Pospisil, *Kapauku Pauans and Their Law* (Yale University Publications in Anthropology, No. 54, 1964) at 248. Pospisil suggests the following definition of law for these cases: '[r]ules or modes of conduct made obligatory by some sanction which is imposed and enforced for their violation by a controlling entity; also, any single rule of conduct so imposed or enforced' (id at 249). He argues that law is manifested by decisions of legal authority rather than by abstract rules or by the behaviour of the litigants. In this regard, he says that '[o]ne may imagine a picture of the legal field which consists of several levels. The lowest level is composed of legal decisions. From this base, the principles of the decisions may be abstracted and will form, according to their degree of abstraction, the different upper strata. The abstractions from the decisions which belong in the field of law will be called legal postulates. They may be identical in content with the abstract rules, in which case we may say that the rules are enforced' (id at 256). Pospisil also suggests that analysis of legal phenomena reveals a common pattern of attributes rather than one sweeping characteristics of law. These attributes are: (a) authority; (b) true *obligatio*; (c) intention of universal application; and (d) sanction (id at 257-258).

'[t]he legal positivist concentrates his [or her] attention on law at the point where it emerges from the institutional processes that brought it into being. It is finally made law itself that furnishes the subject of his [or her] inquiries. How it was made and what directions of human effort went into its creation are for him [or her] irrelevances.52

Natural law theorists, on the other hand, seek to organise a philosophical system of legal and moral principles purportedly deriving from a universalised conception of human nature or divine justice rather than from judicial or legislative action.53 Such moral principles are not to be drawn from any kinds of reasoning and standards, but only from the best human reasoning.54 Brierly has stated that '[i]t is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning could discover it, and not, of course, that the results to which any and every individual’s reasoning led him was natural law'.55

Yet another group of legal theorists, the American legal realists, who were forefathers of the Critical Legal Studies movement, treat law as rationalisation of the empirical behaviour of legal officials and find the sources of that behaviour in economic, political and other non-legal factors.56

iii. Theories of Law and Legal Culture

As may be seen from above, the unsettled and evolving nature of theories of law indicates that the concept of law is still open to debate. If the very concept of law itself is unsettled, then clearly, the relationship between law, culture and legal culture cannot be fully examined based upon a theoretical analysis alone. The methodological endeavour to ascertain the nature of law may be viewed as essentially vague.57 The preferred approach to understand the relationship between law and legal culture may be to start from the other end: that is, to examine some of the theories in relation to legal culture itself. A selection of these theories is thus analysed in Part III below.

Despite these qualifications, law and legal culture seem to be closely related. While the concept of legal culture (discussed below in Parts II.3 and III.2) may not even be a legal theory,58 it is a useful concept for exploring law’s ‘empire’. This is particularly true for Korea, where it is claimed that there is a large disparity between what law is and what law ought to be because of alleged ‘indigenous’ practices. The main debate between the legal theorists – notably that H. L. A. Hart and Lon L. Fuller – may be as much cultural as

52 Lon L. Fuller, Anatomy of the Law (Greenwood Publishing Group, 1976) at 78.
53 See for example, John Finnis, Natural Law and Natural Rights (Clarendon Press, 1980).
55 Ibid.
intellectual owing to the different legal culture of each theorist. The relationship between law and legal culture is discussed in more detail in Part II.4 below.

B. Law and Culture

What does the definition of law say about its relationship with culture? What is the relationship between law and culture? It is said that law, rather than being a mere technical add-on to a morally (or immorally) finished society, is, along with a whole range of other cultural realities ranging from the symbolics of faith to the means of production, an active part of such a society. The relationship between law and culture is said to be dynamic, interactive and dialectical, law being both a producer of culture and an object of culture.

It has been argued that law shapes individual and group identity and social practices as well as the meaning of cultural symbols. Laws define persons and relationships, which create popular consciousness. Culture in its myriad manifestations also shapes law by changing what is socially desirable, politically feasible and legally legitimate. A 'constitutive theory of law' would say that law participates in the production of meanings within the shared semiotic system of a culture; but it is also a product of that culture and the practices that produced it. Hence, there are calls for a greater engagement between cultural analysis, cultural studies and law, treating law as a cultural reality.

Others, like Teubner, argue that while law is intricately interwoven with culture, law and culture are autonomous and their ties to each other are highly selective. Another way


Ibid.


Naomi Mezey, 'Approaches to the Cultural Study of Law: Law as Culture' (2001) 13 Yale J L & Human 46. Sally Merry argues that '[l]egal words and practices are cultural constructs which carry powerful meanings not just to those trained in the law or to those who routinely use it to manage their business transactions but to the ordinary person as well'. See Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (The University of Chicago Press, 1990) at 8-9.


of looking at law and culture is Williamson’s notional model of institutional analysis where
culture occupies a higher level than law and imposes constraints on the development of the
latter. 70 Pospisil has suggested that law falls in one of the subdivisions of culture. 71 Legal
systems have been defined as ‘cultural belief systems’. 72

Whichever argument one takes on the relationship between law and culture, what is
clear is that law and culture are closely related and they affect each other. At the same time,
certain social reforms may be effected through law reforms – which was what some of the
elite groups in Chosun Korea attempted to do through the creation of ‘Confucian
legislation’. 73

3. The Concept of Legal Culture

A. Meaning of Legal Culture

As with the concepts of culture and law, accurately defining legal culture is a difficult task. 74
As indicated earlier in this chapter, Friedman has described legal culture as ‘the ideas, values,
attitudes and opinions people in some society hold, with regard to law and the legal
system’. 75 Legal culture is sometimes referred to as ‘legal consciousness’ 76 or as knowledge
about law, 77 – and some writers take a further step by elaborating the distinctions between

Econ Lit 595 at 595-613. According to Williamson, culture occupies Level 1, and below it, formal
legal rules (Level 2), and then transactions (Level 3), and then economic outcomes (Level 4). Higher
levels impose constraints on the development of the levels immediately below. See also Douglas C.
North, Institutions, Institutional Change and Economic Performance (Cambridge University Press,
1990).

71 Leopold Pospisil, Kapauku Papuans and Their Law (Yale University Publications in Anthropology,
No. 54, 1964) at 248.

72 John Owen Haley, Authority without Power: Law and the Japanese Paradox (Oxford University Press,
1991) at 4.


74 It has been said of legal culture that ‘[a]s a concept it is difficult to define, and is closely aligned to
the concept of culture in an anthropological sense’. See Poh-Ling Tan, ‘Introduction’ in Poh-Ling Tan,
Asian Legal Systems: Law, Society and Pluralism in East Asia (Butterworths, 1997) at 9. He also
argues that understanding one’s legal culture is even more complex than understanding one’s culture
(ibid).

75 Lawrence M. Friedman, ‘Is There a Modern Legal Culture?’ (1994) 7 Ratio Juris 117 at 118.
Friedman also says that legal culture refers to ‘public knowledge of and attitudes and behaviour
patterns toward the legal system’. See Lawrence M. Friedman, The Legal System (Russell Sage
Foundation, 1977) at 193. Friedman’s definition of legal culture has been criticised on the basis that it
reflects ‘a plebiscitarian belief that popular consent is the basic legitimacy of law’s legitimacy – a
conceptualisation which is useful within the context of [the United States’] legal tradition, but less
plausible, if used in comparing different legal traditions’. See Erhard Blankenburg, ‘Patterns of Legal
But it seems that consent or acceptance of law is not only the basis of legitimacy of US law; it tends to
form the basis of the legitimacy of transplanted law in general. See Part III.4.C.ii below.

Consciousness and Disputing Behaviour’ (1987) 21 Law & Society Review 219 at 221. Sally Merry
says that legal consciousness is ‘expressed by the act of going to court as well as by talk about rights
and entitlements’. See Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among
Working-Class Americans (The University of Chicago Press, 1990) at 5.

'legal consciousness' and 'legal conception'. Atiyah and Summers speak of 'visions' of law, which may be a concept similar to legal culture. Behavioural patterns as well as beliefs about law may be seen as part of legal culture— to the extent that the former shows the latter — but the two may be different. The idea of legal culture points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture that constitute and reveal the place of law in society. However, even within a given society, legal culture is a complex, contested and changing phenomenon.

It is said that every person has a legal culture, just as every person has a general culture and a social culture. Every person has unique traits, but each person is at the same time part of a group, a social entity, and he or she shares in the ideas and habits of that group. This is how one may talk about a national legal culture even though everyone's legal culture may be different.

The term 'legal culture' may refer to a variety of units — the culture of the local courthouse, of specific types of strong and weak 'community' (as referred to by Cotterrell), of the nation state. Or it may refer to 'modern legal culture' (as referred to by Friedman), or even 'third cultures' of international trade, communication networks or other transnational processes (as referred to by Gessner). This thesis attempts to cover the legal culture of Korea in a broad sense. Thus, Chapter 3 covers important parts of the national legal culture of Korea; Chapter 4 covers more specific (but at the same time significant) aspects of the local legal culture of Korea; and Chapter 5 covers aspects of a significant 'third culture' relating to Korea. In all of these chapters, the 'modern legal culture' of Korea is also

---

78 It has been said that 'legal consciousness' refers to attitudes towards a specific legal system and laws whereas 'legal conception' refers to attitudes about a more abstract image of law. See Setsuo Miyazawa, 'Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behaviour' (1987) 21 Law & Society Review 219 at 222-223.

79 Atiyah and Summers define 'visions' of law as 'the inarticulate and perhaps unconscious beliefs held to some degree by the public at large, and more specifically by judges and lawyers, as to the nature and functions of law, and as to how and by whom it should be made, interpreted, applied, and enforced'. See P.S Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Oxford University Press, 1987) at 4-5. They argue that the difference in methods of legal reasoning between England and the United States 'reflects a deep difference in legal style, legal culture, and, more generally, the visions of law which prevail in the two countries' (Original emphasis).


81 See Part II.3.C.iii below.


83 Id at 26.

84 Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) 7 Ratio Juris 117 at 118.

85 Ibid.

86 See generally Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing 2001) at 71-92.

87 See generally Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) 7 Ratio Juris 117.


discussed by examining firstly, recent legal history, current laws and some survey results (Chapter 3); secondly, constitutional review (Chapter 4); and thirdly, negotiations in cross-border financing deals (Chapter 5).

B. Criticism of the Concept of Legal Culture

Some scholars argue that it may be impossible to develop a concept of legal culture that is sufficiently analytically precise; that is, one that is appropriate for empirical research on the sociology of law.\(^90\) The argument is that heavy reliance on a vague concept of legal culture in the interpretation of social phenomena would, except in limited and carefully defined circumstances, be erroneous.\(^91\) Similar criticisms have been made in relation to the notion of culture as well.\(^92\)

Still, even those who argue that legal culture is a vague concept admit that the concept of legal culture seems to suggest a way of covering a range of important but indeterminate matters.\(^93\) This may be particularly so in light of the significance of 'general changes in social beliefs, opinions, values and outlooks that cannot be easily encapsulated in the kind of testable hypotheses about social action that law and society research has usually sought'.\(^94\) These scholars also suggest that the concept of legal culture is especially appropriate to ethnographic research that aims to portray the interweaving of cognitive structures, systems of values and beliefs, patterns of social action and regulatory structures as a relatively undifferentiated complex aggregate.\(^95\)

Korean legal culture as such a complex aggregate may therefore be an appropriate subject matter in respect of which the concept of legal culture may be used. With its unique culture and relatively homogeneous population, Korea might be an ideal place to apply the concept of legal culture. But, as discussed earlier, the term 'legal culture' itself is perhaps still too vague if one is to use it for the purposes of showing specific results. It may be that conventional views about Korean legal culture actually reflect this problem. Most of the writers who hold conventional views about Korean legal culture tend not to define the parameters of their views. For example, when these writers state that Koreans view hierarchical relationships are important, they do not define this aspect of the culture precisely enough for one to know whether it influences Koreans' attitudes towards law.\(^96\) The rest of this chapter will thus attempt to further narrow the concept of legal culture to devise a reasonable methodology for studying the legal culture of Korea.

C. The Concept of Legal Culture Used in This Thesis

i. Narrow and Broad Definitions of Legal Culture

\(^90\) R. Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth, 1997) at 14.

\(^91\) Id at 29.


\(^93\) R. Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth, 1997) at 21.

\(^94\) Ibid.

\(^95\) Id at 27.

\(^96\) See Part II.1.D of Chapter 1.
Yoon Dae Kyu, who appears to hold conventional views on Korean legal culture, defines legal culture as "a set of values, attitudes and sentiments of a group of people in the form of rules that underlie the common behaviour patterns with reference to law and the legal system". Thus, by 'legal culture', Yoon means legal culture 'in the form of rules'. While it is not clear exactly what he means by this, it seems to be a rather narrow definition of legal culture.

Compared to Yoon's definition, 'culture' as it was discussed in Part II.1 above is a broad concept, one that contemplates culture to exist in various forms (for example, 'semantic space, field of signs, practices, encodements, images and symbols'). Although not as broad as the description of culture, the definition of legal culture (in other words, that of Friedman's) seems also broad, in the form of 'ideas, values, attitudes and opinions'. Given these descriptions of culture and legal culture, limiting the concept of legal culture to that 'in the form of rules' would seem to be a rather restrictive approach. At the same time, the concept of legal culture seems to become too broad if one were to say that it might come in the form of encodements, images, symbols, signs, etc. (which is part of the description of culture.) A more precise description of legal culture would be useful for present purposes.

ii. **Legal Culture as a Value System**

How is the concept of legal culture proposed to be used in this thesis? The aim is to ascertain historical and present Korean attitudes towards and ideas about law. The concept is used to analyse in detail whether Korean attitudes towards law are very different from attitudes in the West towards law. More specifically, this thesis attempts to ascertain whether Korean legal culture supports either the rule of law or Confucian ideas.

Legal culture is treated in this thesis as a value system towards law, one that may support or criticise a particular law (for example, a law that is related to Confucianism on the one hand, or a law that upholds the rule of law, on the other hand). Friedman's formulation of legal culture seems appropriate for this thesis: that is, legal culture in the form of 'the ideas, values, attitudes and opinions' of a group of people.

iii. **'Practice' and 'Action'?**

While the present use of the term 'legal culture' probably does not contemplate that it would also take the form of 'signs, encodements, images and symbols', would the concept include 'practice' or 'action'? Ideas, values, attitudes and opinions are basically what occur within people's minds, while practice and action are visible. Should these be included in the definition of legal culture adopted in this thesis?

---

97 See Part II.1 of Chapter 1.


100 Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) *7 Ratio Juris* 117 at 118.
It is submitted that, in principle, there should be no objection in including ‘practice’ as a form that legal culture may take, because showing the practice of a group of people may be one way of indicating their attitudes or value system. In his earlier definition of legal culture Friedman seems to include ‘behavioural patterns’ manifested by people towards the legal system; note though that his later definition seems to omit such a reference. A problem is that it is possible that the practice and the attitudes of a group of people in respect of a particular law may differ. The two concepts may therefore need to be distinguished. Still, arguably they cannot be totally separated – the attitudes may tell something about the practice and vice versa. Also, it is arguable that one cannot ascertain the attitudes of a person unless the actions and practice of that person are also examined. Therefore, practice and actions will not be irrelevant in the current inquiry, and it might be appropriate to consider the overall context and ascertain the real attitudes of people towards law.

To summarise: in principle, the concept of legal culture as used in this thesis will be limited primarily to ideas, values, attitudes and opinions. But ‘practice’ and ‘actions’ will be relevant insofar as they help to show ideas, values, attitudes and opinions.

4. Law and Legal Culture

Part III of this chapter focuses on the relationship between law and legal culture and how one may affect the other. For now, one notes Nelken’s observation that legal culture points to differences in the way aspects of law are themselves embedded in larger frameworks of social structure and culture, which constitute and reveal the place of law in society. Thus, it may be legal culture that points to the place of law in society. The following points are relevant:

(a) Legal culture, being essentially a value system, may support or oppose a particular law. If it supports a particular law, then there will be a greater justification for having the law because the legal culture may be viewed as a form of social, political and possibly (depending on the circumstances) moral consensus in respect of the law.

(b) If a group of people is particularly significant in number or in other respects within a country, then the legal culture is likely to carry even more weight. Also, if the

---

101 In this regard, one notes Sally Merry’s argument that implicit assumptions about the nature of social relationships revealed in actions help one to ascertain the person’s stance toward law. See Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (The University of Chicago Press, 1990) at 5.


103 In this regard, one notes this statement by Friedman: ‘I am talking about general and legal culture – people’s ideas and expectations – not necessarily about the truth and reality of the world’. In the context of discussing the culture of free choice and individualism, Friedman goes on to say that ‘[t]he culture of individualism does not depend on whether people are actually free to choose. It is enough that they believe they are.’ See Lawrence M. Friedman, The Republic of Choice: Law, Authority, and Culture (Harvard University Press, 1990) at 61. Thus, Friedman seems to clearly distinguish between belief and practice. The author agrees with this approach. Also, one notes Pospisil’s argument that ‘behaviour’ lacks ‘an ideal aspect which is so important in making people conform’. See Leopold Pospisil, Kapauku Papuans and Their Law (Yale University Publications in Anthropology, No. 54, 1964) at 254.

'content' of the legal culture is such that the 'approval' in relation to particular law is made in a forceful manner and is convincing, then the legal culture is also likely to carry more weight.

(c) If the legal culture supports or approves certain 'non-legal' rules, then, again, depending on the 'degree' and the 'quality' of such support or approval, there may be a convincing case for suggesting that such non-legal rules should become legal rules.

These ideas will be further explored in Part IV.2 below.

5. Culture and Legal Culture

It has been argued that legal culture is only a certain aspect of culture – a point of view on it, an undifferentiated aggregate – and that legal culture is culture seen from a certain standpoint of legal relevance to the observer. Pursuant to this approach, the form legal culture takes might be just as broad as the form culture takes. This is because, pursuant to this approach, strictly speaking there is no legal culture - only culture.

It is submitted that this is an unhelpful perspective of the concept of legal culture. The mere fact that, for instance, 'law' can be seen as part of culture does not mean that law by itself does not have an independent identity. Likewise, the mere fact that legal culture can be seen as part of the concept of culture does not necessarily mean that legal culture does not have an independent meaning of its own. Rather, the view taken in this thesis is that legal culture is not a mere subculture or a product of the main culture, but a unique culture of its own capable of influencing other cultures and constantly subject to negotiations in changing circumstances.

The concept of legal culture as its own distinct concept has been discussed by numerous writers including David Nelken, Roger Cotterrell, Alice Tay, Lawrence Friedman, Franz Wieacker, Gunther Teubner, and Masaji Chiba, to name a few. They have generally focused upon the concept of legal culture as an approach to study law and legal systems. Clifford Geertz, a leading anthropologist, has urged that the cultural contextualisation of legal incident is a critical aspect of legal analysis. He seems to

---

107 See, for example, Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 71-92.
109 See, for example, Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) 7 Ratio Juris 117.
110 See, for example, Franz Wieacker, 'Foundations of European Legal Culture' (1990) 38 Am J Comp L 5.
111 See, for example, Gunther Teubner, Law as an Autopoietic System (Blackwell, 1994).
112 See, for example, Masaji Chiba (ed), Asian Indigenous Law: In Interaction with Received Law (KPI, 1986).
113 Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology (Basic Books, 1983) at 182-184.
recognise that the study of legal culture is a distinct and necessary approach to analysing law. Still, it might be true to regard legal culture as an aspect of culture, and there are unresolved questions about how to draw the boundary between, say, political culture and legal culture. Nevertheless, it is assumed that the concept of legal culture has a distinct meaning and use in itself apart from the concept of culture.

With Friedman’s definition of legal culture largely adopted in this thesis, it is submitted that one may contemplate a varying degree or ‘quality’ of legal culture. Such varying aspects of legal culture are discussed here in terms of ‘normative legal culture’ and ‘non-normative legal culture’. It suffices to note at this point that certain aspects of what is commonly regarded as legal culture may be better termed ‘culture’, while other aspects of legal culture may be appropriately termed ‘legal culture’. This will depend on one’s choice of methodology for studying legal culture.

III. THEORIES OF LEGAL CULTURE

1. Introduction

So far, some basic concepts of legal culture have been discussed. This has involved comparing culture, law and legal culture. The idea has been to show that the term ‘legal culture’ has meanings independent of concepts such as culture and law. Writers who discuss the legal culture of Korea often use the terms ‘culture’ and ‘legal culture’ indiscriminately. When they do use the term ‘legal culture’, they often tend not to explain its meaning clearly. However, a reasonably precise definition of the term ‘legal culture’ may be helpful for studying the legal culture of Korea. In this section, more detailed theories and ideas about legal culture will be discussed to devise a methodology for studying the legal culture of Korea.

Under common law, the term ‘legal culture’ is not a term of art – the better view is that it has no status in law and it is not even a theory of law. It is also the case that, although there is a large and growing volume of literature on the theories relating to legal culture, these theories remain relatively undeveloped. The theories relating to ‘legal transplant’, closely related to the concept of legal culture, are also underdeveloped.

Nevertheless, there are theories relating to the concept of legal culture that are helpful to explore for the purposes of this thesis, including those of Lawrence Friedman, Gunther Teubner and Masaji Chiba. In the case of Chiba, his use of the terms ‘legal postulates’ and ‘postulative values’ appear to be very similar to the definition of legal culture adopted in this thesis. Also, his whole approach for analysing unofficial law in Japan is founded upon an anthropological methodology for ascertaining legal culture.

115 See, for example, Dae-Kyu Yoon, Law and Political Authority in South Korea (Westview Press, 1991) at 28.
This contrasts with Friedman’s approach to legal culture, which can be viewed as a modernist’s view of legal culture because he uses and develops the concept of legal culture to explain modern trends in law. Teubner’s theory of legal autopoiesis is also different in that it strives to understand how law ‘evolves’, interacts with other socio-cultural norms and becomes validated. It is helpful to discuss Teubner’s theory in the present context because it arguably provides a basis for explaining how culture influences law. Teubner’s description of how transplanted law ‘irritates’ law’s binding arrangements provides a further insight into the concept of legal culture.118

The views of other writers such as Nelken, Priban, Watson, Legrand and Tanase are also examined below. The concept of legal culture, from the viewpoint of the idea of legal transplant, is analysed. The views of these writers represent a sophisticated engagement of the concepts of legal culture and legal transplant, both of which are increasingly becoming the subject of academic debates.

A methodology for studying Korean legal culture will ultimately be suggested that takes into account (a) some of the ideas developed by the leading scholars in this field, and (b) the specific requirements of this thesis, which focuses on aspects of legal culture that support the rule of law or Confucianism.

2. The Concept of Legal Culture

A. Starting Point – Lawrence M. Friedman

Lawrence Friedman argues for a central place for legal culture in law and legal systems today.119 It has been said that his concept of legal culture is ‘one of the first and most extensive concepts of legal culture in the context of the modernisation debate where Western-type law had been elevated as an integral and necessary part of the modernisation of traditional societies’.120 Friedman has argued that law requires not merely government-decreed code or set of laws that could be adopted from another country but a whole ‘legal culture’. As Alice Tay has put it, this is ‘a set of social traditions, attitudes and expectations concerning law, a legal profession and an independent judiciary, and together with respect to these, an internationalisation of law-abidingness and of legal attitudes, procedures and ways of looking at things’.121 These may all form part of ‘modern legal culture’.122

In exploring the concepts of legal culture and legal transplant, it is convenient to start by examining more closely some of Friedman’s theories about legal culture.

---

121 Ibid.
122 See, for example, Lawrence M. Friedman, The Horizontal Society (Yale University Press, 1999) at 4.
B. Legal Culture and Theories of Law

i. Difference between Legal Culture and Theories of Law

Friedman says that many legal theories are concerned with ideas about law in society, philosophical attitudes toward the subject, exposition of the thoughts of great thinkers, and, in short, the intellectual history of the subject, rather than the subject itself. These legal theories may be an attempt to explain how law works, or how law ought to work, in practice, but, Friedman argues, they are not themselves the substance of the subject of how law works in practice. He says that behind the study and development of legal theories, there may be an implicit assumption that these ideas have a large impact on the way legal systems work in practice. These are the ideas that filter down and shape how jurists and lawyers and citizens behave, which, according to Friedman, is in fact not correct.

Friedman argues that these theories are merely an attempt to conceptualise and analyse how legal systems work in practice according to their own legal culture. In other words, legal culture influences and shapes the creation of theories of law, but not necessarily the other way around. Legal culture, unlike legal theories, is not 'critical' or radical in itself, but it is in a sense far more subversive than the various critical or radical theories. Also, it is far more relevant for understanding and studying law because it is how law is in fact practised daily in society. Similar arguments have been put forward by other writers.

This view, however, may not be entirely legitimate because although theories of law may pretend to be analytical and value-free scientific discourse, they nevertheless seek to influence the process of lawmaking and enforcement of law and thus the construction of legal reality. Also, legal culture, like theories of law, may be critical or radical. Legal culture may, for example, be critical of aspects of official law to the extent that legal culture conflicts with them. Indeed, often the reason for studying legal culture is to investigate such discrepancies between legal culture and law. Nevertheless, Friedman's argument highlights the often under-estimated influence of legal culture in society and how law may be shaped by legal culture.

---

123 Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) 7 Ratio Juris 117 at 129-130.
125 Lawrence M. Friedman, 'Is There a Modern Legal Culture?' (1994) 7 Ratio Juris 117 at 129-130.
126 Atiyah and Summers also seem to support this argument. See P.S. Atiyah & Robert S. Sammers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Oxford University Press, 1987) at 5. They argue that 'some scepticism may be felt at the idea that a legal theory can be found embedded in a community's culture, in such a way as to influence its laws and institutional arrangements' (ibid).
127 For example, Sally Merry argues that the Americans' strong and particular sense of entitlements is 'not based on particular legal doctrine' but 'on a broad sense of rights. They believe that, as members of a legally ordered society, they are guaranteed protection of property and person and can use the courts to protect these rights.' See Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (The University of Chicago Press, 1990) at 2.
Friedman argues that there is a need to approach the study of law from the legal cultural perspective – from simple, commonplace notions that are part of the fabric of daily life, from the ‘bottom up’, so to speak – so that one ought to be gathering empirical data and be concerned with facts, measurement and trends.\textsuperscript{129}

However, this is not the only way in which the concept of legal culture should be viewed. The extent to which law is state directed (as opposed to party directed), that is, ‘top down’, may show something about legal culture as well.\textsuperscript{130} Further, although there is no doubt that Friedman is correct in saying that information about how law is practiced in daily life is useful information – part of what legal culture is – legal culture must be, and is, more than mere ‘information’.

For example, information on the opinions of a group of people about a particular piece of legislation may be useful as data on particular public opinion. But unless specific and workable methodologies are available to process or ‘turn’ such data into concrete suggestions as to how the law should change, such data will remain as data only. It might be true that when legal culture is used as (part of) an explanation, it tends to be tautologous, to sum up other findings and resorted to only when no other explanation will do.\textsuperscript{131} Nevertheless, it certainly seems to be the case that the concept of legal culture claims to be more than mere ‘data’.

To be sure, Friedman himself suggests some ‘theories’ or methodologies for studying legal culture (and, in turn, law). For example, he elaborates on the concept of ‘external legal culture’, which he says is the legal culture of the general population. On the other hand, he says that ‘internal legal culture’ is the legal culture of those members of society who perform specialised legal tasks.\textsuperscript{132} (But in other places, Friedman seems to deny that such distinctions are material.)\textsuperscript{133} Friedman has also used a methodology that involves a contrast between economic theories of law (namely, price-rationing) and the moral or ideological theories of law for the purposes of highlighting aspects of legal culture.\textsuperscript{134} (Friedman does, however, emphasise that such methodology is incomplete.)\textsuperscript{135} The point, it seems, is to avoid (if that is


\textsuperscript{132} Lawrence M. Friedman ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 Yale L J 1579 at 1580. Also, see Leopold Pospisil, Kapauku Papuans and Their Law (Yale University Publications in Anthropology, No. 54, 1964) at 253. Pospisil also argues that what the judge says and what he or she conceives the ‘law to be’ is much more important in its effect on society than what is written in the code.

\textsuperscript{133} Lawrence M. Friedman, ‘The Concept of Legal Culture: A Reply’ in David Nelken (ed), Comparing Legal Cultures (Dartmouth, 1997) at 35 and 36. See also Lawrence M. Friedman, The Legal System: A Social Science Perspective (Russell Sage Foundation, 1975) at 194.


\textsuperscript{135} Id at 15.
formulating theories to explain how law is practised and what a particular law should be, and instead observe how the legal system operates in society.  

Scholars have criticised Friedman on the basis that his concept of legal culture tries to explain too much. This may be because more concrete theories and methodologies are needed to study legal culture for a specific purpose, in contrast to merely explaining things that happen or fail to happen within a legal system by linking them to the idea of legal culture. This is particularly the case for this thesis in its investigation of the legal culture of Korea, both present and historical, involving as it does an element of comparison between indigenous legal culture on the one hand and Western legal cultures embodied within the received laws of Korea on the other.

C. Legal Culture as Source of Law and Source of Demands Made on the Legal System

i. Inner Acceptance of the Law by People

Franz Wieacker has argued that legal orders are societal systems of rules and as such they are said to be two-faced by nature: they require external enforcement, but also inner acceptance by people, without which, in the long run, external legal compulsion will not work. Similarly, Friedman argues that, legal rules will be ‘ineffective’ without a legal culture that accepts and supports such rules. Legal culture determines when, why and where people use law, legal institutions or legal process. Putting it in another way, if one is to implement law reform, one must not only attempt to change legal rules and the means of enforcing them, but must also effect changes in, and impact, the legal culture.

In the Korean context, when the Chosun Dynasty elites attempted to effect social reform by enacting ‘Confucian legislation’, people found the new laws to be inconsistent with their existing customs and values. Hence, the question becomes whether this legislation was ‘accepted’ by the Korean people. Such ‘inner acceptance’ of the law may be critical for affording legitimacy of the law. Also it may, by itself, be what constitutes the rule of law.

136 Ibid.
137 See for example, Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), Comparing Legal Cultures (Dartmouth, 1997) at 20.
138 Ibid.
139 Nelken recognises that when comparing other units of legal culture, a more extensive definition may be more productive in allowing one to grasp larger patterns of difference. David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 27.
142 Lawrence M. Friedman, Law and Society: An Introduction (Prentice Hall, 1977) at 75.
ii. Source of Law

Friedman argues that, in one sense, legal culture is the source of law – its norms create legal norms, and legal culture is what determines the impact of legal norms on society. According to Friedman, one way of examining how legal culture impacts on law could be to view the study of a legal system as comprising these three studies: (1) a study of the demands made upon legal institutions, calling for action of one sort or another; (2) a study of the responses made by the legal institutions; (3) a study of the impact and effect of these responses on the persons making the demands and on society as a whole. Friedman says that it could be said that legal institutions are effective if society is stable – that is, if the demand side and the supply side of the legal system are in some sort of equilibrium. On the demand side, the dominant factor would be the push toward change; legal culture helps create such demand. On the supply side, the critical question would be whether the legal system is responsive enough or effective enough, measured by some ideal end product or goal.

However, following Friedman’s logic, will the response of the legal system to the demand created by legal culture also be determined by legal culture itself? Surely, how the legal system responds to the demand placed upon it will be largely affected by its legal culture. In fact, the legal system can only respond to the demand placed upon it according to its own legal culture because how it reacts to such demands is an aspect of the legal culture itself. In other words, if both the demand and the supply sides of the legal system are dictated by the legal culture, what does this say about how the legal culture works in the legal system? Which aspects of the legal culture – the aspect of the legal culture which creates the demand or which determines the supply – should be given priority or more weight? And, if so, why should they be given such priority and weight?

Perhaps one way of explaining how demands upon law created by legal culture impacts the law is to categorise different aspects of such demands. For example, one may


145 To be more specific, according to Friedman, legal culture converts ‘interests’ into ‘demands’ during this process. See Lawrence M. Friedman, *The Legal System* (Russell Sage Foundation, 1977) at 193. ‘Demands for law’ are also relevant in the context of legal transplants. Berkowitz, Pistor and Richard argue that ‘a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand’. See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, ‘The Transplant Effect’ (2003) 51 Am J Comp L 163 at 167-168.


147 Id at 38.


149 Lawrence M. Friedman, ‘Legal Culture and Social Development’ (1969) Law and Society Review 4 at 39. In this context, references to a legal system are, according to Friedman, references to concrete activities going on, such as lawyers and judges at work, legislators passing laws, administrative agencies making rules and settling disputes – such that it is seen as a process, what legal institutions do and how they do it (id at 33).

150 This is what Friedman seems to be saying when he says that legal culture determines the ‘responses’ of legal institutions.
categorise the demands based on their extent and quality. Friedman himself elaborates different kinds of demands in the context of explaining his concepts of external and internal legal culture. He uses Vilhelm Aubert’s concept of the distinction between demands of ‘interests’ and ‘claims of right’\(^{151}\) to suggest that external legal culture may express its demand in terms of ‘interests’, meaning how lay people would express their demands. But internal culture (the legal culture of such people as lawyers and judges) can convert such demand in to a ‘claim of right’.\(^{152}\) This kind of distinction seems helpful, and is similar to the ideas found in this thesis’ distinction between normative and non-normative legal culture. But, as will be seen, there are differences in emphasis between this author’s concepts and Friedman’s concepts. In short, while Friedman’s focus on Aubert’s concept is on the content of interests and rights, the author’s focus is on the extent of such demands.

### iii. Legal Culture Determines Law

Friedman argues that when examining a country’s legal system, one will be misguided if he or she focuses on the legal structures and substantive law of that country only. This is because, he argues, legal culture is the term that one applies to those values and attitudes in society that determine which legal structures are (or should be) used and why, which rules work, which do not and why.\(^{153}\)

But how does legal culture ‘determine’ which legal structures should be used and which rules work? It is submitted that there is a distinction between (a) the idea that legal culture is useful information in determining what particular law should be, and (b) the idea that legal culture actually ‘determines’ what particular law should be. There could be several types of information that might serve as useful references in determining what particular law should be. Examples include a survey on population and income, information on certain economic and social trends and on political incidents, etc. But it is not entirely accurate to say that such information actually ‘determines’ what a particular law should be at a particular time. Such information does not actually ‘determine’ what a particular law should be – it merely provides facts that help determine what a particular law should be.

---

\(^{151}\) Vilhelm Aubert, ‘Competition and Dissensus: Two Types of Conflict and of Conflict Resolution’ (1963) 7 J Conflict Resolution 26. Friedman argues that in order to bring a lawsuit, a party must convert his or her interests into a claim of right, with this explaining the characteristics of his concepts of internal and external legal culture. That is, external legal culture may express its demand in terms of interests. But internal legal culture can convert such demand into a claim of right. See Lawrence M. Friedman, The Legal System: A Social Science Perspective (Russell Sage Foundation, 1975) at 225-227. While Friedman’s focus on Aubert’s concept emphasises the content of interests and rights, this author’s focus is on the extent of such demands. That is, the focus is on the fact that a claim of right is generally a ‘stronger’ demand than a demand of interests.


\(^{153}\) In another context, Friedman says that ‘popular legal culture makes law’. See Lawrence M. Friedman, ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 Yale L J 1579 at 1587. Also, Friedman, in discussing an example, says that Louisiana’s law is historically a close relative to France, belonging to the civil law family, and yet the cultural elements of Louisiana’s legal life are surely closer to those of Arkansas or Texas than those of France. In other words, even though textbooks sharply distinguish Louisiana’s law from that of Mississippi, stressing historical and diagnostic traits, from the perspective of the workings of laws of social and economic life, tax law, economic regulation, race relations, occupational licensing, labour codes, the two states are not that different. See Lawrence M. Friedman, ‘Legal Culture and Social Development’ (1969) Law and Society Review 4 at 35.
Friedman gives an example of early US laws prohibiting prostitution. He argues that because modern legal culture has changed, such laws also have changed.\textsuperscript{154} This is simple enough to understand, and probably no one doubts that this would be the case. But is there a concrete methodology for arriving at such a conclusion? Or is it just ‘common sense’? How about a more complicated example, such as the question of how the law relating to possession of fire arms should be changed in light of a legal culture that supports increasing security measures against terrorist attacks? Of course, one may be able to make a reasonable suggestion regarding this question. But is there a concrete theory to back up the suggestion?

Even without such a concrete methodology for studying legal culture, it is possible to envisage an argument that ‘legal culture’ is nevertheless different from other types of information such as a survey on certain economic trends. The argument could be that this is so because legal culture is a type of ‘legal’ information and not merely ‘factual’ information. In other words, because the attitudes and ideas in question are specifically ‘legal in content’,\textsuperscript{155} it somehow follows that such attitudes and ideas should have certain determinative effects on particular law. How accurate is this argument? This issue is examined in detail by using an example below.

D. An Example

\textit{i. Legal Culture of X Limited}

A hypothetical example may facilitate one’s understanding of the above types of issues. Suppose that a company called X Limited has employees working for it. The employment contracts between X Limited and its employees state that all employees must come to work every Saturday. In other words, it is a legal rule that all employees of X Limited must work every Saturday.

Suppose that, notwithstanding such a contractual term, in practice none of the employees actually come to work on Saturdays. They only come to work on Saturdays if they have work to do that can only be carried out on Saturdays. The employees believe it to be an ‘unspoken rule’ that they only need to work on Saturdays if there is work to do that can only be done on Saturdays.

In this case, one may say that, with respect to the rule regarding working on Saturdays, the legal culture of the employees of X Limited is this: notwithstanding the legal rule, the employees do not come to work on Saturdays if they do not have work to do that can only be done on Saturdays. This is ‘legal culture’ because it is (and if it can be seen as) the attitudes and opinions of the employees regarding a particular law (that is, the rule regarding working on Saturdays).

\textit{ii. Mere Information on X Limited}

On the other hand, suppose that someone has conducted a survey on the employees of X Limited and found that the employees do not wish to work on Saturdays for various reasons.

\textsuperscript{154} Lawrence M. Friedman, 'Two Faces of Law' (1984) \textit{Wis L Rev} 13 at 25.

\textsuperscript{155} See Lawrence M. Friedman, ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 \textit{Yale L J} 1579 at 1579 (saying that ‘[l]egal culture refers to those ideas and attitudes which are specifically legal in content...’).
It would be possible to view such a survey as evidencing the legal culture of the employees of X Limited for the same reasons as discussed above.

But what if the emphasis of the survey is not so much on how the employees view the rule regarding working on Saturdays (that is, their attitudes, views and opinions towards this particular law). Suppose rather that the emphasis of the survey is on, for example, certain working trends of the employees (that is, mere action or practice). Then, unless there is evidence to suggest that the relevant actions of the employees and their attitudes towards the rule are directly linked between each other, one may not be able say that they are the same. In fact, it is possible that the employees may think along these lines: ‘Although we do not come to work on Saturdays unless we have work to do, we do not think that the rule should change.’ The justification for the discrepancies in their belief and action might be several. It may be that they want the rule as is because, for example, (a) it pressures them to work harder, (b) it had been agreed already, or (c) they see the rule as reasonable. In this case, it is probably appropriate to call the survey result mere ‘information’ on particular socio-cultural issues and not legal culture.

iii. Distinction between Legal Culture and Mere Cultural Information

With the survey result, it is perhaps less unconvincing to argue that some aspects of socio-cultural trends actually ‘determine’ what the rule regarding working on Saturdays should be. This is because, despite the practice of not working on Saturdays, the employees may actually believe that the rule requiring working on Saturdays should stay. On the other hand, it is conceivable that one may argue that the relevant legal culture of the employees may have a ‘determinative influence’ on (without going so far as saying that it ‘determines’) what the rule regarding working on Saturdays should be.156 (How that might be conceivable is discussed in Part III.2.D.iv below.) If this is correct, there seems to be a material distinction between legal culture and mere information – the former clearly having more impact and influence on a particular law than the latter.

iv. Legal Culture Determines Law?

The next question then will be: will or should X Limited change the rule regarding working on Saturdays to conform to the legal culture of the employees? In other words, does legal culture determine what a particular law should be? The answer, it seems, is that X Limited might change the rule that way; but at the same time, it might not, and it probably does not have to. In other words, it is clearly X Limited that ‘determines’ what the rule should be, and not the legal culture of the employees (albeit it may have a ‘determinative influence’).

Having said that, it is arguable that if X Limited had accepted the practice of the employees regarding not working on Saturdays as being the usual practice, then X Limited may not or should not be able to enforce the contractual provision regarding working on Saturdays if the employees dispute its validity. But this, of course, depends on the relevant applicable law. Suppose that the existing rule regarding working on Saturdays cannot be enforced, and that there is an ‘unspoken rule’ in favour of not working on Saturdays – all this because of the legal culture of the employees. In that case, arguably, the legal culture of the employees has had a ‘determinative influence’ on the rule. However, the strength of such an

---

156 Such a distinction may be rather slight which simply rests on the differences in emphasis. Friedman seems to think that social changes and social forces lead to legal changes. See id at 1587.
argument might depend upon several factors – and all of such factors would depend on the applicable law in question.  

v. Assessment

From the above lines of reasoning, one may reasonably conclude that a particular legal culture may or may not have a determinative influence upon a particular law. Whether a particular legal culture would have a determinative influence on a particular law will depend largely upon whether the relevant law (or the courts) would treat the legal culture as having a determinative influence upon the particular law.

The following further observations may be made. If one insists upon the idea that legal culture should have a determinative influence on the question of what a particular law should be, then the relevant definition of legal culture should be modified. It should be modified along the lines of ‘attitudes, opinions, etc. of a group of people in respect of a law, provided that the law would treat such attitudes, opinions, etc. as having a determinative influence upon the law’. As shown in the above example, without such a restrictive definition of legal culture, it does not necessarily follow that particular legal culture has a determinative influence on the question of what particular law should be. This is because, as defined in this thesis, the term ‘legal culture’ will include legal culture that may have a determinative influence on what a particular law should be, as well as legal culture that may not have a determinative influence on what a particular law should be.

Following from the above analysis, a related but slightly different way of looking at legal culture may be possible. Within the concept of legal culture, one may draw a distinction between (a) legal culture that consists of the ideas, values, attitudes and opinions of a group of people that, taken as a whole, adopts a firm position on what a particular law should be, and (b) legal culture that consists of ideas, values, attitudes and opinions of a group of people that, taken as a whole, does not take a firm position on what a particular law should be. In this thesis, for the sake of convenience, the former type of legal culture is called ‘normative legal culture’, while the latter type of legal culture is called ‘non-normative legal culture’. The term ‘legal culture’ as analysed in this thesis includes both normative and non-normative legal culture. The concept of ‘normative and non-normative legal culture’ is further elaborated in Part III.4 below.

Following this further refinement of the concept of legal culture as normative and non-normative legal culture, the next section will discuss the concept of ‘legal transplant’. The discussion will further elaborate on the concept of legal culture, particularly in the context of a country that has received foreign laws such as Korea.

---

157 For example, assuming that English law is applicable, the following factors may be relevant: (a) How much or how far did X Limited ‘accept’ such practice? Has the management of X Limited expressly endorsed it or simply acquiesced?; (b) Has there been an occasion where an employee asked the management of X Limited to change the rule regarding working on Saturdays, and notwithstanding such a request, the management did not change the rule?; (c) Are there reasons for not changing the rule despite the fact that, in practice, the rule is not followed? Is there any value or policy in leaving the rule as is?; (d) What does the relevant employment law say?; (e) Ultimately, how would the court decide such a case? What is the legal position in respect of such dispute?
3. Legal Transplant

A. The Concept of Legal Transplant

The concept of legal transplant (or legal transfer) is closely related to the concept of legal culture.\(^{158}\) It is particularly relevant for this thesis because the legal culture of Korea is, and should be, examined in the context of various stages of legal transplant effected upon Korea. According to Friedman, ‘legal transplant’ means the diffusion of rules, codes of practices from one country to another — and a country can borrow from another country, or can have an alien system impose on it.\(^{159}\) Sally Merry argues that ‘[t]ransplanted systems of law are a widespread feature of the contemporary world as well as the colonial one, and understanding how this transplantation happens and what its implications are is a critical but understudied process’.\(^{160}\)

In the case of Korea, both the borrowing and imposition of foreign rules have taken place throughout its history. An imposition of foreign rules occurred during the Japanese occupation period (1910-1945). Prior to this time, Korea had borrowed certain laws from China. After the Japanese occupation period, Korea borrowed laws from Europe and the United States.\(^{161}\) David Nelken argues that legal transplant involves ‘transplanting’ institutions, models and practices as well as philosophies, mentalities and ways of conceiving and categorising methods, problems and solutions. He says that it comes in a ‘package’ and, therefore, one should not attempt to take over just one part of the package, which can lead to unexpected difficulties.\(^{162}\)

Setting aside the rather extreme view that legal transplants are impossible,\(^{163}\) there is little agreement on the appropriate theoretical framework to use for investigations in relation to legal transplants.\(^{164}\) Nevertheless, some of the different ‘types’ of legal transplants and the possible consequences of such transplants are discussed below.


\(^{159}\) Lawrence M. Friedman, ‘Some Comments on Cotterrell and Legal Transplants’ in David Nelken & Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) at 94.


\(^{161}\) For a detailed discussion of this process, see Part IV.2 of Chapter 3.


B. Types of Legal Transplant

The subject matter of a transfer may involve very different kinds of law (such as family law, criminal law, human rights law or commercial law), each of which may travel more or less well and have greater or lesser difficulty in being accepted.\(^\text{165}\) It is said that some law may be more univocal. But other law may be more ‘chaotic’, in that it aims at a variety of audiences and attempts to straddle a multiplicity of values such as rights and utility or autonomy and community.\(^\text{166}\) Some law may be intended to change behaviour in a certain direction, other law only to facilitate choices.\(^\text{167}\)

Korea’s adaptation of laws at various stages of its history has involved the transfer of many different, and even an entire system of, laws – some from China, Japan and the United States. In this thesis, rather than examining the legal culture of Korea as it relates to particular type of laws, more general and ‘embedded’ aspects of Korean legal culture will be examined. Nevertheless, it is useful to identify certain laws, particularly the ‘Confucian legislation’ adapted at the beginning and during the Chosun Dynasty, as being laws that were intended to change the behaviour of the Koreans in certain ways. On the other hand, even during the Chosun Dynasty period, it can be observed that the adoption of Chinese law was deliberately made a slow process. This was to ensure that only the aspects of Chinese law that were appropriate to Korean customs and values would be adopted.\(^\text{168}\)

Nelken lists three types of legal transfer: (1) cases where one country borrows or submits to new laws or institutions from another country; (2) processes involving the spread of standards or regulations; (3) cases where ‘third cultures’ reflect and further processes of the globalisation of law.\(^\text{169}\) Nelken also says that the conditions of success of legal transfers will depend on what is being transferred, by which source, to which receiving society, the way the transfer is introduced, and a potentially unlimited number of wider background factors and previous historical experiences.\(^\text{170}\)

The first type of legal transplant will be particularly relevant for examining the legal culture of Korea; it is relates to the incidents of Korea’s intentional borrowing or submission by force in respect of transplanted laws. A detailed examination of legal history becomes indispensable because the process of legal transplants in Korea is a complicated historic process. The intentional borrowing of Chinese laws by Korea was a notably smoother process than when the Japanese laws were imposed during the Japanese occupation period. However, it might be difficult to speak of success or failure of legal transplant merely based on the way laws were transferred.\(^\text{171}\)

\(^{165}\) Id at 288.
\(^{166}\) Ibid.
\(^{167}\) Ibid.
\(^{168}\) Ibid.
\(^{169}\) See, for example, Part III.5.B of Chapter 3.
\(^{171}\) For the issues relating to the success or failure of legal transplants, see Part III.3.C.i below.
The third type of legal transfer referred to by Nelken is also relevant for this thesis. This is particularly the case for Chapter 5, where some of the findings on Korean legal culture are applied in the context of negotiations in cross-border financing transactions involving Korean parties. Here, the process of legal transplant seems to be a two-way process. That is, both Korean and foreign parties receive from each other aspects of each other's laws and culture. Thus, a 'region legal culture' may be taking shape.

Jonathan Miller identifies four different types of legal transplant: (1) the 'cost-saving' transplant, where the legal transplant is motivated by the idea of saving time and cost; (2) the 'externally dictated' transplant, which may involve a foreign individual, entity or government that indicates the adoption of a foreign legal model as a condition for doing business or for allowing the dominated country a measure of political autonomy; (3) the 'entrepreneurial' transplant, which may involve individuals and groups who pursue local adoption of a foreign legal model to reap certain benefits for them; (4) the 'legitimacy-generating' transplant, which often focuses on the prestige of the foreign model as the basis for the adaptation.

In terms of Miller's classification, the case of Korea will be a mixture of the 'externally dictated', 'entrepreneurial' and 'legitimacy-generating' transplants. These are convenient ways of classifying the legal transplants in question. But ultimately it appears that there are so many complicated and mixed purposes and factors that relate to these transfers that classification almost becomes an over-simplification of the process. For example, in the case of the 'externally dictated' transplant of laws during the Japanese occupation, the process of legal transfer may be perceived as a humiliating and unwanted event in Korean history from the recipients' point of view. But it seems inappropriate to over-attribute such a psychological factor in explaining the legal culture of Korea. As discussed in Part IV.1 of Chapter 3, this colonialism provided a complex cultural context in which aspects of Korea's deeply rooted legal culture renegotiated itself in the new environment.

C. Effects of Legal Transfer

i. Success or Failure of Legal Transplant

Nelken argues that it may or may not be possible to speak of the success or failure of particular incidents of legal transplant. Success, from the point of view of the transferring country, may be, and may be seen to be, different from success from the point of view of those in the recipient country. Further, harmonisation of the transferred law may not
necessarily be the goal of the transfer.\textsuperscript{176} The fact may be that the shifting complexity of the law cannot be explained through a rigid concept of legal transplant.\textsuperscript{177}

Nevertheless, Legrand argues that, in order for there to be a meaningful legal transplant, both the propositional statement as such and its invested meaning – which jointly constitute the rule being transferred – are transported from one culture to another.\textsuperscript{178} In other words, not only should laws be transferred, but also the underlying legal culture should be transferred for there to be an effective transfer. Hence, similarities of formal legal systems may be seen as ‘bad indicators of how legal systems actually work’.\textsuperscript{179} There may be ‘little correlation between the level of legal protection afforded by statutes on the one hand, and measures for the effectiveness of legal institutions on the other’.\textsuperscript{180}

Cotterrell makes similar points when he says that a legal transplant will be considered successful only if it proves consistent with the recipient culture or reshapes it in conformity with the cultural pre-suppositions of the transplanted law.\textsuperscript{181} He goes on to say that success or failure in transplantation may depend ultimately on education, organisation, and a flexible system of administration and judicial practice for adapting unfamiliar ideas to local conditions, perhaps to maximise incentives and remove disincentives to popular invocation of new legal ideas.\textsuperscript{182} Hence, Cotterrell attributes the responsibility for success to the efforts made by the relevant institutions of the recipient country. Nelken similarly argues that the problem of effective change often comes down to how to transform institutions rather than influence individuals.\textsuperscript{183}

\textit{ii. Korea – Successful Legal Transfer?}

As mentioned earlier,\textsuperscript{184} the main goals of this thesis are to (a) identify the deeply rooted legal culture of Korea, and (b) determine its application in certain spheres of legal practice. Therefore, the question of whether the various stages of legal transplants that have taken place in Korea have been successful is not directly relevant to this thesis.\textsuperscript{185} The main focus

\begin{itemize}
\item \textsuperscript{176} See, generally, A. Harding, ‘Comparative Law and Legal Transplantation in South East Asia’ in David Nelken & Johannes Feest (eds), \textit{Adapting Legal Cultures} (Hart Publishing, 2001).
\item \textsuperscript{177} P. Legrand, ‘What “Legal Transplants?”’ in David Nelken & Johannes Feest (eds), \textit{Adapting Legal Cultures} (Hart Publishing, 2001) at 64.
\item \textsuperscript{178} Id at 60.
\item \textsuperscript{179} Erhard Blankenburg, ‘Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany’ (1998) 46 \textit{Am J Comp L} 1 at 39.
\item \textsuperscript{180} Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, ‘The Transplant Effect’ (2003) 51 \textit{Am J Comp L} 163 at 165. They argue (at 167) that for the transplanted law to be effective, firstly ‘it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop law’; and secondly, ‘the judges, lawyers, politicians, and other legal intermediaries that are responsible for developing the law must be able to increase the quality of law in a way that is responsive to demand for legality.’
\item \textsuperscript{181} Roger Cotterrell, ‘Is There a Logic of Legal Transplants?’ in David Nelken & Johannes Feest (eds), \textit{Adapting Legal Cultures} (Hart Publishing, 2001) at 79.
\item \textsuperscript{182} Id at 80.
\item \textsuperscript{183} David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken & Johannes Feest (eds), \textit{Adapting Legal Cultures} (Hart Publishing, 2001) at 40.
\item \textsuperscript{184} See Part I.2 of Chapter 1.
\item \textsuperscript{185} Having said that, one of the implications of the conventional view of Korean legal culture (set out in Part II.1 of Chapter 1) is that the imported western legal system has not been functioning well largely due to the traditional legal culture of Korea. See, for example, Dae Kyu Yoon, \textit{Law and Political}
of this thesis is the actual (deeply rooted) legal culture of Korea itself, rather than the effectiveness of the received laws as such.

Nevertheless, one aspect of the discussion on the success or failure of legal transfer seems noteworthy – namely, the focus on the acceptance of a transplanted law by the people of the recipient country. As Cotterrell and Legrand suggest, the extent to which a transplanted law is accepted by the people of the recipient country is a significant indicator of the success of the legal transplant. This is related to the way in which the people of the recipient country view the transplanted law as having legal legitimacy, and this closely relates to the concept of ‘normative legal culture’.

Chapter 5 illustrates how Korean local legal culture interacts with, and influences, aspects of the ‘global legal culture’ relating to deal-making processes in cross-border financing transactions. Again, the focus is not so much on success of the globalisation of the legal culture in the relevant area of practice. Rather, the focus is on how the normative legal culture of Korea influences, and is relevant to, such deal-making processes. Some practical implications of correctly understanding and applying the relevant findings in respect of a country’s legal culture are emphasised in Chapter 5.

iii. Four Types of Community Receiving Transferred Laws

As part of a conceptual framework for understanding legal borrowing based on Max Weber’s four ideal types of social action, Cotterrell suggests four types of ‘community: (1) ‘instrumental community’, in which instrumental aspects of social relations are highlighted; (2) ‘traditional community’, which embraces not only relations based on tradition or custom but all aspects of relationships based on chance proximity or common experience; (3) ‘community of belief’, which focuses on aspects of social relationships defined by shared beliefs or commitment to certain values for their own sake; (4) ‘affective community’, which highlights aspects of social relationships that are intimate, uncalculated, universalistic and strongly shaped by emotion or friendship.¹⁸⁶

Cotterrell argues that this framework of types of community provides possibilities for linking law to different kinds of needs and problems associated with different kinds of social relationships.¹⁸⁷ He argues that when laws are transplanted, the transplant is likely to be linked in the perception of the transplanters with patterns of social relations they associate with law. For example, it may be a secular society of individual values, providing a model for those wishing to borrow that society’s law to achieve secularisation and ‘modernisation’ in their own society.¹⁸⁸

¹⁸⁶ Authority in South Korea (Kyungnam University Press, 1990) at 27, and Pyong-Choon Hahn & Seung-Doo Yang, ‘The Attitudes of the Korean People Toward Law’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 162. By challenging such conventional views, this thesis implicitly, and necessarily, argues that the perceived ‘failure’ of the legal transplant in Korea is not due to the existence of traditional legal culture. Indeed, it is probably too early to say that such legal transplant in Korea has in fact ‘failed’.


¹⁸⁸ Id at 83.

Ibid.
This seems particularly relevant for examining the perceptions of Korean lawmakers at the beginning of the Chosun Dynasty who were linking law to Confucian ideals that they wanted to spread in Korea. They attempted to effect social reforms through legislation aimed at increasing the influence of Confucianism. Did this reform successfully penetrate all of the four categories of communities? Would it have been more difficult for Confucianism to penetrate some of the four communities than others?

Cotterrell argues that the difficulty of law’s relation to community of belief lies in the ambiguity of translating values into legal forms or of interpreting law in terms of values. The main difficulty of law’s definition of affective community lies in the elusiveness and resistance to legal definition of affective community itself as a matter of social relationship. The latter is reflected, for example, in the difficulty of interpreting situations of coercion and consent in sexual relationships or in defining fiduciary duty, and in the often alien or irrelevant character of law as perceived from within affective relationships, even when legal protection or help in escaping from a relationship is clearly necessary.\(^{189}\)

In the Korean context, although some may argue that the ‘Confucian legislation’ was apparently able to penetrate both the community of belief and the affective community in Korea during the Chosun Dynasty period, there may have been real difficulties associated with introducing the legislation. For example, when the Confucian legislation attempted to change the matrilocal marriage system into a patrilocal system, there was considerable resistance.\(^{190}\) Similarly, although the Confucian reformers had succeeded in reducing women’s rights by, for example, restricting women’s rights of equal inheritance, it is doubtful if the people’s value system itself had significantly changed. Suppose that the people’s social value system had changed; did their attitudes towards law change as well?

There may be other ‘communities’ than those discussed by Cotterrell. His theory does not explain all situations of legal transplant.\(^{191}\) Nevertheless, Cotterrell’s thesis suggests that the apparent penetration of a new law into a community does not necessarily mean that the penetration was successful in other communities also. It might be particularly difficult for law reform to penetrate into value systems. One particular value system – legal culture – may be such an example. It must also be remembered that the transplanter of Confucian legislation had aimed at effecting social changes – changing social values. The reform was not necessarily aimed at changing the legal culture as the term is used in this thesis.

Another theory for examining the concept of legal transfer may be found in Luhmann and Teubner’s autopoiesis theory,\(^{192}\) which is briefly discussed below.

D. Autopoietic Law and Legal Transplant

i. Introduction

\(^{189}\) Id at 88-89.

\(^{190}\) See Part III.5.B of Chapter 3.

\(^{191}\) Cotterrell concludes that no unambiguous correlation of areas of law with the ideal types of community is possible because law’s relevance to them is complex, diverse and variable. See Roger Cotterrell, ‘Is There a Logic of Legal Transplants?’ in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 89.

Teubner’s application of the theory of legal autopoiesis in the context of legal transplants presents a unique insight into the issues relating to legal culture and legal transplants, and therefore it is instructive to briefly consider his theory. Examining autopoiesis theory in the context of this thesis’ concerns highlights Teubner’s theoretical ground for analysing the process of legal transplants, which adds to one’s understanding of legal transplants in ways that the theories of other commentators do not. But it appears that autopoietic theory does not acknowledge adequately the aspects of ‘consent’ and ‘belief’ of people in the recipient country in respect of transplanted laws. Given the significance of the consent and belief of the recipient country, Teubner’s theory may represent a rather unique (or extreme) theory of legal transplants.

Autopoietic theory nonetheless may be relevant to certain issues discussed in Chapter 5. There it is observed that legal practice in cross-border structured financing transactions tends to be somewhat isolated from the relevant local and judicial systems, mainly due to the complexity of these transactions. Thus, the actual practice of lawyers in these transactions is often seen as creating ‘market practice’ and ‘market norms’ for this area of practice. Some writers even suggest that ‘autopoietic norms’ are generated in these types of financing transactions by virtue of the practice of the finance lawyers, such that those lawyers are in fact said to act as ad hoc regulators of the market.

It is beyond the scope of this thesis to verify whether or not autopoietic norms are in fact generated in such practice. Nevertheless, assuming that they are, it will be instructive to briefly discuss the concept of autopoiesis. This will provide another theoretical basis for explaining how legal transfer may take place in such contexts, affecting both local laws and cross-border legal regimes.

ii. Theory of Legal Autopoiesis

The theory of legal autopoiesis is largely based on, and derives from, Niklas Luhmann’s systems theory and the theory of social autopoiesis (which in turn originates from biological debates). The theory is related to the idea that an autopoietic system produces and reproduces its own elements by the interaction of its elements, and that communication (which is the basic element of a social system, as the unity of utterance, information and understanding) constitutes social systems by recursively reproducing communication.

Similar to social autopoiesis, Teubner argues that legal autopoiesis is created when a legal system that is already autonomous to a certain degree constitutes its own elements, which trigger off legal changes and hence initiate autopoietic circulation: legal acts, legal change, legal act. Within autopoietic theory is the theory of self-referential systems, which assumes that systems with a certain level of complexity gain their identity through the fact

---

193 Ibid.
195 See Part II.2.C of Chapter 5.
198 Id at 221.
that they refer to themselves in all their operations and processes. This means that systems can only bring about continuous self-reproduction by having recourse to themselves - that is, only in a form in which the operations of the system reproduces in a circular way the elements of the system, its structures and processes, its boundary and the overall unity of the system. How is this theory relevant to legal transplant?

iii. Legal Autopoiesis and Legal Transplant

Unlike most historical or sociological descriptions or explanations of particular examples or occasions of legal adaptation, autopoietic theory attempts to incorporate the topic of legal transfer into an all encompassing social theory. In relation to the concept of legal transplant, Teubner argues that the use of the metaphor ‘legal transplant’ is misleading, and he suggests instead the expression ‘legal irritant’. He argues that when a foreign rule is imposed on a domestic culture, it is not transplanted into another organism, but rather it works as a fundamental irritation that triggers a whole series of new and often unexpected events. It irritates the law’s ‘binding arrangements’ and forces them not only to reconstruct internally their own rules but to reconstruct from scratch the alien element itself.

Teubner argues that a binding arrangement, tying law to a social discourse, does not develop in one single historical trajectory but in two separate and qualitatively different evolutionary paths of the two sides that are reconnected via co-evolution. That is, the legal side takes part in the evolutionary logic of law while the social side obeys a different logic of development. But their changes interact insofar as due to their close structural coupling they permanently perturb each other and provoke change on the other side.

On the legal side of the binding institution, the rule will be recontextualised in the new network of legal distinctions and it may still be recognisable as the original legal rule even if its legal interpretation changes. But on the social side, the legal impulse will create perturbations and trigger some changes governed by the internal logics of the social world, leading to new series of events. The social change in its turn will work back as an irritation to the legal side of the institution thus creating a circular co-evolutionary dynamic that comes to a preliminary equilibrium only once both the legal and the social discourse will have evolved relatively stable ‘eigenvalues’ in their respective spheres.

199 Id at 220.
202 Ibid.
203 Ibid.
204 Id at 28.
205 Ibid.
206 Ibid.
207 Ibid.
Teubner concludes that this shows how improbable it is that a legal rule will be successfully transplanted in a binding arrangement in a different legal context. He says that if it is not rejected outright, either it destroys the relevant binding arrangement or it will result in a dynamic of mutual irritations that alters its identity fundamentally.

Nelken criticises this view on the basis that legal transplants are often not either an outright success or failure but are more likely a mixture of both. Indeed, it would be difficult to evaluate the fact of an acceptance or a rejection of purportedly transferred rules in the first place. What constitutes a rejection or an acceptance of the rules? Related to this issue is another criticism that Nelken makes, namely Teubner’s failure to give sufficient attention to analysing the arguments used by those promoting or resisting legal transfers. According to Nelken, the groups involved in the transferring country and those in the country receiving the law would have different views of what ‘success’ of the transfer means.

Nelken implicitly suggests that Teubner’s use of the metaphor ‘legal irritant’ should be used heuristically for highlighting only certain aspects of legal transplants and not as a term of art. Priban also argues that the main shortcomings of autopoietic theory are its reduction of legitimation to passive processes of learning procedures and its deliberate exclusion of the social contingency of belief in legitimacy. This is because, according to Priban, instead of legitimation of the transferred law based on founded values, Teubner’s theory bases legitimation on procedural grounds. Therefore, according to Priban, the procedural legitimation begins to dominate and teach subjects to accept systematic processes and procedures, and legitimacy remains a matter of passive consent with pre-existing procedures. Habermas makes similar criticisms.

The shortcomings of autopoietic theory in explaining the process of legal transplants are further highlighted in the context of this thesis and its examination of the various stages of the reception of foreign law and the changing ideological and cultural environments of Korea throughout its history. Simply, autopoietic theory does not clearly explain the complexity of these issues, particularly when it fails to emphasise the issues of legitimacy and consent in respect of transplanted laws. More generally, Teubner’s theory adopts an excessively

---

208 Ibid.
209 Ibid.
214 Id at 110.
215 Jurgen Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy (Polity Press, 1966) at xxiii and xxviii (arguing that legitimacy requires democratic processes of public ‘opinion and will formation’).
descriptive and deconstructive approach that does not provide clear explanations in respect of the normative forces within a legal system.\textsuperscript{216}

Nevertheless, as mentioned, Teubner’s theory might be relevant in explaining certain aspects of the global legal culture discussed in Chapter 5. There, the focus is not so much on legal transplant, but the idea that autopoietic legal order might have formed in certain cross-border financing transactions. Certainly, it is clear that legal culture in these deals is a unique phenomenon where the Anglo-American way\textsuperscript{217} of doing these deals tends to prevail. The suggestion that autopoietic laws may have formed in respect of these transactions is an indication of the closed culture of the players in such deals. But it is interesting to note that local legal culture (for example, Korean) also influences and shapes such legal culture for deals involving local parties. Thus, the need to properly understand the relevant local legal culture becomes of paramount importance for international counsel doing such deals. This will be further elaborated on in Chapter 5.

Another way in which to apply Teubner’s theory in the Korean context is this: in one respect, it is arguable that autopoiesis theory may represent a broad description of the process of legal transfer that has taken place in Korea throughout its history. It is conceivable that the received laws that were ‘accepted’ by the Koreans had ‘triggered’ events that had profound effects on Korean society. This, in turn, would have triggered evolution of the law. This co-evolution process possibly continued throughout Korean history during the process of reception of foreign laws.

To recap the discussion thus far, the very concept of legal culture has been described and defined. Some of Friedman’s concepts were elaborated on and adopted as the basic concept of legal culture for this thesis. The concept of normative legal culture was then introduced. This concept, which will be further elaborated in the next section, emphasises the level of inner acceptance of law. The concept of legal transplants, as expounded by writers such as Nelken, Cotterrell and Teubner, was discussed. With the exception of Teubner, it was seen that, again, inner acceptance plays a key role in determining the ‘success’ of a legal transplant. Cotterrell discusses in detail how different ‘communities’ may accept transplanted law differently, thereby suggesting a dynamism in the inner acceptance of transplanted law.

The concept of normative legal culture also deals with such dynamism, but with a difference in emphasis. Whereas Cotterrell’s emphasis is on different communities of recipients of law, normative legal culture is more concerned with the extent to which acceptance of the law has taken place. Also, unlike Teubner’s theory, it attempts to ‘lift the veil’ on the process of legal transfer to examine what actually happened in terms of specific legal culture. How did people actually perceive the transplanted laws? Did they believe in, and consent to, the legal legitimacy of those laws?

4. The Concept of Normative Legal Culture

A. Basic Characteristics of Normative Legal Culture


\textsuperscript{217} For a discussion of the relevant practice of Anglo-American law firms, see Part II.2 of Chapter 5.
In this section, the concept of normative legal culture will be further elaborated in light of the preceding discussion. Firstly, as discussed, the concept of ‘normative legal culture’ is different from the idea that certain types of legal culture have a determinative effect on what a particular law should be. This is because normative legal culture may or may not, depending on complex factual circumstances, have a determinative effect on what a particular law should be. Simply put, all that normative legal culture represents is a firm view or position on what a particular law should be. It is a view or position that believes in the legal legitimacy of a rule, such that, as Pospisil would say, the rule is ‘internalised’.\(^{218}\)

Such a view or position, even though taken quite firmly, may or may not actually have a determinative effect on a particular law. For example, in the case of X Limited discussed above in Part III.2.D, the employees of X Limited may take a firm view that the legal rule regarding working on Saturdays should be changed, such that employees of X Limited need not work on Saturdays unless they have work that can only be done on Saturdays. Will such a view of the employees have a determinative effect on the relevant rule? Such a view of the employees may trigger disputes between the employees and the employers, and they may even end up in court. But the court may not decide in favour of the employees. It is the law, or an individual court, that determines what the relevant law should be, not the normative legal culture.

Secondly, another requirement for normative legal culture (which was not elaborated previously) is that it must have existed for a considerably long time.\(^{219}\) People’s attitudes can change frequently, sometimes for no obvious reason, and for different reasons. Therefore in order for normative legal culture to be meaningful, there must be a degree of stability in the views, attitudes and opinions, so that it can be seen as a significant trend. What is a long time will depend on the circumstances and on the purpose for which it is studied. For present purposes, since the inquiry is into the deeply rooted legal culture of Korea, one that goes back hundreds of years, the relevant time span should be quite long, requiring a study of Korean legal history over many centuries. Further, normative legal culture generally must have survived until today; otherwise, it is probably irrelevant for contemporary law. But one cannot preclude the possibility that normative legal culture once believed to have disappeared may reappear as new cultural environments are created.\(^{220}\)

Thirdly, the concept of normative legal culture does not mean that the legal culture of everyone represents a firm view or position on what a particular law should be. If that was the case, then it would mean that the employers and the employees of X Limited would take


\(^{219}\) People’s attitudes can change frequently, sometimes for no obvious reason, and for different reasons. Therefore in order for normative legal culture to be meaningful, there must be a degree of stability in the views, attitudes and opinions, so that it can be seen as a significant trend. What is a long time will depend on the circumstances and on the purpose for which it is studied. For present purposes, since the inquiry is into the deeply rooted legal culture of Korea, one that goes back hundreds of years, the relevant time span should be quite long, requiring a study of Korean legal history over many centuries. Further, normative legal culture generally must have survived until today; otherwise, it is probably irrelevant for contemporary law. But one cannot preclude the possibility that normative legal culture once believed to have disappeared may reappear as new cultural environments are created.

\(^{220}\) See, for example, Part IV.2.A of Chapter 3.
the same view on the law in question. If so, there would not be any dispute about what a particular law should be in the first place. It would be sufficient if a significant group of people, and particularly those who are directly affected by, and subject to, the relevant rule have such legal culture. And what is significant will depend on the nature of the legal culture, the relevant factual circumstances, and the law in question.\textsuperscript{221}

B. Non-Normative Legal Culture

What then, does 'non-normative legal culture' mean? It would mean, in the case of X Limited, while the employees take the view that it is possible for them not to work on Saturdays, that nevertheless they do not necessarily view that this is what the legal rule ought to be in relation to working on Saturdays. In other words, non-normative legal culture is mainly concerned with 'preferences' in relation to certain rules, without a firm view, belief, attitude or opinion about what the rule should be. It may be more than 'mere information' on the practice or actions of the employees in that it is still an attitude towards a particular law. But it is not a 'strong' attitude. It is not a view, belief, attitude or opinion representing a firm position on a particular law.\textsuperscript{222} One may also draw a helpful analogy (although they are not the same) between this and Vilhelm Aubert's concept of the distinction between demands of 'interests' and 'claims of right'.\textsuperscript{223} Non-normative legal culture may be closer to a demand of interests rather than a claim of right.

Take Friedman's example of speeding laws. He says that most people agree that there ought to be laws against speeding. And yet, they may 'quibble' about the national speeding limit and, further, everyone violates the speeding law at some time or other without feeling particularly guilty about it.\textsuperscript{224} Friedman states that this is a 'curious fact' and that public attitudes support a mixed arrangement.\textsuperscript{225} It is submitted that such a phenomenon may also be explained by saying that the aspects of legal culture that 'quibble' and violate the speeding law may be seen as non-normative legal culture. On the other hand, the aspects of legal culture that support the existence of the speeding law may be seen as normative legal culture. Putting it in another way, although the non-normative legal culture of the public appears to


\textsuperscript{222} This is perhaps one way of explaining why some writers deny that they are using the idea of cultural determinism when they argue that Korea's traditional legal culture hinders the successful transplant of Western law. See Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 34. Not all cultural aspects influence the law. Non-normative legal culture might not influence the law. On the other hand, there is something about law that does not change despite cultural changes. In this regard, Yoon, for example, explains that '[...]the normative aspects of law can, to some degree, neutralise the obstacles posed by culture' (ibid). The fact that certain aspects of law do not change despite changes in culture suggests that certain attitudes towards law tend to remain relatively constant. Such attitudes might be normative legal culture.

\textsuperscript{223} Vilhelm Aubert, 'Competition and Dissensus: Two Types of Conflict and of Conflict Resolution' (1963) 7 J Conflict Resolution 26. See Part II.2.C.ii above.


\textsuperscript{225} Ibid. In another context, Friedman seems to explain such a 'mixed arrangement' in terms of the protection of freedom of choice. See Lawrence M. Friedman, The Republic of Choice: Law, Authority, and Culture (Harvard University Press, 1990) at 62. That is, even though people may often violate traffic regulations, there is a strong and overriding culture that wants the protection of freedom of choice -- the choice to be able to drive freely on the roads. This type of strong culture may be, in this thesis, referred to as normative legal culture. On the other hand, the culture of violating traffic regulations may be seen as non-normative legal culture, even though this culture may be equally universal.
disagree with the relevant speeding law, nevertheless, normative legal culture supports the relevant speeding law.\textsuperscript{226} 

C. Why Use the Concept of Normative Legal Culture?

There is no doubt that the difference between normative legal culture and non-normative legal culture is a question of degree, and the concept might not be useful in some contexts.\textsuperscript{227} Nevertheless, for the purposes of this thesis, the distinction between normative and non-normative legal culture is a useful distinction to make.\textsuperscript{228}

\textit{i. More Likely to Have Determinative Influence on Law and Be Seen as Source of Law}

First, as already mentioned, the mere fact that certain legal culture is normative legal culture does not necessarily mean that it will have a determinative influence on what a particular law should be. Nevertheless, suppose that normative legal culture does not support a particular law, but it in fact supports a rule that is inconsistent with the law in question. In this case there is likely to be a dispute about the law in question. For example, if the law does not prohibit speeding, but if the normative legal culture supports a rule that prohibits speeding, then this is likely to trigger a debate about the speeding law in question.

Further, such a debate may lead to changes in the law in question. Although the normative legal culture does not determine what a particular law should be, it may be influential. It is more than mere public opinion. It is specific public opinion. Particularly regarding laws that govern fundamental rights, normative legal culture may be very influential in shaping such laws. As shown in Chapter 4, this is the case in many constitutional review decisions in Korea.\textsuperscript{229} The Constitutional Court often refers to firmly-held public opinion about certain rights in making decisions relating to the rights.

\textsuperscript{226} Thus it has been said that ‘internalisation’ of a rule does not necessarily mean that such a rule is always maintained in actual behaviour. See Leopold Pospisil, \textit{Anthropology of Law: A Comparative Theory} (HRAF Press, 1974) at 201-202. Pospisil argues that there are situations in which an individual either breaks a rule on the spur of the moment (without much thinking) or consciously compromises a moral conviction for an immediate and sufficiently strong reward. In Friedman’s example, the drivers would be quite consciously compromising their conviction (in relation to the speeding laws) for the short-term convenience of getting to their destinations faster.

\textsuperscript{227} In other contexts, Friedman’s concept of internal and external legal culture might be more useful. See Lawrence M. Friedman, \textit{The Legal System: A Social Science Perspective} (Russell Sage Foundation, 1975) at 223-267. Unlike Friedman’s concept of internal legal culture, normative legal culture includes the legal culture of lay persons as well. But like the concept of internal legal culture, rules supported by normative legal culture are more likely to be viewed as legal rules. Friedman seems to admit the limitation of his concept when he says ‘the complex behaviour of professionals, the legal culture of the insiders, is by no means an autonomous growth and by no means an exception to the general proposition about the primacy of society over law’ (ibid at 194). Paul W. Kahn also seems to criticise the distinction between internal and external legal culture. See Paul W. Kahn, ‘Approaches to the Cultural Study of Law: Freedom, Autonomy, and the Cultural Study of Law’ (2001) 13 \textit{Yale J L \& Human} 141 at 150.

\textsuperscript{228} For Friedman, his distinction of internal and external legal culture is a useful distinction to make because ‘[o]fficial law, internal legal culture and public opinion can also differ about the substance of demands’. See Lawrence M. Friedman, \textit{The Legal System: A Social Science Perspective} (Russell Sage Foundation, 1975) at 225.

\textsuperscript{229} See Part I.2.C of Chapter 4.
These kinds of features of normative legal culture show that when writers such as Friedman refer to the concept of legal culture, often their concept of legal culture *in reality* seems to be consistent with the concept of normative legal culture. That is, it is normative legal culture that may have a determinative influence on law and may be seen as a source of law. On the other hand, non-normative legal culture may not be seen as having such effects. It helps to be more specific in elaborating on the concept of legal culture for the purposes of identifying what aspect of legal culture one is really focusing on.

**ii. Normative Legal Culture and Legitimacy of Transplanted Laws**

Also, as discussed earlier, there is a close connection between the concept of normative legal culture and the question of legitimacy of law. This is particularly an issue relating to transplanted laws. A fundamental implication of the conventional view of Korean legal culture is that received Western laws conflict with local Korean legal culture. The conventional view would suggest that this is because there is a lack of inner acceptance of the received laws – the legitimacy of the received laws may be in question. Thus, there appears to be a close relationship between inner acceptance of law and legitimacy of law.\(^{230}\)

Specifically, how are they related?

According to Max Weber, legitimacy of law requires a belief in the legality of enacted rules on the side of those who are to be subjected to the rules. As such, there is a tension between the impersonal and rational order of procedures and rules on the one hand, and the belief in such order on the other hand.\(^{231}\) Tanase suggests that the issue of legitimacy of law arises because law has its own set of ideas and values that may conflict with the worldview of people.\(^{232}\) Also, legitimacy in this sense may be defined as a capacity of political will to impose a particular opinion and worldview or ideology.\(^{233}\) Priban argues that a decision, will, and command are integral to legality, which therefore can never be explained purely by concepts such as rationality and formal legislation.\(^{234}\)

Priban goes on to argue that belief in the legitimacy of legal domination must be supported by a rational normative framework – and this is why political power must look for a coalition of reason to control belief in the legitimacy of law.\(^{235}\) Hence, Joseph Raz

\(^{230}\) Indeed, law itself may be described as ‘a system of coercible rules and impersonal procedures that also involve an appeal to reasons that all citizens should, at least ideally, *find acceptable*’ (emphasis added). See Jurgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (Polity Press, 1966) at xi.


\(^{234}\) Ibid. Compare this to Habermas’ argument that the legitimacy of law may be established through communicative action among persons who recognise each other as equals and who agree to accept as legitimate only those laws that they all consent both (1) to enact as autonomous legislators and (2) to follow as law abiding citizens. See Jurgen Habermas, ‘Paradigms of Law’ in Michael Rosenfeld & Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, 1998) at 19-21.

\(^{235}\) Ibid. Similarly, Sally Merry argues that [p]olitical authority always relies to a greater or lesser extent on the consent of the governed, and any form of domination requires some level of consent by the dominated group, some willingness to accept its own subordination. Without this consent, the costs of
considers that trust between a government and its subjects has fundamental importance for any legitimate political order.\(^\text{236}\) It has been argued that the vast majority of law-abiding behaviours occur without sanction and are the product of general acceptance of a legal regime and its system of meaning.\(^\text{237}\) Nelken also argues that the best evidence of success of a legal transfer may be its complete acceptance into the legal and political culture that has imported it.\(^\text{238}\) Friedman also argues that authority is legitimate if the public views the authority as legitimate.\(^\text{239}\)

Thus, there is a close nexus between the inner acceptance of a rule and the legitimacy of that rule. As discussed earlier, these concepts are closely connected to the concept of normative legal culture. In fact, the concept of normative legal culture links these two ideas together — that is, there must be inner acceptance as to the legitimacy of a rule. For normative legal culture, inner acceptance itself is not enough. Inner acceptance must be such that it accepts the legal legitimacy of the rule in question. In this sense, normative legal culture has similar features as Pospisil's concept of 'internalisation' of law\(^\text{240}\) and Roberto Unger's emphasis on the 'internal expression' of law when it comes to law reform.\(^\text{241}\) In this regard (comparing the concept of internalisation), normative legal culture may be seen as containing the cultural elements formed by a 'cognitive schemata, built up in the individual minds through past participation of the group'\(^\text{242}\) that initiates and guides the internalisation process.\(^\text{243}\) The distinction between normative legal culture and internalisation of law may be that the former is a value system, whereas the latter is a psychological and/or societal process.

---


\(^{240}\) Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (HRAF Press, 1974) at 193-232. According to Pospisil, 'internalisation' is a process by which a rule that has not been accepted by people becomes accepted by them. In his work *Kapauku Papuans and Their Law* (Yale University Publications in Anthropology No. 54, 1964) at 279, Pospisil says that "a law is internalized when the majority of members of a group consider it to be binding, as when it stands for the only proper behaviour in a given situation. If such law is broken, the culprit may feel guilty; ... Conformity to such a law is not much effected by external pressure — it is produced by a different, internal mechanism which we may call conscience in some culture and fear of shame in others." Internalisation is also said to be a 'transformation of outer conformity into inner conformity' in relation to particular rules. See Carl I. Hovland, Irving L. Janis & Harold H. Kelly, *Communication and Persuasion: Psychological Studies of Opinion Change* (Yale University Press, 1968) at 281. The result of an internalisation process may be called 'intrinsically motivated conformity' to particular rules. See Herbert C. Kelman, 'Compliance, Identification and Internalisation: Three Processes of Attitude Change' in Harold Proshansky & Bernard Seidenberg (eds), *Basic Studies in Social Psychology* (Holt, Rinehart and Winston, 1966) at 142.


\(^{243}\) It has been said that the source of power that feeds the process of internalisation process is a subject's conviction about the desirability of prescribed conduct that they assume irrespective of their feelings towards the group or authority and their immediate surveillance. See Leopold Pospisil, *Anthropology
In the context of Korea, one may question whether some of the Confucian legislation created by the Chosun Dynasty was really legitimate from a legal cultural perspective. Does the mere fact that formal legislation was imposed by the legitimate political will make the legislation "legitimate"? In addition to the political will to create formal legislation, there must be acceptance by people of the relevant legislation as law. In this regard, the concept of normative legal culture is relevant to the question of legitimacy of transplanted law as it is concerned with the extent to which people subject to the transplanted law believe in the legitimacy of the relevant law. The rule that is supported by normative legal culture will tend to have more legitimacy than if it were supported by non-normative legal culture. Even if the Confucian legislation of the Chosun Dynasty period was complied with, this does not necessarily mean that there had been an inner acceptance of the law by people. Such law may have been what Pospisil would call "authoritarian law". Those who hold the conventional view of Korean legal culture often seem to ignore this point.

The above discussion shows that when commentators use the term 'legal culture' in the context of legal transplants, very often, they may in reality be referring to the concept of normative legal culture. This means that the concept of normative legal culture is particularly relevant for present purposes, when the conventional views of Korean legal culture is examined in detail. The assumption is that when writers argue that Korean legal culture is deeply Confucian in nature, they are really saying that Confucianism as legal culture has been internalised by the Koreans. If so (that is, internalisation of Confucianism as legal culture is what they mean), it is the normative legal culture that is the focus of the present debate.


245 Applying Pospisil's theory, the Confucian legislation of the Chosun Dynasty period might be called 'authoritarian law', lacking acceptance by the people subjected to it. See Leopold Pospisil, Anthropology of Law: A Comparative Theory (HRAF Press, 1974) at 196.

246 Conformance to a given rule does not necessarily imply that it will be considered just by the majority of people. See Leopold Pospisil, Anthropology of Law: A Comparative Theory (HRAF Press, 1974) at 197. The motivations for complying with the relevant rules may be several. For example, an individual may desire to remain as a member of the group. See Carl I. Hovland, Irving L. Janis and Harold H. Kelly, Communication and Persuasion: Psychological Studies of Opinion Change (Yale University Press, 1968) at 144-147. Also, there may be fear of the punishment for not complying with the rule. See Herbert C. Kelman, 'Compliance, Identification and Internalisation: Three Process of Attitude Change' in Harold Proshansky & Bernard Seidenberg (eds), Basic Studies in Social Psychology (Rinehart and Winston, 1966) at 142.

246 According to Pospisil, 'authoritarian law' is law that has not been internalised by a majority of the members of a group. He says that '[a] strong minority which supports the legal authority may have elevated such law to be an "ideal" and may have simply forced the rest of the people to accept it. In some cases this kind of law is internalised only by the legal authority. ... In other cases the law owes its authoritarian quality to the fact that there has not been sufficient time for internalisation.' See Leopold Pospisil, Kapauku Papuans and Their Law (Yale University Publications in Anthropology, No. 54, 1964) at 280.

78
iii. Practical Significance for Legal Practice

Thirdly, as mentioned briefly above, the difference between normative legal culture and non-normative legal culture is one of degree, the former being a more definite position in relation to a particular law and the latter being closer to being a mere preference in relation to a particular law. Both normative and non-normative legal culture should be capable of influencing the issue of what a particular law should be, although the former is likely to be more influential. That said, in countries where there is no legislature or official rule, some of the non-official rules being supported by normative legal culture are likely to be treated as law (which is similar to Chiba’s concept of ‘unofficial law’ discussed below\textsuperscript{247}), much more so than the rules supported by non-normative legal culture.

Determining whether a certain rule is ‘in fact law’\textsuperscript{248} may be, to a large extent, dependent on the normative legal culture of the relevant people in those circumstances. This is because normative legal culture, by its very definition, implies that people consider that certain rules should be law.\textsuperscript{249} Such ‘conscious’ recognition may be sometimes what distinguishes law from custom.\textsuperscript{250} In other words, some of the non-legal rules that are being supported by normative legal culture might have a certain normative value comparable to that of law, which is created by the value system of relevant groups of people. The same cannot be said of non-normative legal culture because, by its very definition, their value system does not grant it any such normative value.

However, to be sure, this is not to say that non-legal rules supported by normative legal culture necessarily become legal rules. For example, how customary law is created is a complex process and there is more than one theory that explains it.\textsuperscript{251} Indeed, the focus of

---

\textsuperscript{247} See Part III.6.A below.


\textsuperscript{249} An analogy may be drawn between such a situation and the case of public international law. In the latter case, the concept of \textit{opinio juris} places emphasis on affording validity to a rule as public international law. Using such an analogy, it would be even more convincing if the non-legal rule supported by normative legal culture has been in existence (that is, unofficially) for a significant duration of time and consistently applied (albeit unofficially). See Ian Brownlie, Principles of Public International Law (Clarendon Press, 1998) at 5. Of course, the analogy cannot be applied at face value because international law is law between sovereign states and normative legal culture in the present context refers to municipal situations.


\textsuperscript{251} In his article ‘An Approach to Customary Law’ (1984) \textit{U Ill L Rev} 561, Alan Watson discusses various theories relating to the creation of customary law. He says that one view is that customary law is created when certain custom is known to be law, is accepted as law and is practiced as law by persons who share the same legal system. In short, this view embodies the doctrine of \textit{opinio necessitates}, which requires the behaviour that achieves the necessary common consciousness to become law. Another view (that of Savigny) is that customary law arises not from individual acts of behaviour but from common consciousness itself. Austin is of the view that customary laws originate as rules of positive morality that arise from the consent of the governed, but that the state must establish these customary rules. After considering these theories, Watson makes the following propositions about customary law: 1. To become law, custom requires something more than behaviour. 2. \textit{Opinio necessitates} fails to provide the extra factor required. 3. Court decisions declare customary law even when (a) custom is uncertain (and there is no \textit{opinio necessitates}) and (b) there is no custom. 4. Proposition three is still accurate when, as in many systems, court decisions do not make law; hence, we cannot simply say that the court decision is the entire basis of customary law. 5. Custom officially written down as law is equal to law in the form of a statute; the writing, however, is not proof that the custom was not previously law. ... 6. Court decisions are not law, and therefore cannot be the basis of
this thesis is not on whether or not customary law would be or should be created in certain circumstances. Rather, this thesis argues that legal culture, particularly normative legal culture, often critically influences the law and the legal system. Specifically, it argues that, ascertaining normative legal culture may be practically significant in areas of legal practice where much of the practice involves identification of the relevant law in question and doing so accurately.

The concept of normative legal culture has a distinct relevance in the Korean context in view of the recent decision of the Constitutional Court of Korea in the Special Law on the Establishment of a New Capital City Case. In this case, the Court held that, in Korea, unwritten 'customary constitutional rules' co-exist with the written Constitution of Korea. The Court also endorsed the existence and validity of customary laws of Korea, and provided a detailed formulation of customary laws. The Court's pronouncement as to how customary laws are identified bears marked similarities to the author's concept of normative legal culture. The Courts' use of a concept similar to the normative legal culture is interesting particularly because the Court equates such culture to an unwritten constitutional right. Thus, such culture is treated as a source of the relevant constitutional law in question, which, in turn, is often crucial to the rule of law in Korea. This is consistent with the approach by which inner acceptance of a law itself constitutes the rule of law. This may be another reason for investigating Korea's normative legal culture – because, according to this approach, the extent to which normative legal culture supports official law will itself provide evidence of the rule of law.

The implication may be drawn that the methodology for studying legal culture and findings on Korean legal culture presented in this thesis may be useful in ascertaining other elements of the 'unwritten customary Constitution' that may exist in Korea. The Court often looks for historical arguments that support its view of what the deeply rooted legal culture of Korea is. But the available literature on this topic often reflects the conventional view of Korean legal culture. This thesis may help balance this situation. Also, there is a lack of material that provides a rigorous analysis of the deeply rooted legal culture of Korea based on the Court's approach. This thesis may contribute in this regard as well.

---

253 Compare the similar position in South Africa where certain customary laws may be recognised as part of the Constitution. However, in the case of South Africa, the Constitution makes more explicit reference to customary law, and there have been extensive negotiations about the inclusion of customary law to form part of the Constitution. See generally Yvonne Mokgoro, 'The Customary Law Question in the South African Constitution' (1997) 41 St Louis L J 1279.
Before further discussing the proposed methodology for studying legal culture (which will be revealed after discussing some of Chiba’s theories in Part III.6), set out below are some of the issues relating to ascertaining legal culture. In particular, three questions may be asked: (1) Can legal culture be ascertained? (2) Can deeply rooted legal culture be ascertained? (3) What is the interaction between one’s own legal culture and one’s view of legal culture?

5. Ascertaining Legal Culture

A. Is Legal Culture Measurable?

Having established basic concepts of legal culture, the next questions to ask are these: How determinate is the concept of legal culture? Is it measurable? If it is, can it be measured with a reasonable degree of accuracy? Friedman argues that legal culture is in principle measurable; it is not a mysterious, invisible substance; it can be measured directly, by asking people questions; or indirectly, by watching what people do and inferring their attitude from what one sees.256 Kahn says that legal culture may be ascertained from ‘statistical representation and analysis of the symbolic productions of everyday life’.257 But since the legal culture of a person might be different to that of another person, it might be difficult to ascertain the legal culture of a group of people.258 Also, since legal culture will change and depend on circumstances, the group legal culture may be difficult to ascertain accurately. It may be that cross-cultural, comparative analysis may be required since a group’s culture can be characterised only in relation to other cultures,259 which makes the task even more difficult. Nevertheless, one may not deny the fact that, in principle, there is such a thing as legal culture, and that legal culture should in principle be measurable.

To begin ascertaining the traits of a legal culture, Friedman suggests asking questions such as these: What are the attitudes of different populations toward law and the legal system? Who goes to court and why? What is the conversion process of the legal system – that is, how are demands handled, by whom and how are decisions made? Which officials have discretion, which do not? What is the source of the legitimacy of various parts of the

258 Compare Ramseyer’s approach of generally refusing to take into account people’s attitudes or stated intentions in assessing legal culture. See, for example, Yoshiro Miwa & Mark Ramseyer, ‘Banks and Economic Growth: Implications from Japanese History’ (2002) 4 J Law & Econ 127 (denies the practice of, and the relationship between, banks and Japanese firms that enabled financing even though the credit of the firms may be poor). But see the criticisms made by Freedman and Nottage that Ramseyer simply refuses to recognise facts. See Craig Freedman & Luke Nottage, ‘The Chicago School of Economics and (Japanese) Law: The Invasions by Stigler and Ramseyer’ unpublished paper to be presented at an ANJEL conference, February 2006 (www.law.usyd.edu.au/~luken/anjel2006.pdf). Indeed, while not entirely easy to ascertain, opinions and intentions are clearly facts capable of being ascertained. Other more seemingly ‘objective’ facts, such as cross-national litigation rates, are sometimes just as difficult to ascertain. See Tom Ginsburg & Glenn Hoetker, ‘The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation’ Illinois Law and Economics Working Paper No. LE04-009 (September 2004) at 26-27.
system? What are the underlying rationales for the various laws?²⁶⁰ In Part IV.3.C of Chapter 3, survey results that purport to ask some of these kinds of questions will be analysed (showing the Korean public’s legal culture). Chapter 4 shows how the Constitutional Court handles demands made on it (showing the Court’s, and the Court’s view of the public’s, legal culture).²⁶¹ Chapter 5 shows how finance lawyers execute transactions in practice (showing these lawyers’, and their view of the other parties’, legal culture). In addition, since this thesis is principally concerned with the ‘deeply rooted’ legal culture of Korea, it undertakes a historical investigation of Korean legal culture, in Chapter 3.

B. Historical Investigation in Relation to Deeply Rooted Legal Culture

Is there such a thing as a ‘deeply rooted’ legal culture of a country? At times, Friedman seems to suggest that while countries may have their distinct legal cultures, there is no such thing as a fundamental national culture that is so deeply rooted in the country, that modern legal culture cannot successfully penetrate.²⁶² Similar arguments have been advanced by other scholars.²⁶³ Their arguments seem persuasive particularly when one considers the (possible) existence of ‘modern legal culture’.²⁶⁴ Modern legal culture shows marked similarities among people with different historical backgrounds, throwing doubts as to whether there is such a thing as deeply rooted legal culture of a country. The formation of modern legal culture may partly be a result of the mass media spreading popular culture around the world. Increasing levels of globalisation facilitate this phenomenon.

Even if there is such a thing as deeply rooted legal culture, modern legal culture, at times, seems to override any such deeply rooted legal culture. Whatever the deeply rooted legal culture there persists after hundreds (or even thousands) of years, modern legal culture seems to change all that almost instantly. If this is the case, the very argument that some cultural elements are deeply rooted is simply not very persuasive. It may be difficult to show that there is such a thing as deeply rooted legal culture, and even if one can show it, its effects may not be as significant as one might think.


²⁶¹ Sally Merry argues that court records reveal, among other things, the following: (a) who is in court, for what kinds of problems and with what results; (b) stories of ordinary people and their problems during a period of dramatic social change. Thus, they are a good source from which to ascertain certain legal culture. See Sally E. Merry, Colonizing Hawai’i: The Cultural Power of Law (Princeton University Press, 2000) at 8-9.

²⁶² Lawrence M. Friedman, ‘Borders: On the Emerging Sociology of Transnational Law’ (1996) 32 Stan J Int’l L 65 at 84. However, at other times Friedman himself seems to recognise the existence of such national culture. For example, he says that the ‘borrowing [of foreign law] is a question of official law; we do not know if borrowed codes and rules set down real roots in national behaviour’. See Lawrence M. Friedman, The Legal System (Russell Sage Foundation, 1977) at 195. Also, he says that ‘[t]he concept of legal culture suggests that at least in some sense each country or society has a legal culture of its own and that no two are exactly alike, just as no two societies are exactly alike in politics ... Yet some societies are more closely related than others’ (id at 199).


Nevertheless, the argument that there is deeply rooted legal culture cannot be set aside so easily either. There are amble suggestions for the existence of deeply rooted legal culture. For example, there may be a degree of group cohesion, forming what Cotterrell calls unique communities. There may be some ‘predictability of behaviour’, and ‘ways of doing that may be considered more deeply rooted, likely to recur within the group and capable of producing behavioural standards’. Friedman himself seems to embrace the notion that history and the fundamental elements of a given society significantly affect the modern legal culture of the society in question. He also remarks that ‘similar history and similar economic conditions should produce striking similarity in legal culture’.

The question of whether ‘legal transplants’ are possible is also related to this kind of debate. Watson is of the view that when legal transplants are being implemented, ‘historical factors and habits of thoughts’ are not crucial elements affecting the process. However, other scholars such as Legrand disagree with Watson, arguing that the meaning of a rule is a function of the interpreter’s subjective epistemological assumptions, which are themselves historically and culturally conditioned. Legrand goes on to say that ‘law is a poly-semic signifier which connotes, among other things, cultural, political, sociological, historical, anthropological, linguistic, psychological and economic referents, and it is a complete social fact’. The fact that tradition and history matter in the context of legal transplants is,


266 This may be implied from the following statement of Montesquieu: ‘[I]law should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another’. See Charles de Montesquieu, ‘The Spirit of the Laws’ in Anne Cohler, Basia Miller & Harold Stond (eds), Cambridge Texts in the History of Political Thought (Cambridge University Press, 1989) at 8. Also, Robert Cover has said that ‘[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning’ See, Robert Cover, ‘Nomos and Narrative’ (1983) 97 Harv L Rev 4 at 4. Sally Merry argues that Americans’ legal culture in relation to court disputes is ‘rooted in such deep-seated cultural traditions of American society as individualism, equality, faith in the law, and the search for freedom from the control of neighbours and local leaders, traditions noted by Tocqueville early in the nineteenth century’. See Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (The University of Chicago Press, 1990) at 17. Chung Chai Sik says that ‘[c]ulture is much more stable and resistant to change than are in a society’s economic and political forces. Consequently, a fundamental alteration of a society is rare, because it requires extensive changes in its shared cultural orientation’. See Chai-Sik Chung, ‘A Korean Confucian Encounter with the Modern World: Yi Hang-no and the West’ Korea Research Monograph (Institute of East Asian Studies, University of California, Berkeley, Center for Korean Studies) at 1.


269 Jan Dalhuisen, Dalhuisen on International Commercial Financial and Trade Law (Hart Publishing, 2004) at 111. Dalhuisen says that some groups may have a ‘much more doctrinaire and unchangeable attitude’ (id at 112).

270 Lawrence M. Friedman, ‘Some Comments on Cotterrell and Legal Transplants’ in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 95.

271 Lawrence M. Friedman, The Legal System (Russell Sage Foundation, 1977) at 203.


274 Id at 60.
according to Cotterrell, evidenced by the fact that lawmakers tend to seek to frame new law in relation to established traditions. As such, any 'interim law' that may be useful in the short term will give way to something more stable and firmly linked to interpretive traditions, even if a struggle remains over which traditions will prevail and in what form.\(^{275}\)

This kind of view is consistent with the views of several scholars, including Nelken who recognises that law 'belongs' to the past - to previous social and economic order, to tradition and history, as much as to the present.\(^{276}\) Haley insists that (Japanese) law is 'bound within particular historical social contexts'.\(^{277}\) Explanations about the success or otherwise of a legal transplant may be sought either in deep-lying aspects of culture or in more superficial or more recent aspects of social structure.\(^{278}\) If the outcome of a legal transfer depends on the future, it is also conditioned by the past.\(^{279}\) Nelken argues that because of the way the social systems approach focuses on current differentiation amongst social discourses, less attention tends to be given to the different levels of historically inherited culture.\(^{280}\)

Friedman may be right in saying that there is no such thing as the, or a, legal culture of a society, or even a dominant legal culture.\(^{281}\) But Friedman himself seems to suggest that, for example, 'horizontal' legal culture dominates modern society, promoting a 'kind of universal tribalism'.\(^{282}\) In other words, there is a dominant culture even according to Friedman. His elaboration of the group claims of, say, black minorities in the United States is itself an elaboration of a culture.\(^{283}\) According to Friedman, these claims of black minorities are directed against the dominant culture,\(^{284}\) meaning that there can be a dominant culture.\(^{285}\) Friedman also recognises the fact that, for example, in the case of the people of Israel, it was their (ancient) history and religion that gave meaning to the project to build the modern nation of Israel. Also, many of the laws of Israel today are based on such historical


\(^{280}\) Ibid.


\(^{282}\) Lawrence M. Friedman, *The Horizontal Society* (Yale University Press, 1999) at 4, 5, 6 and 12.


\(^{284}\) Ibid.

\(^{285}\) Another aspect of modern legal culture that dominates is, according to Friedman, the desire of choice and the experience of choice that pervade modern life and reconstitute modern law to fit the culture of choice. See Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Harvard University Press, 1990) at 74.
ideologies of the people, the implication being that their deeply rooted legal culture plays a role even today. Similarly, deeply rooted legal culture may be particularly relevant to Koreans who regard themselves as a homogenous race that has very strong traditions and has been living in distinct geographical boundaries for thousands of years.

It seems undeniable that history and religion strongly influence a country’s legal culture. History and religion are often the basis that forms the ideological core, the source of concepts and passion of a people. It is true that societies and environments change constantly and so does legal culture. Nevertheless, a historical investigation of legal culture is still relevant to identifying the modern legal culture of a people because modern society cannot be separated from its history. While socio-cultural norms and values constantly change, it is also true that the history of a country does not change (although its interpretations may change), and substantially the same history tends to be shared between the diverse people within a country.

Religion, in particular, is one of the most significant ways in which people stamp their identity. If Confucianism can be seen as a religion, then this partly explains why the conventional view of Korean legal culture has focused so much on Confucianism. Confucianism was the state religion and political ideology during the Chosun Dynasty, and the conventional view assumes that the Korean people were ‘converted’ to Confucianism. This thesis is concerned with determining whether this view holds true, or whether Koreans had in fact resisted Confucianism as their true religion. Even if Koreans largely accepted Confucianism as their ‘religion’, this thesis questions whether this significantly affected their normative legal culture as well as their religious beliefs.

C. One’s Own Legal Culture and One’s View of Other People’s Legal Culture

The question of whether or not there is such a thing as deeply rooted legal culture is not a matter that this thesis attempts to resolve completely: this thesis simply assumes and indicates that there may be such a thing as deeply rooted legal culture. What is required here is to

287 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 3-4. Buzo particularly attributes the unique geography of Korea to its strong cultural identity. He says that '[i]the modern air traveller is usually struck by the rugged uniformity of the Korean landscape ... closer inspection of its rugged uniformity reveals further geographical boundaries which in turn have reinforced distinct regional characteristics' (ibid).
288 It has been suggested that, religion particularly is the most important, most binding idea at the heart of a culture. See Lawrence W. Beer, 'Introduction' in Lawrence W. Beer (ed), Constitutional Systems in Late Twentieth Century Asia (University of Washington Press, 1992) at 16.
290 It has been noted that history provides a source of inspiration and models of institutional design for new democracies. See Jon Elster, Claus Offe & Ulrich K. Preuss, Institutional Design in Post-Communist Societies (Cambridge University Press, 1998) at 60-61.
explore various dimensions of legal culture within a reasonably concrete and specific framework. While the normative/non-normative legal culture dichotomy discussed above is one aspect of legal culture (as well as one aspect of the concept of deeply rooted legal culture) emphasised in this thesis, there may be other features of legal culture that one may have regard to, as elaborated below.

i. One's Own Legal Culture

Firstly, there can be a person's or a group's own legal culture.\(^{293}\) In this regard, this thesis is concerned primarily with the Korean people's legal culture. Here, no distinction is made between the legal culture of a different group of people within Korea based on sex, status, occupation, and age, etc., unless the context indicates otherwise.

However, the context in which the discussion in Chapter 5 is concerned with indicates that the legal culture of the likely parties (including any relevant third parties) to cross-border financing transactions is more relevant than the legal culture of other people. Such parties would include Korean and international lawyers. Likewise, in Chapter 4, the legal culture of the judges of the Korean Constitutional Court becomes more relevant. As already mentioned, according to Friedman, the legal culture of these lawyers and judges may be characterised as separate category of legal culture, that is, 'internal legal culture'.\(^{294}\)

ii. One's View of Other People's Legal Culture

In addition to one's own legal culture, one's view of other people's legal culture seems to matter significantly in legal practice. For example, the Korean Constitutional Court's judges' view of the deeply rooted legal culture of the Korean people often directly influences their judgments (see Chapter 4). Also, international counsels' view of Korean parties' deeply rooted legal culture may influence their negotiation strategies and transactions (see Chapter 5). While there may be a close connection between one's own legal culture and one's view of other people's legal culture, they are not necessarily the same. For example, although the legal culture of an international counsel itself may not be Confucian-oriented, he or she may believe that Korean parties' legal culture is deeply Confucian-oriented. But, as can be seen from Chapter 5, international counsels' view of Korean parties' legal culture (as well as their own legal culture) may also influence negotiation strategies. Chapters 4 and 5 demonstrate, or require one to ascertain, in addition to 'internal legal culture', another dimension of legal culture, one that is concerned with lawyers' and judges' perceptions of other people's legal culture, which in turn have considerable significance for legal practice.

This kind of idea about legal culture bears some similarities to some of the arguments made by Atiyah and Summers when they discuss different methods of legal reasoning as between England and the United States.\(^{295}\) One of their arguments is that people's assumptions about the legal culture of England and the United States are fundamentally

\(^{293}\) Sometimes the term 'culture' is used to describe the aggregate level whereas the term 'attitude' is used for the individual level. See Setsuo Miyazawa, 'Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behaviour' (1987) 21 Law & Society Review 219 at 221.


different, and that *this* factor is the ‘fundamental and complex factor’ that ‘links most of the other institutional factors’ explaining the difference in the legal reasoning between the two countries. 296 Thus, the emphasis of Atiyah and Summers is not just on the actual difference in the legal culture of England and the United States to explain the difference in the method of legal reasoning of the two countries. Instead, an emphasis is on people’s ‘assumptions’ (that is, people such as judges) about the legal culture of their country as a fundamental factor explaining the differences in the methods of legal reasoning used in the two countries. Further, one notes Veronica Taylor’s argument that law and legal culture (referring to those of Japan) ‘exists in our minds and in our writings, but it maps very imperfectly the worlds of jurisprudence and legal practice’. 297 If this is correct, one’s view of a particular legal culture may have real substance, existing in people’s minds, and therefore be very relevant to studying the legal culture of a country.

The relevance of one’s view of other people’s legal culture is clearly illustrated in Chapters 4 and 5 where this view is shown to lead to actual court decisions and consequences in cross-border transactions, potentially affecting people’s fundamental rights and economic interests. The underlying implication of this is that the conventional views of Korean legal culture (as well as the actual legal culture itself) potentially have significant ramifications for society, and that therefore there is a real need to carefully re-assess the evidence that might form the basis of the conventional view itself.

Figure 2-1

Figure 2-1 shows the interaction between the different aspects of legal culture discussed above. It shows that while ‘internal legal culture’ (and people’s own legal culture), on the one hand, and lawyers’ views of other people’s legal culture, on the other hand, may coincide,

296 Id at 36-41.

the latter may go 'outside' people's own legal culture. In other words, people's views of other people's legal culture may not be what people's own legal culture actually is. That is, such views may be 'imaginary' only — and wrong. This aspect of 'imaginary' legal culture is represented by the shaded area in Figure 2-1. For Korea, the author argues that the shaded area represents the conventional view of Korean legal culture that associates Korean legal culture closely with Confucianism.

The 'imaginary' legal culture may have real influence in legal practice even though it does not actually exist. The Constitutional Court judges' view of Korean people's normative legal culture may critically influence their decisions — even if such normative legal culture does not actually exist in Korea. Also, foreign lawyers' views of Korean parties' normative legal culture may critically influence negotiations in cross-border financing — even if such normative legal culture does not actually exist. It follows that such 'imaginary' legal culture should be minimised if one is to apply findings about legal culture in legal practice accurately.

D. Summary

In this chapter, some of Friedman's theories have been used as a starting point for discussing the concept of legal culture, allowing the development of a concept of normative legal culture to be used in studying the legal culture of Korea."298 Aspects of the concept of legal culture developed by other writers such as Teubner and especially Cotterrell also provide valuable insights into the theory of legal culture and legal transplants, which may be applied in studying the legal culture of a country. Further, it has been established that legal culture (and deeply rooted legal culture) is in principle measurable, although not without difficulties. It is also important, it has been argued, to identify people's (especially lawyers' and judges') views of other people's legal culture as these often influence legal practices.

One of the significant issues for examining the legal culture of Korea is the fact that there have been certain common assumptions and understandings in respect of the legal culture of Korea — referred to as the conventional views throughout this thesis. Chiba's theory for studying legal culture is significant in this regard because his theory, in a sense, 'explains' how one can come to have such views. He provides a theoretical basis for such views — although, to be sure, Chiba's work could be understood and perceived otherwise, and its applications could lead to different conclusions.

Since an aim of this thesis is to show that the legal culture of Korea is actually quite different to how it is perceived under the conventional view, it might be helpful to examine Chiba's theory as well. Contained within Chiba's theory is the apparent assumption that the indigenous legal culture of a country that has adopted Western law may be significantly different from the transferring Western legal culture. Further, Chiba argues that the indigenous legal culture may support certain non-legal rules, and such non-legal rules may be viewed as 'unofficial law'. Thus, analysing and determining the merits of Chiba's theory

298 Friedman's theories are, of course, not limited to those described above. His concepts touch upon other issues such as the concept of plural equality, global legal culture, judicial review and express individualism, many of which will be further discussed, and where appropriate, applied, in subsequent chapters. In relation to these other issues, see the following works by Lawrence M. Friedman, 'The Shattered Mirror: Identity, Authority, and Law' (2001) 58 Wash & Lee L Rev 23; 'Erewhon: The Coming of Global Legal Order' (2001) 37 Stan J Int'l L 347; 'Borders: On the Emerging Sociology of Transnational Law' (1996) 32 Stan J Int'l L 65; 'Popular Legal Culture: Law, Lawyers, and Popular Culture' (1989) 98 Yale L J 1579.
could show the level of merit of the conventional view of Korean legal culture, from a theoretical perspective.

Examining Chiba’s work is also significant because it is seen as the ‘first attempt to formulate a general theory of law from a non-Western viewpoint’.\(^{299}\) So far, the theories discussed in this chapter on culture, law and legal culture (and the relationship between them) are those devised from a Western viewpoint. But since this thesis is concerned with Korean legal culture, it is appropriate to incorporate a theory devised from a non-Western viewpoint in examining the concept of legal culture.

6. **Masaji Chiba’s Approach**

A. **Chiba’s Theory**

Korea has, at various stages of its history, adopted foreign laws.\(^ {300} \) The most recent and notable reception of foreign laws was the reception of a set of Western laws that currently constitute the official state law of Korea.\(^ {301} \) While foreign laws could be adopted suddenly, the relevant foreign legal culture could not be adopted so suddenly. Therefore, it is reasonable to assume that although the official state law of Korea is Western-style law, the legal culture of the Koreans remains, to a considerable extent, indigenous.

In this context, the examination of the legal culture of Korea takes a unique significance because the *distinction* between the law and the legal culture of Korea could highlight important concerns for Koreans and others who use, or are subject to, Korean law. Cultures have different ways of combining imported and pre-existing law.\(^ {302} \) Chiba is a legal anthropologist who has proposed a concrete methodology for studying the legal culture of countries such as Japan and Korea.

Chiba argues that when Asian cultures (referring to those Asian countries that have adopted Western laws) were confronted in their past with the different systems of law received from Western countries, they must have struggled with that received law at the risk of their cultural identities. He says that the general state of law found today in those Asian countries is nothing but the result of those struggles.\(^ {303} \) He argues that this is why one must accurately identify the structural position and function of the indigenous laws of the countries concerned in terms of their state laws, which would be largely based on received Western laws.

---


\(^ {300} \) See Part III.1 of Chapter 3.

\(^ {301} \) See Part IV.2 of Chapter 3.


\(^ {303} \) Masaji Chiba, ‘Introduction’ in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (KPL, 1986) at 2. Haley makes a similar argument in John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (Oxford University Press, 1991) at 6 (he says that new Western legal rules ‘conflict with pre-existing customary and legal norms’). But compare Takao Tanase, ‘The Empty Space of the Modern in Japanese Law Discourse’ in David Nelken & Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) at 187-188. Tanase makes a similar argument, but says that culture is not the only factor that affects the introduction of modern law into countries such as Japan. He says that society may also lack the necessary infrastructure to accommodate the new laws.
law. For these reasons, Chiba suggests his own approach for examining the laws of Asian countries, which he calls the ‘three level structure of law, the interaction between received law and indigenous law’ approach. His revised version of this approach is what he calls the ‘three dichotomies of law’ approach. Under the ‘three dichotomies of law’ approach, Chiba sets out three dichotomies of law as follows:

1. Law may be ‘official law’ or ‘unofficial law’.
2. Law may be in the form of ‘positive rules’ or ‘postulative values’.
3. Law may be ‘indigenous law’ or ‘transplanted law’.

Chiba argues that for Asian countries that have received Western law, one may have a more accurate understanding of their law if their law is viewed at the above three levels. On the other hand, if these concepts are disregarded, and if one merely tries to apply traditional Western jurisprudence in the context of these Asian legal systems, then one will be misguided and fail to fully identify and appreciate what the ‘law’ of the Asian country is.

Chiba’s approach to law, like the author’s approach, highlights and analyses some of the distinctions (Chiba uses the term ‘dichotomies’) between legal rules and non-legal rules that are supported by the legal culture of a country. In this respect, Chiba’s approach shows a close similarity with the author’s approach. However, there are significant differences between the two approaches, and between Chiba and the approaches of other theorists, some of which are discussed below.

---

306 According to Chiba, ‘official law’ is defined as ‘the legal system and its components sanctioned by the legitimate authority of a country’, and ‘unofficial law’ is defined as ‘the legal system of its components which are not officially sanctioned by any legitimate authority but sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country, and which present distinct influences upon the effectivity of official law, supplementing, opposing, modifying or even undermining any of the official law, especially state law’. See Masaji Chiba (ed), Asian Indigenous Law: In Interaction with Received Law (KPI, 1986) at 393.
307 For Chiba, ‘positive rules’ mean ‘the formalised verbal expressions of particular regulations to designate specified patterns of behaviour’ whereas ‘postulative values’ mean ‘particular values and ideas and their systems specifically connected with a particular law to ideationally found, justify or else supplement, criticise the existing positive rules’ (ibid).
308 Chiba says that ‘indigenous law’ means ‘law originated in the native culture of a people’ and ‘transplanted law’ means ‘law transplanted by people from other cultures, whether voluntarily received or involuntarily imposed’ (ibid).
309 Berkowitz, Pistor and Richard make similar arguments, not only regarding Asian countries, but regarding other countries, including the developed countries. See Daniel Berkowitz, Katharina Pistor & Jean-François Richard, ‘The Transplant Effect’ (2003) 51 Am J Comp L 163 at 170. They argue that ‘all societies, including the most developed ones, are also governed by informal norms and institutions. This informal legal order evolves over time mostly by internalising existing norms of a social group. It is enforced not by the state, but relies largely upon trust and reputation effects as well as monitoring devices.’ (Ibid.)
**B. Comparing Chiba’s Theory to Other Approaches**

Chiba defines legal culture as a ‘cultural configuration of law’. This definition seems too general in comparison with Friedman’s more specific definition. But a close examination of Chiba’s definition of the term ‘postulative values’ or ‘legal postulates’ (that is, ‘particular values and ideas and their systems specifically connected with a particular law to ideationally found, justify or else supplement, criticise the existing positive rules’) is similar to Friedman’s description of legal culture. The difference between the two concepts is that this definition from Chiba is more specific and limited in that ‘legal culture’ must ‘ideationally found, justify or else supplement, criticise the existing positive rules’.

Upon a closer look at the two concepts, the distinction between Chiba’s definition of postulative values and Friedman’s definition of legal culture seems minimal. This is because any ‘ideas, values, attitudes and opinions [that] people in some society hold, with regard to law and the legal system’ would often ‘justify, supplement or criticise particular law’. Without being too technical about the exact language, it might not be dangerous to treat the term ‘postulative values’ as substantially the same as the term ‘legal culture’, particularly given the somewhat vague and broad nature of the definition of legal culture itself. This indicates that what has been suggested as a theory devised from a ‘non-Western viewpoint’ (that is, Chiba’s theory) differs very little from a theory devised from a Western viewpoint.

Nevertheless, Chiba’s formulation is more refined than that of Friedman’s in that (a) Chiba is mainly using the terminology in the limited and specific context of discussing laws in Asian countries that have received Western law, whereas Friedman is not limiting the use of the term ‘legal culture’ to such a context, and (b) Chiba elaborates the concept of legal postulate by stating that it consists of ideas such as natural law, justice, equity, sacred truths, and precepts emanating from various gods in religious law, and so on. On the other hand, Friedman’s distinction between internal and external legal culture is yet another distinction that Chiba’s formulation does not take into account.

Chiba’s definition of postulative values also appears to be quite different from the author’s description of ‘normative legal culture’. This is because, whereas the author’s

---


311 Masaji Chiba (ed), Asian Indigenous Law: In Interaction with Received Law (KPI, 1986) at 393


313 Chiba indicates that the term ‘postulative values’ is an improved version of the term ‘legal postulate’. See Masaji Chiba (ed), Asian Indigenous Law: In Interaction with Received Law (KPI, 1986) at 393.

314 More precisely, he says that a legal postulate consists of ‘established legal ideas such as natural law, justice, equity, and so on in model jurisprudence; sacred truths and precepts emanating from various gods in religious law; social and cultural postulates affording the structural and functional basis for society as embodied in clan unity, exogamy, bilineal descent, seniority, individual freedom, national philosophy, and so on; political ideologies, often closely connected with economic policies, as in capitalism or socialism; and so on’. See id at 6.


316 This is also different from Friedman’s concept of internal legal culture. See Lawrence M. Friedman ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 Yale L.J 1579 at 1580.
description of normative legal culture emphasises its firm view or position on a particular law, Chiba's formulation of 'postulative values' seems to merely require that the relevant legal culture only 'justifies, supplements or criticises' the law in question. In other words, postulative values, unlike normative legal culture, may or may not take a firm position on what a particular law should be.

Chiba's definition of the term 'unofficial law' appears to be similar to the author's concept of 'normative legal culture' in the sense that the substance of both of them is likely to have a significant influence on law. But in other respects, there are notable differences between the two concepts. Firstly, the most obvious difference between the two are that 'unofficial law' is a rule (albeit non-legal) whereas normative legal culture consists of ideas, values, attitudes and opinions. Thus, the relationship between the two could be that normative legal culture may (or may not) support particular unofficial law.

Secondly, Chiba says that unofficial law is 'not officially sanctioned by any legitimate authority but sanctioned in practice by the general consensus of a certain circle of people'.\textsuperscript{317} In other words, according to Chiba, it appears that the validity of unofficial law comes from the general consensus of a certain circle of people rather than the (official) legal system itself. As it will be discussed below, the question of the validity of unofficial law is a difficult one. The concept of normative legal culture, on the other hand, does not necessarily suggest that any non-legal rule supported by normative legal culture has attained some kind of legal status, albeit unofficial. It is arguable that some of the non-legal rules that are being supported by normative legal culture may possess certain normative values, but that is not the same as saying that such rules should be part of the law.

C. Can Unofficial Law Become Law?

The author's preference is to use the term 'normative legal culture' rather than the concept of 'unofficial law'. This is because it appears that Chiba's use of the term 'unofficial law' not only requires one to show the way in which such unofficial law could gain its status as unofficial law; the exact nature of such unofficial law must also be explained. How does one determine that there is certain 'unofficial law'? Can such law be expressed in sufficiently definite terms? Is it binding? If so, in what ways? If it is not binding, why is it called 'law'? These kinds of questions must be answered before one can say that there is certain unofficial law. As it will be discussed below, Chiba does not seem to address such issues clearly.

It suffices to note here that according to Chiba, the way in which a certain rule can attain the status of unofficial law is, as noted above, by virtue of the general consensus of a certain circle of people. As to the validity of this rule of recognition, Chiba himself appears not to be so sure when he also says that 'the validity of unofficial law is not discerned so definitely however, for, unlike that of state law, the source of the validity [of unofficial law] is not clearly identified or presented'.\textsuperscript{318} Arguably, the very fact that certain law has to be 'unofficial' must be because there is doubt about its validity as law, albeit unofficial law.

\textsuperscript{317} Masaji Chiba, 'Introduction' in Masaji Chiba (ed), \textit{Asian Indigenous Law: In Interaction with Received Law} (KPI, 1986) at 6.

\textsuperscript{318} Id at 336.
Further, Chiba seems to suggest that such unofficial law should be viewed as part of the official law in those Asian countries that have received Western law. This is another moot question which will be further discussed below. On the other hand, as discussed, the concept of 'normative legal culture' is silent on the question of whether any non-legal rule that it supports has attained the status of unofficial law. Further, it is also silent on the question of whether such non-legal rules should be viewed as law. The concept of normative legal culture allows one to discuss those aspects of legal culture that strongly support certain rules (legal or non-legal), without claiming that certain non-legal rules are in fact legal rules, albeit unofficially.

This is not to say that the question of whether and how certain non-legal rules (or unofficial law) that are being supported by a legal culture may be recognised as legal rules is not of importance or relevance to this thesis. It is an important question because if it can be shown that certain non-legal rules should be recognised as law, then the point of ascertaining and examining legal culture (and particularly normative legal culture) would take a more obvious significance. In this respect, Chiba seems to be arguing that (although, not clearly) unofficial law should be regarded as law because, according to him, 'it has become accepted that law must be recognised as an aspect of the total culture of a people, characterised by the psychological and ideational features as well as the structural and functional features of the people'. Chiba is not alone in expressing such a view – others have also argued that 'law is not merely a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events which can be drawn, but a distinctive manner of imagining the real'; therefore, the cultural contextualisation of legal incident is a critical aspect of legal analysis. New conceptions of law may be advanced through cultural studies of law.

The question of whether unofficial law may be regarded as law is a complex question that requires an extensive jurisprudential analysis and which is beyond the scope of this thesis. Further, this is a jurisdiction-specific question and the conclusion could be different for the laws of different jurisdictions. For example, for the purposes of this thesis, it will be a matter of Korean law as to whether any unofficial law (if there is such a law) of Korea will be treated as part of Korean law.

In the Korean law context, the recent decision of the Constitutional Court of Korea in the Special Law on the Establishment of a New Capital City Case is significant. As already mentioned, the Constitutional Court of Korea in that case held that, in Korea, 'customary constitutional rules' co-exist with the written Constitution of Korea. While this case will be discussed and analysed in detail in Part III.4 of Chapter 4, it suffices to note here that a concept similar to unofficial law as proposed by Chiba in fact seems to exist as a matter of Korean constitutional law. This case involved a highly controversial subject matter and complex political issues. Nevertheless this case makes it practically important to consider the

319 Id at 1-3.
320 Id at 1.
323 For a discussion of the concept of customary law, see Part III.4.C.iii above.
concept of unofficial law and its implications in the Korean law context, and possibly in other Asian law contexts.

As discussed, there are differences between Chiba’s theory and the concept of normative legal culture. For the reasons discussed earlier, the concept of normative legal culture is preferred here, and this concept is summarised below by proposing a more specific methodology for studying the legal culture of Korea.

IV. METHODOLOGIES FOR STUDYING LEGAL CULTURE

1. Unofficial Law? – Analysis

To sum up so far: pursuant to the concept of normative legal culture, one may determine the level of support that a legal culture affords particular rules. If a non-legal rule is supported by normative legal culture, then the non-legal rule will need to be carefully considered by those who are subjected to the rule. Also, in that case, the normative value of the rule will not be irrelevant even if the rule is not made a legal rule. Hence, distinguishing whether a legal culture constitutes normative legal culture or non-normative legal culture may be a meaningful exercise in studying legal culture. Nevertheless, it is not proposed that any non-legal rule supported by normative legal culture should necessarily be called unofficial law as the term is used by Chiba. Although unofficial law and the rules supported by normative legal culture possess similarities, there are differences between the two terms.

Chiba’s theory is that a system of unofficial law exists in Japan, and that such a system co-exists with the official legal system. His view is that unofficial law distinctively supplements, opposes, modifies or undermines official law, so much so that the effectiveness of the total system of official law is dependent upon the status quo of the unofficial law. The same proposition may be put forward for Korea. It may be argued that unofficial rules, which may tend to oppose the rule of law concept embedded in the modern official law, distinctly modify and oppose official law.

But in practice, how, according to Chiba’s theory, will unofficial law influence official law? Using the earlier example of X Limited, suppose, for the sake of argument, that the legal culture of the employees of X Limited in not working on Saturdays was actually part of the broader legal culture of the people of their country. Also suppose that such legal culture had supported a set of unofficial laws – the unofficial law in this case being the rule that says that the employees do not need to work on Saturdays unless they have work that must be done on Saturdays. How will such a non-legal rule influence the existing legal rule about working on Saturdays?

According to Chiba, the unofficial rule should ‘distinctively supplement, oppose modify or undermine’ the official rule. But if the employees and employers of X Limited were to ask the court for its decision, what would the court say? The court may or may not decide the case in the employee’s favour. In either case, and even if the court decides in favour of the employees, it would firstly identify the law that is applicable to the case, and then secondly, apply the law to decide whether the official rule about working on Saturdays

---

should be changed. The court will look to, for example, the relevant law of contract or law of employment to resolve the dispute. In other words, one must rely on official law to effect changes to the official law about working on Saturdays – and the unofficial law by itself cannot ‘distinctively supplement, oppose, modify or undermine’ the official law.

This observation is made on the assumption that unofficial law is not viewed as part of official law. On the other hand, as Chiba suggests, if unofficial law should be viewed as part of official law, then Chiba might be correct in saying that unofficial law could directly influence official law. This is because unofficial law would not need to rely on other official law to effect changes in official law. But this would lead to further complex issues. For example, what is the hierarchy between official law and unofficial law? Is the unofficial law now incorporated into the official law or is unofficial law still seen as a separate set of law belonging to a separate legal system even though it is treated as part of the official law?  

Chiba mentions the Japanese Tenno (Emperor) system as an example of an unofficial law of Japan that directly influences official law. He explains that, for instance, when Tenno, Kogo (Empress) and other Imperial Family members go out on trips or attend meetings, some people are obliged to preserve rooms and buildings. By this, Chiba seems to be saying that the law relating to certain private rights may be, and often is, directly modified by the unofficial law relating to the Tenno system. But is it correct to say that the relevant private laws in Japan are in fact directly modified by the unofficial law relating to the Tenno system? In other words, what would happen if those who were supposed to preserve rooms and buildings upon a Tenno visit were to go to the court and ask whether they are obliged as a matter of law to preserve their rooms and buildings because of the Tenno system? Will the court hold that their private rights to use the rooms and buildings are temporarily modified because of the direct influence of the unofficial law relating to the Tenno system without relying on any other (official) law to decide the case?

It is submitted that unless the court would acknowledge the unofficial law relating to the Tenno system as having certain legal effects in itself, the court would treat the Tenno system as a factual matter. Then, the court will identify and apply the applicable official law to decide the case. Even if the court holds that the private rights of individuals have been modified by the Tenno visit, it may be because, for example, it is in the national or public interest that the Tenno visit be carried out successfully and without interruption. Suppose that there exists an official law in Japan that stipulates that private rights may be modified to a reasonable extent if events occur that are of sufficient national interest. Applying such a law to the fact of the Tenno visit, the court may decide that the relevant private rights have been temporarily modified. This might be a reasonable assumption in the circumstances; Chiba himself admits that ‘in reality, Tenno cannot function without exerting any political influence, however slight, when seen from a broader perspective’. If the Tenno system can only function with political influence, then the normative value of the Tenno system either as official law or unofficial law is to be doubted.

---

326 These kinds of issues are similar to the concepts relating to monism and dualism in the context of public international law. See Ian Brownlie, Principles of Public International Law (Clarendon Press, 1998) at 31-33. See also Part III.4.B.i of Chapter 4.

327 Masaji Chiba (ed), Asian Indigenous Law: In Interaction with Received Law (KPI, 1986) at 337.

328 Ibid.

329 Ibid.
On the one hand, if one takes the view that unofficial law should form part of the law, then it might be appropriate to say that unofficial law directly and distinctly influences official law in a variety of ways. The Korean Constitutional Court’s findings in the Special Law on the Establishment of a New Capital City Case is an example of such an instance. In that case, the Court’s recognition of certain ‘customary constitutional rules’ meant that the legislation in question that was found to conflict with such rules was unconstitutional. Thus, unofficial law directly opposed and undermined the official law. On the other hand, as already mentioned, if one were to take the view that unofficial law is not part of the official law, then, rather than a direct interaction between unofficial law and official law, there is an indirect interaction between them. However, the problem in that case is that it is unclear and doubtful (a) whether there in fact exists unofficial law, or (b) whether there exists merely certain cultural or political considerations that influence the factual findings of the matter, which in turn influence the application of existing official law.

2. Conceptual Framework for Studying the Legal Culture of Korea

This analysis suggests that the starting point for developing the methodology for examining the legal culture of Korea will be to focus upon assumptions and observations referred to below.

A. Certain Assumptions

In understanding Korea’s official law, one must carefully consider the legal culture of Korea. This is because, besides its Western-style official law, there might be ‘unofficial law’ that has gained the general consensus of Koreans and that is regarded in fact as law in Korea. The Special Law on the Establishment of a New Capital City Case supports this possibility.

The way in which the existence of any unofficial law in Korea will be investigated will be to identify normative and non-normative legal culture. Although the rules supported by normative legal culture and unofficial law (as the term is used by Chiba) may not be conceptually identical, nevertheless they possess close similarities and may be treated as being the same for many purposes.

Suppose it can be established that there are significant and substantial unofficial rules supported by the normative legal culture of the Koreans. If so, as Chiba has suggested in relation to the Japanese context, it may be argued that a separate legal system of unofficial law exists in Korea alongside the official legal system of Korea.330 This would be a case of normative legal culture supporting non-legal rules.

B. Normative Legal Culture Supporting Legal Rules

So far, the discussion on normative legal culture has centred on normative legal culture that supports non-legal rules. But what about normative legal culture that supports legal rules? In other words, as illustrated in Figure 2-2, does the normative legal culture of Korea support the official law of Korea that is mainly Western-style law? Or is it the case that the

---

330 One notes that, in a different context, Friedman mentions that ‘if the formal system will not meet the demands [of legal culture], the informal system will’. See Lawrence M. Friedman, The Legal System: A Social Science Perspective (Russell Sage Foundation, 1975) at 208. Such an ‘informal system’ appears to be similar to Chiba’s notion of a ‘system of unofficial law’.
normative legal culture does not support official rules in Korea? In the latter case, it may be because the official laws may have been ‘imposed’ upon the Koreans or ‘transplanted’ into Korea, and they were not appropriate for Korea.

If it can be established that the normative legal culture of Korea in fact supports official legal rules, then to what extent will the concept of unofficial law be relevant? For example, it has been argued that one of the aspects of Korean legal culture is the concept of ‘bureaucratic elitism’, which is founded in, or related to, Confucianism, and which opposes the value of egalitarianism. An implication of this would be that, for example, a citizen of Korea who does not have a good relationship with the relevant bureaucrat may be denied an opportunity to obtain, say, a government approval that he or she needs to carry out his or her business. The argument is that this could occur despite the fact that the official law of Korea states that an egalitarian administration process must be followed in issuing government approvals. Therefore, to obtain the government approval, the applicant must, despite the official law on this point, comply with the ‘unspoken rule’ or ‘unofficial law.’ Such unofficial law being that he or she should, in the first place, identify the relevant bureaucrat who is involved in issuing the government approval and approach that person to develop a relationship with that person.

It might be true that many Koreans actually follow this sort of practice when it comes to obtaining certain government approvals. But what is the ‘normative legal culture’ in that situation? What kind of legal norm does the relevant normative legal culture support? Does the normative legal culture support the ‘unofficial rule’ that upholds the concept of bureaucratic elitism, or does it support the official legal rule that requires a fair administration process?

331 If such rules do not exercise social control and are not enforced, then they are ‘dead rules’ because ‘they have no corresponding legal postulates’. See Leopold Pospisil, Kapauku Papuans and Their Law (Yale University Publications in Anthropology, No. 54, 1964) at 256.

normative legal culture does not support official rules in Korea? In the latter case, it may be because the official laws may have been ‘imposed’ upon the Koreans or ‘transplanted’ into Korea, and they were not appropriate for Korea.

![Diagram showing non-legal rules and legal rules with support questions]

**Figure 2-2**

If it can be established that the normative legal culture of Korea in fact supports official legal rules, then to what extent will the concept of unofficial law be relevant? For example, it has been argued that one of the aspects of Korean legal culture is the concept of ‘bureaucratic elitism’, which is founded in, or related to, Confucianism, and which opposes the value of egalitarianism. An implication of this would be that, for example, a citizen of Korea who does not have a good relationship with the relevant bureaucrat may be denied an opportunity to obtain, say, a government approval that he or she needs to carry out his or her business. The argument is that this could occur despite the fact that the official law of Korea states that an egalitarian administration process must be followed in issuing government approvals. Therefore, to obtain the government approval, the applicant must, despite the official law on this point, comply with the ‘unspoken rule’ or ‘unofficial law.’ Such unofficial law being that he or she should, in the first place, identify the relevant bureaucrat who is involved in issuing the government approval and approach that person to develop a relationship with that person.

It might be true that many Koreans actually follow this sort of practice when it comes to obtaining certain government approvals. But what is the ‘normative legal culture’ in that situation? What kind of legal norm does the relevant normative legal culture support? Does the normative legal culture support the ‘unofficial rule’ that upholds the concept of bureaucratic elitism, or does it support the official legal rule that requires a fair administration process?

---

331 If such rules do not exercise social control and are not enforced, then they are ‘dead rules’ because ‘they have no corresponding legal postulates’. See Leopold Pospisil, *Kapauku Papuans and Their Law* (Yale University Publications in Anthropology, No. 54, 1964) at 256.

C. Existence of Unofficial Law?

The answers to these questions will require detailed research and accurate findings on the relevant legal culture in question, which is part of what is intended to be done by this thesis. But suppose that the normative legal culture of Korea actually supports the relevant official rule rather than the alleged unofficial rule. Also, assume that such findings are found to be the case in respect of many more aspects of the normative legal culture of Korea. If so, then the whole concept of unofficial law as discussed previously might have to be reconsidered.

In this example, it may the case that, although many Koreans may try to build up relationships with bureaucrats when applying for a government approval, they may not think that there is an unspoken rule that suggests such practice. In fact, they may strongly support the official rule that requires fair administrative procedures and they may believe that this should be the law. They may consider that bureaucratic elitism should not be allowed to continue. Their attitude may be that government administration processes should be fairly and transparently carried out, and that unequal treatment based on personal relationships should not be allowed. If this is the case, then although one may say that a certain culture, or even legal culture, exists in Korea that supports the concept of bureaucratic elitism, one could not say that normative legal culture exists in Korea supporting bureaucratic elitism. The relevant normative legal culture in fact supports the official rule requiring fair administrative processes.

In this case, is there an ‘unofficial rule’ in Korea that upholds or supports the concept of bureaucratic elitism? There might be a certain cultural tendency that encourages bureaucratic elitism, but it may be difficult to say that there is an unofficial rule that supports the concept. This scenario is illustrated in Figure 2-3.

![Diagram](image_url)

Figure 2-3
Take another example, in relation to the Japanese Tenno system discussed earlier. Suppose that the court has decided that the rights of individuals to use their property would be temporarily modified by a Tenno visit. However, has the court made this decision (a) because it felt that the Tenno system was an unofficial law of Japan, or (b) was it because of the principle (assuming that there is such a legal principle in Japan) that private rights may be modified to the extent necessary to preserve certain national interests, of which the Tenno visit was one? If the answer is the latter, then can it be said that the normative legal culture of Japan supports the concept of the Tenno system? Or is it the case that, although the Tenno system is an important national cultural heritage of Japan, it is only a cultural matter, but not a normative legal cultural matter.

If the latter is found to be true, then what is the normative culture supporting? The normative legal culture might be seen as supporting both the rules for the preservation of private rights of individuals to use their property and the rule that allows modification of such private rights to the extent necessary to guard certain national interests, both of which are legal rules. The normative legal culture is not supporting the unofficial rule relating to the Tenno system. If so, there would not be a convincing case for deciding that the Tenno system constitutes part of the unofficial law of Japan.

D. Indigenous Cultural Norms

Unofficial law backed by indigenous cultural values is said to exist in some Asian countries that have received Western law. However, it is possible that extensive research on the legal culture of these Asian countries (such as Korea) might reveal that what many people often assume as being the unofficial law of that country is actually not being supported by the normative legal culture. If so, can it be said that such unofficial law is in fact unofficial law? It is probably not appropriate to call such rules unofficial law because people do not believe in the legitimacy of such rules. For the sake of convenience, such rules will be called in this thesis ‘indigenous cultural norms’. Indigenous cultural norms are non-legal rules supported by non-normative legal culture. This is illustrated in Figure 2-4 below.

E. Non-Legal Rules Supported by Normative Legal Culture

It is possible that there are several non-legal rules supported by the normative legal culture of Korea. In that case, one must question whether the normative legal culture tends to support indigenous cultural norms or official law. ‘Tends to’ because if in fact it does support certain indigenous cultural norms, then the indigenous cultural norms will not be called indigenous cultural norms in the sense described above, but they will in fact be ‘unofficial law’ in the sense previously described. This is described in Figure 2-4 below.

---

333 See Part IV.1 above.
334 For the avoidance of doubt, the author does not intend to suggest that this is necessarily the case for the Japanese Tenno system, as this thesis is concerned with the legal culture of Korea. Obviously, the case of the Tenno system is used only as an example in order to illustrate the author’s point. Nevertheless, it is submitted that the concepts discussed herein may be applied and used in the Japanese context.
Another related question is this: when (i) a certain normative legal culture supports (ii) certain non-legal rules, are such non-legal rules more likely to support or agree with (iii) any indigenous cultural norm or are they more likely to support or agree with (iv) any official law? This is discussed below.

F. Non-Legal Rules Supported by Normative Legal Culture – In Turn Support Legal Rules?

By way of illustration, suppose that the concept of bureaucratic elitism discussed above is in fact found to be an indigenous cultural norm in Korea. Suppose that upon a close investigation, it is concluded that the normative legal culture of Korea supports a legal rule that requires fair administrative processes. Further, the normative legal culture supports a non-legal rule (assuming that it is a non-legal rule) that would require that any government official who has been in contact with the applicants seeking a government approval to be disqualified from being involved in the process of issuing the approval. This latter rule, although currently not in existence, would tend to support the former legal rule requiring fair administration processes. But it would tend to oppose the indigenous cultural norm relating to bureaucratic elitism.

In this illustration, the non-legal rule could, according to Chiba, still be part of the 'unofficial law' in the sense described by him. It would be part of unofficial law that 'supplements' the official law, but that does not 'oppose, modify or undermine' the official law.335 For the sake of convenience, such non-legal rules will be called in this thesis (v) 'normative unofficial law', depicted in Figure 2-5 below.

---

Suppose that, upon extensive research into the legal culture of Korea, virtually all or substantially all the significant non-legal rules supported by the normative legal culture of Korea support the official law (that is, they are (v) normative unofficial law). But on the other hand, suppose that they do not support any of the indigenous cultural norms of Korea. In that case, can it be said that a separate and independent system of unofficial law exists in Korea alongside the official legal system in the sense contemplated by Chiba?

Within the concept of Chiba’s unofficial law, non-legal rules that ‘supplement’ official law are included. Nevertheless, it appears from his examples of Japanese unofficial law and his approach as a whole to the question of Asian indigenous laws\(^{336}\) that his view of a system of unofficial law in Japan (or in an Asian country that has received Western law) is probably limited to a system that mainly consists of non-legal rules that do not support official law. In other words, unlike this thesis, Chiba’s idea of an unofficial legal system does not seem to contemplate any significant system of normative unofficial law.

G. A System of Cultural Norms or Legal Norms?

Instead of a system of unofficial law, what may exist is a loose system of indigenous cultural norms (represented by the shaded area in Figure 2-6). This would occur if there was very little (vi) unofficial law. But in order to come to such conclusions, one must, in the first place, conduct extensive research on the indigenous cultural norms, unofficial law and the normative unofficial law of a country. This is beyond the scope of this thesis.

\(^{336}\) Chiba mentions that when Asian countries were confronted with the different systems of law from Western countries, they must have ‘struggled’ with that received law at the risk of their cultural identities. He goes on to make the point that ‘the general state of law found today in Asian countries is nothing but the result of those struggles’. Hence, Chiba’s emphasis is on indigenous unofficial law that opposes or conflicts with, the Western-style official law. See id at 3.
Rather, the broad conceptual framework discussed in this thesis is intended to illustrate the following points (which are described in Figure 2-6):

(a) Applying the hypotheses developed in Part III.5 of Chapter 1, it would be assumed that the most relevant normative unofficial law for the present purposes would be those non-legal rules that support the rule of law concept found in Korea’s official law. On the other hand, it is assumed that unofficial law and indigenous cultural norms support Confucianism. Chapter 3 will mainly present evidence from Korean legal history to support such assumptions.

(b) Next, one may try to ascertain the extent to which indigenous cultural norms and unofficial law exist in particular situations. Applying the relevant hypotheses, the assumption is that indigenous cultural norms rather than unofficial law would tend to exist (or would be more frequently found) in Korea. That is, where there is a non-legal rule that supports Confucianism, such a rule would tend to be supported by non-normative legal culture rather than normative legal culture. Chapters 3, 4 and 5 attempt to illustrate these points in different areas and contexts.

(c) It follows from the above assumptions that normative unofficial law that supports the rule of law should exist in Korea. A further discussion of the nature of normative unofficial law is set out in the next section.

H. ‘Lack of Law’ Situations

What then are the characteristics of normative unofficial law? In the example of the normative unofficial law given above, which would require that ‘any government official who has been in contact with any of the applicants who were seeking a government approval should be disqualified from being involved in the process of issuing the relevant government approval’, what is the nature of this normative unofficial law? Why does such normative unofficial law exist instead of official law? Putting it in another way, why is there no official law in place of such normative unofficial law?
It is submitted that one of the key reasons why such normative unofficial law would exist would be, in the absence of other reasonable explanations, simply because there is a 'lack of law'. That is, certain rules do not yet exist as law, which, according to the legal culture of the relevant people, should exist as law.\textsuperscript{337} There is a 'gap' in law. This represents a similar context as that in which Friedman would propose that legal culture is a source of law and that it determines what a particular law should be.\textsuperscript{338} That is, the relevant legal culture suggests that there should be a particular law that does not currently exist. In countries such as Korea, Western law has been 'received' relatively recently, and there are still many gaps in the law because the law is at an early stage of development. Therefore, such 'lack of law' situations may arise often.\textsuperscript{339} Another reason for this lack of law situation in Korea might be due to its small number of lawyers, which creates a shortage in the resources to effect developments of law.\textsuperscript{340}

This is clearly different from the idea that the gaps in law may be somehow filled in by 'unofficial law' or that another system of unofficial law exists that supplements, opposes, modifies or undermines the official law. The solution to 'lack of law' situations is, it seems, to create new (official) laws that effectively fill such gaps in laws.\textsuperscript{341} In doing so, one may have regard to the relevant normative legal culture and the normative unofficial law supported by such normative legal culture.\textsuperscript{342}

\textsuperscript{337} Similar arguments have been made in the Japanese context. See, for example, Veronica L. Taylor, 'Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan' (1993) 19 MULR 352 at 361. Taylor emphasises, among other things, the systematic factors, including whether the law is well 'settled' in assessing the practice of making contracts in Japan. Luke Nottage also argues that, rather than cultural reasons, 'structural disincentives' and lack of the relevant law and system best explain the poor uptake of Japan's arbitration services. See Luke Nottage, 'Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?' (2004) Int ALR 54.

\textsuperscript{338} See Part III.2.C above.

\textsuperscript{339} It is instructive to note Samsung Group's internal code of conduct. It says, among other things, 'We will comply with all environmental laws. If there is no law, or if the environment does not protect the environment, we will set and adhere to our own standards (emphasis added)'. See Craig P. Ehrlich & Kang Dae-Seob, 'A Look at Korean Corporate Codes of Conduct' in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 101.


\textsuperscript{341} On the issue of filling the gaps in law, Nottage identifies countries that have a more formal orientation in legal reasoning, such as England and New Zealand, and countries that have a more substantive orientation of legal reasoning, such as Japan and the United States. He argues that gaps in law tend to be changed by 'law in books' influencing 'law in action' in the former countries, whereas gaps in law tend to be changed by 'law in action' influencing 'law in books' in the latter countries. Assuming that Korea has a more substantive orientation of legal reasoning like Japan, because of their similarities in the legal systems (to prove this point, of course, would require extensive research), then arguably gaps in law in Korea tend to be changed by 'law in action' influencing 'law in books'. If so, it is the more important to examine the legal culture when creating new law to fill gaps in law. See Luke Nottage, Form, Substance, and Neo-Prdoecurialism in Comparative Contract Law: Law in Books and Law in Action in New Zealand, England, the United States, and Japan (Ph.D Thesis, Victoria University of Wellington, 2002) at 14-79.

\textsuperscript{342} Additionally, in the case of Korea, increasing the number of lawyers could help such a situation. With more lawyers, their practice would penetrate into new areas of social life and thereby fill the gaps in law. See Tom Ginsburg, 'Introduction: The Politics of Legal Reform in Korea' in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 10. It is observed that such gaps in law are now quickly being filled. See Dai-Kwon Choi, 'The Emergence of Formalised Intermediate Norms in Korea: The Case of Sexual Harassment' in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 90.
Thus, where there are gaps in law, one may contemplate, on the one hand, a system of official law, and on the other hand, a system of unofficial law. This scenario appears to be similar to what Priban refers to as the two ‘spaces’ relating to legitimacy of law. Priban argues that the problem of legitimacy breaks into two different spaces that must be analysed separately. The first space is already normalised legitimacy. The second space is a plural space of various legitimisation strategies, many of which have an openly anti-normative, parasitic or subversive character.\(^{343}\) Put it differently, Priban says that ‘legitimacy’ is a contingent outcome of the legal definition of a particular social strategy; whereas ‘legitimation’ is a permanent struggle to obtain this outcome, which does not initially have a legal form and represents what has not yet been defined, conceptualised and enforced by law.\(^{344}\)

The first space that Priban describes may be the space for official law, and the second space may be a system of unofficial law, whether it be of normative unofficial law or just unofficial law. The second space is related to the lack of law situation in Korea where ‘legalisation’ (as Friedman calls it\(^{345}\)) should continuously take place.

3. Proposed Methodology for Studying Legal Culture

To sum up: normative culture may support legal rules or non-legal rules. Any non-legal rules supported by normative legal culture may in turn support other legal rules. Such non-legal rules are referred to as normative unofficial law. For the purposes of this thesis, those aspects of legal rules that support the rule of law will be focused on. On the other hand, references to any indigenous cultural norms will be references to the Confucian norms suggested by those who hold the conventional view of Korean legal culture. Thus, normative unofficial law refers to those non-legal rules in society that support the rule of law. Such normative unofficial law exists mainly because there are gaps in the law in Korea. These concepts form the basis for studying Korean legal culture in the rest of this thesis, generating the following more detailed methodology for studying the legal culture of Korea.

A. Ascertaining the Legal Culture of Korea Before and After the Reception of Foreign Laws

First, accurate findings of the legal culture of Korea are required. The current laws and the legal system of Korea form a mixture of received and indigenous laws. Thus, one may need to ascertain the legal culture of Korea before and after the reception of foreign laws. Unlike the adoption of foreign laws and foreign legal systems, it appears that legal culture takes longer to change.\(^{346}\) Therefore, an investigation of the current legal culture of Korean will only show a ‘snap-shot’ view of a process of adaptation, or formation of, new legal culture. By ascertaining the legal culture of Korea before and after the reception of foreign laws, one can better view the process forming new legal culture.

---


\(^{344}\) Id at 117.


Therefore, one needs to examine the indigenous legal culture of Korea historically and ascertain any trend or pattern of the process of the change in the legal culture. Such indigenous legal culture would have been, at various stages of the Korean history, influenced, affected, and sometimes even forced to change, by the relevant law and legal systems prevailing at the time. The *length of time* in which the culture has remained unchanged will be relevant in this regard.\(^{347}\)

B. Ascertain the ‘Quality’ of the Legal Culture

It might be the case that some elements of Korean legal culture (a) might have been relatively quick to change; (b) might have been more resilient to changes and taken longer time to change; (c) might not have changed despite the forces that have influenced them to change; or (d) might have changed but are likely to reappear in appropriate contexts.

It is therefore important to distinguish the ‘quality’ of the legal culture in order to ascertain its normative value in society. It has been argued that some parts of the law tend to be ‘deeply embedded in national culture, and to replace major parts of it either means to uproot something quite fundamental, at considerable cost in disruption, or face the possibility that new law will lapse into ineffective life’.\(^{348}\) Therefore, part of the task in investigating the legal culture of Korea will be to try to identify which aspects of the legal culture of Korea are deeply embedded in the country’s national culture.

C. Ascertain the Normative Legal Culture and the Non-Normative Legal Culture of Korea

\[ i. \quad \text{Normative or Non-Normative Legal Culture?} \]

Having identified the legal culture of Korea that has been embedded in the national culture of Korea, one must then try to ascertain which part of the legal culture represents normative legal culture rather than non-normative legal culture. Hence, the relevant question to ask is ‘Which part of the legal culture consists of ideas, values, attitudes and opinions of a group of people which, taken as a whole, takes a firm position as to what particular law should be?’ More generally, what are the attitudes of people in respect of the legal legitimacy of a particular law? This will be a question of fact and degree and will require careful analysis, taking into account the relevant historical, cultural and legal circumstances.

\[ ii. \quad \text{Presumption in Favour of the Existence of Normative Legal Culture} \]

As a general rule, the very fact that certain laws exist that have been properly created and consistently applied for a substantial period of time would itself be prima facie evidence that there exists a normative legal culture that tends to support such laws.\(^{349}\) This kind of

---


\(^{349}\) In this regard, one notes Friedman’s statement that ‘[legal] structure is valuable evidence of attitude. A consistent structural pattern betrays and describes underlying attitudes, like clothing which follows the lines of the body’. See Lawrence M. Friedman, *The Legal System: A Social Science Perspective*
approach is based on the assumption that an existing legal rule should be supported by the legal culture of the relevant people unless proved otherwise – which is based on the reasonableness of the circumstances in which inner acceptance is formed.\textsuperscript{350} The very fact that a law has been legitimately enacted and put in force without significant resistance gives rise to a presumption that people believe in the legal legitimacy of the law.\textsuperscript{351}

Of course, such a presumption may be rebutted by contrary evidence. For example, laws, even though legitimately created, may have been created as a tool for, or with the purpose of, achieving certain political goals (rather than based on genuine legal reasoning).\textsuperscript{352} Such laws may have been created because of certain religious reasons (rather than ‘legal’ reasons\textsuperscript{353}). Also, such laws may have been created due to the sudden adoption of foreign laws. In such cases, reasonable doubt may be raised as to whether the legal culture of the relevant people would in fact support such laws.\textsuperscript{354}

iii. The Normative Unofficial Law and the Unofficial Law of Korea

After distinguishing the normative and non-normative legal culture of Korea, one must ascertain whether the normative legal culture tends to support Korean indigenous cultural norms or Korean official law. This means that one must, firstly, identify what the indigenous

\textsuperscript{350} See, for example, Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) Cardozo Law School, Public Law Research Paper No. 36 at 18. The Korean Constitutional Court also seems to take this kind of approach in ascertaining the legal culture of Korea. See, for example, 2004Hun-Ma554, 566, 21 October 2004, 4Da(3) Na3Na.

\textsuperscript{351} In this regard, one may note Tanase’s argument that there can never be a sharp distinction (in legal culture) between the elite and the masses because the elite has to solicit support from the masses even in a very authoritarian regime. See Takao Tanase, ‘The Empty Space of the Modern in Japanese Law Discourse’ in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 191. Applying Tanase’s argument, the above kind of presumption may apply even to non-democratic societies.

\textsuperscript{352} The consent of the public in relation to particular laws depends on a lack of coercion. See Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) Cardozo Law School, Public Law Research Paper No. 36 at 18. Also, culture should be distinguished from situations where there has been deliberate government policy to pursue a certain social system. See Frank K. Upham, ‘Ideology, Experience, and the Rule of Law in Developing Societies’, Papers Presented at the University of Michigan Law School Conference on Japanese Law (Michigan, April 2001) at 25. (Upham argues that the Japanese’ lack of attraction of law was not due to their culture, but due to the government’s deliberate policy to limit the population’s access to law.) See also Setsuo Miyazawa, ‘Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behaviour’ (1987) 21 Law & Society Review 219 at 222. (Miyazawa argues that ‘institutional factors that had been deliberately introduced by the elite might have more impact than culture’).

\textsuperscript{353} Although, to be sure, sometimes it would not be easy to distinguish between religious and legal reasons, particularly if the relevant laws have strong religious underpinnings. Nevertheless, it is submitted that, in most cases, in principle, it should be possible to distinguish legal reasons from religious reasons – which would involve asking such questions as ‘what was the rationale of the new law?’ and ‘what were the explicit and implicit reasons for the creation of such laws?’

\textsuperscript{354} See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, ‘The Transplant Effect’ (2003) 51 Am J Comp L 163 (arguing that ‘if the law was not adapted to local conditions, or if it was imposed via colonisation and the population within the transplant was not familiar with the law, then we would expect that initial demand for using these laws to be weak’).
cultural norms of Korea are. Certain indigenous cultural norms may be seen as 'unofficial law' in the sense contemplated by Chiba if they are in fact supported by the normative legal culture of Korea.

'Indigenous cultural norms' are, as discussed above, simply those 'norms' that are thought to be unofficial law by some people, but which are in fact not unofficial law (because the normative legal culture does not support them). There could be numerous indigenous cultural norms, and it will be almost impossible to cover all of them. But, as mentioned earlier, for the present purposes, any non-legal rules supported by the conventional view of Korean legal culture identified in Part II.1 of Chapter 1 will be treated as the indigenous cultural norms of Korea. But if they are found to be supported by the normative legal culture of Korea, then they will be called unofficial laws rather than indigenous cultural norms. Such indigenous cultural norms or unofficial law will in fact be rules that support the Confucian values rather than the rule of law.

Having identified the indigenous cultural norms (or unofficial law), one may be able to identify any normative unofficial law. However, since the focus of the present thesis is to identify and analyse legal culture rather than rules (whether official or unofficial), emphasis will not be placed on ascertaining normative unofficial law (nor unofficial law for that matter). The concept of normative unofficial law should be seen more as an advanced theoretical apparatus developed to accommodate the other concepts of legal culture that are the main focus of this thesis. For example, an implication of normative unofficial law may be that any 'lack of law' situation in Korea may be explained not in terms of Confucian legal culture but in terms of the rule of law. In other words, suppose that Korean law does not prescribe sufficient rules to govern funding mechanisms between the government entities (see Part III.3 of Chapter 5). Would that be because Koreans prefer relationship rather than rules? The assumptions made in relation to Korea's normative unofficial law suggests that this is simply a 'lack of law' situation, and that the legal culture supports the creation of sufficient rules in this regard.

Thus, while it would be beyond the scope of this thesis to try fully to identify Korea's normative unofficial law (and unofficial law generally), the concept of normative unofficial law allows one to devise the following hypothesis (in addition to the hypotheses set out in Part III.5 of Chapter 1) regarding Korea's legal culture.

| Korean law is still relatively undeveloped and there are many 'gaps' in laws. Because of this 'lack of law' situation, sometimes Koreans are left to rely on 'relationships' and 'practice' rather than objective rules. The way forward for such a lack of law situation is to create appropriate legal rules that fill the gaps in law, rather than attributing the situation to any assumption that Koreans favour a 'relational approach' rather than a rule-based approach to solve issues. The relational approach may be part of general culture (or indigenous cultural norms) rather than the normative legal culture of Korea. |   |

355 To be more accurate, these are not necessarily 'norms' but are thought to be norms or even law by some people. A 'norm' concerning a specific action may exist when the socially defined right to control the action is held not by the actor but by others, which implies that there is a consensus in the social system that the right to control the action is held by others. Such a right may not be a legally defined right, but an informal or socially defined right. See James S. Coleman, Foundations of Social Theory (The Belknap Press of Harvard University Press, 1990) at 243. What people often refer to as 'Confucian norms' may not in fact be norms in the sense defined above.
This hypothesis, together with those set out in Chapter 1, will be applied particularly in
Chapter 5. 356

D. Other Concepts of Legal Culture

Concepts of legal culture other than normative legal culture will also be used to highlight
various aspects of Korean and other people's legal culture. These include 'indigenous legal
culture' (see Part II of Chapter 3), 'modern legal culture' (see Part IV of Chapter 3) and
'global legal culture' (see Parts II.2 and II.3.A of Chapter 5). 'Indigenous legal culture'
simply refers to the legal culture existing prior to modern times, 357 whereas 'modern legal
culture' refers to the legal culture of the modern times, 358 and the two terms are used as a
dichotomy. 359 'Global legal culture' refers to the dominant legal cultures in the globalisation
process 360 discussed in Part I.1.B of Chapter 4 and Part II.3.A of Chapter 5. These terms are
not intended as technical terms. But they enable a wider and more diverse understanding of
legal cultures, and allow for comparisons and contrasts between different concepts of legal
culture. The relationship between indigenous legal culture, modern legal culture and global
legal culture was illustrated in Figure 1-2 in Chapter 1. Figure 2-7 below, on the other hand,
shows the relationship between indigenous legal culture, normative legal culture and modern
legal culture.

---

356 See, for example, Part III.3.C of Chapter 5.
357 Chiba emphasises the dichotomy between the 'native' and 'transplanted' nature of indigenous law on
the one hand, and transplanted law on the other. See Masaji Chiba (ed), Asian Indigenous Law: In
Interaction with Received Law (KPI, 1986) at 393. The author does not intend to make such a
distinction when using the term 'indigenous legal culture' in this thesis.
358 For a discussion of the concept of 'modern legal culture', see generally Lawrence M. Friedman, 'Is
There a Modern Legal Culture?' (1994) 7 Ratio Juris 117.
359 The year 1866 is treated as the beginning of Korea's 'modern period' in Chapter 3. See Part IV.1.B.i
of Chapter 3.
360 For a discussion of the concept of 'global legal culture', see Charles H. Koch, 'Envisioning a Global
supranational organisations will create global legal culture. He says (at 3) that such global legal culture
will borrow from civil law and common law experiences. Also, Friedman recognises that there is such
a thing as 'global legal culture'. See Lawrence M. Friedman, 'Frontiers: National and Transnational
Order' in Karl-Heinz Ladeur (ed), Public Governance in the Age of Globalisation (Ashgate, 2004) at
46.
As Figure 2-7 shows, there is an overlap between normative legal culture and indigenous legal culture because the former will be ascertained from, among other things, historical evidence (see Part III.5.B above). There is also an overlap between normative legal culture and modern legal culture because the former must survive until today (see Part III.4.A above), whereas not all modern legal culture is normative legal culture. The discussion of these three concepts of legal culture will form the basic structure of Chapter 3.

E. Summary

Using the above methodology, firstly, one can ascertain the normative legal culture of Korea. Secondly, one may determine whether the normative legal culture supports the rule of law or Confucianism, and whether the non-normative legal culture supports the rule of law or Confucianism. In this way, the conventional view of Korean legal culture may, where appropriate, be challenged.

In Chapter 3, the legal history and culture of Korea will be examined in detail, taking into account various stages throughout its history ‘receiving’ foreign laws. In this process, core aspects of Korean normative legal culture will be identified and analysed. Chapter 4 discusses the views of the Constitutional Court on some aspects of the ‘deeply rooted’ legal culture of Korea. This may also be significant evidence of what may constitute the normative legal culture of Korea as interpreted by the Court. This will, in effect, be a discussion more of an aspect of ‘internal legal culture’ (in Friedman’s terms). The Court’s attitude towards certain Confucian values demonstrates aspects of the modern legal culture of Korea as well. Chapter 5 then explores the legal culture of Koreans as manifested in contemporary cross-border financing transactions. It shows how the distinction between normative and non-normative legal culture may have practical consequences in shaping the ‘global legal culture’ relating to this important area of legal and economic activity.
Chapter 3 Korean Legal History and Legal Culture

I. INTRODUCTION

The two main arguments of this thesis were set out in Part I.2 of Chapter 1. This chapter is mainly concerned with the first of the two arguments: that is, the proposition that ‘significant aspects of the deeply rooted legal culture of Korea are not inconsistent with the rule of law; rather, in many cases, they strongly support the notion of the rule of law’.

In Chapter 2, several concepts relating to legal culture were discussed to develop a methodology for studying Korean legal culture. In this chapter, concepts such as normative legal culture, indigenous cultural norms and legal transplant are particularly relevant. This chapter applies these concepts in analysing Korean legal history, and suggests how Korean legal history may be interpreted to ascertain Korean legal culture. This chapter is structured in a way that shows the interaction between Korea’s indigenous legal culture (Part II), normative legal culture (Part III) and modern legal culture (Part IV) elaborated in Part IV.3.D of Chapter 2.

Discussions of Korean legal history are not new, and this chapter considers mainly the published (Korean and English) material of mainstream legal historians. But one does not often find such discussions in the context of ascertaining Korean legal culture. This is unfortunate because legal culture (particularly deeply rooted legal culture) is closely connected to legal history. Legal history reveals what Koreans viewed as the law should be (normative legal culture), and how such views have changed over time.

Ascertaining legal culture by examining legal history is not a simple process. History may be subject to different interpretations at different times in different contexts. But a renewed look into Korean legal history will be a valuable exercise particularly in the contemporary globalisation context. This chapter examines Korean legal history by focusing on a series of legal transplants that occurred at various stages of Korea’s history. Legal transplants created unique ‘cultural spaces’ in which indigenous legal culture and imposed

---

1 See Part III.4 of Chapter 2.
3 See Part III.3 of Chapter 2.
4 See Part III.1 of Chapter 1.
5 Poh-Ling Tan, ‘Introduction’ in Poh-Ling Tan (ed), Asian Legal Systems: Law, Society and Pluralism in East Asia (Butterworths, 1997) at 10 (Poh-Ling argues that in order to identify the legal culture of a people, aspects of the history of the people, particularly those aspects relating to the indigenous laws and the customs relating to such laws, are important). See also Lawrence Friedman, ‘Introduction’ (2003) 4 Theoretical Inq L 437 at 448 (Friedman argues that history can be the basis that forms the ideological core of a country, the source of passion of the people).
6 It has been said that ‘[h]istory is precisely the site of contention and conflict over the meaning and significance of the past. When different narratives are free to compete, a general consensus often emerges only to be challenged anew in a process of continual revision’. See Gi-Wook Shin & Michael Robinson, ‘Rethinking Colonial Korea’ in Gi-Wook Shin & Michael Robinson (eds), Colonial Modernity in Korea (Harvard University Press, 1999) at 1. This is precisely why the author believes that Korean legal history should be re-examined in challenging the conventional views on Korean legal culture.
7 For a discussion of the relevance of Korean legal history to globalisation, see Part IV.1.D below.
norms dynamically interacted. Legal transplants continue today through new globalisation processes.

Part II below outlines Korean legal history prior to 1866. The main aim of Part II is to reveal Korean indigenous legal culture as reflected by indigenous Korean laws. It shows that there was a significant continuity in Korean legal culture at least up to the time of the Chosun Dynasty (1392-1910), when 'Confucian legislation' (see Part II.3.G.iii below) was imposed. It demonstrates that at least up until the imposition of Confucian legislation, the indigenous legal culture of Korea was not inconsistent with the rule of law. This leaves the question of whether and to what extent Confucian legislation (as well as the subsequent legal transplants particularly during the Japanese occupation period of 1910-1945) changed Korean legal culture.

Part III then attempts to ascertain Korean normative legal culture by analysing in detail various laws of the Chosun Dynasty, and comparing these laws against, firstly, the laws of previous periods, and secondly, the modern legal culture of Korea. In doing so, the methodology set out in Part IV.3 of Chapter 2 is applied. Thus, the focus is on the duration of the relevant legal culture and the extent to which people viewed particular rules as what the law should be. Legal culture relating to issues such as social status, rights-consciousness, women's rights, litigation and property rights are discussed. The relevant question is 'What Korean legal culture in respect of these issues has survived through the various stages of legal transplants until today?' The tentative conclusion in Part III is that Korea's normative legal culture in respect of these issues is not inconsistent with the rule of law; rather, in many aspects, it in fact supports the rule of law.8

Part IV discusses the legal history and modern legal culture of Korea since 1866 covering the Japanese occupation period and modern times. The key inquiry is to re-examine the findings made in Part III in view of the complex cultural negotiations that took place in the contexts of colonialism, nationalism and modernity. This period is significant because for the first time, the concept of the rule of law was used by the coloniser to legitimise colonisation. But unlike British examples,9 the Japanese legal transplant involved transferring laws that had the form of Western law but considerably lacked elements of the rule of law.10 This factor, together with the complex interplay of nationalism and modernity, produced a mixed understanding of Korean legal culture and its relationship with its Confucian heritage. As a result, inadequate understandings and analyses of indigenous laws, transplanted laws and the deeply rooted legal culture of Korea have prevailed. This must be kept in mind when assessing both the normative legal culture of Korea and conventional views about Korean legal culture.

8 See Part III.9 below for a summary of such conclusions.
10 For a discussion of this aspect of the laws transplanted during the Japanese occupation period, see Part IV.1.B.iv below.
II. KOREAN LEGAL HISTORY AND INDIGENOUS LEGAL CULTURE PRIOR TO THE MODERN PERIOD

1. Introduction

In this Part, aspects of the laws and legal culture of Korea prior to the late nineteenth century will be examined. The subsequent period is termed the ‘modern period’ in this thesis and will be discussed mainly in Part IV of this chapter. It will be shown here in this Part II that significant legal transplants that occurred during the period of the Chosun Dynasty created an opportunity in which Confucianism was powerfully imposed upon the Koreans. Strictly speaking, these legal transplants did not entirely involve borrowing of the laws of other countries. The legal transplants mainly involved creating new laws to achieve social reform based on Confucianism. The precise timing of these legal transplants is difficult to pin down; they probably gained momentum from approximately the late seventeenth century and lasted for about two centuries.

The laws of Korea prior to the period of the Chosun Dynasty tended not to conflict with the rule of law. They had remarkably egalitarian features, including those relating to equal inheritance rights between women and men and a matrilocal marriage system that effectively ensured women’s financial independence after marriage. Confucianism was not a significant feature of Korea’s legal culture. However, this situation allegedly changed during the Chosun Dynasty period. This Part attempts to reveal aspects of Korea’s indigenous laws and the Confucian legislation introduced during the Chosun Dynasty period, and thereby ascertain Korea’s indigenous legal culture.

2. Outline of Korean History prior to the Modern Period

Before discussing its legal history, a brief description of Korea’s ancient history will be helpful for appreciating the context of the current discussion. In regards to the origin of the Korean people, palaeolithic people lived throughout the entire Korean peninsula at least 400,000 years ago. But the predominant view is that the Korean people of today are not the ethnic descendants of these people. By about 5,500 B.C. or 6,000 B.C., Neolithic people first appeared in Korea who are probably the ancestors of the Korean people today. The

---

11 For a discussion on when Korea’s modernisation started, see Part IV.1.B.i below.
13 Ibid. Others argue that it is possible that such people might be the Korean people’s ancestors. See, for example, Young Woo Han, Dashichatneun Wooriyueksa [Korean History Revisited] (Kyungsewon, 2005) at 62, and Hankuksa Teukangpyunchanweiwonhw [Committee for Preparing Special Lectures on Korean History], Hankuksa Teukang [Special Lectures on Korean History] (Seoul National University, 2005) at 36.
14 Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ihchokak, Publishers for Korea Institute, Harvard University, 1990) at 3-4, and Young Woo Han, Dashichatneun Wooriyueksa [Korean History Revisited] (Kyungsewon, 2005) at 62. The ethnic stock of these Neolithic people is seen as continuing unbroken to form one element of the later Korean race, after merging with the new ethnic groups of Korea’s Bronze Age. Thus, Han argues that Koreans are among the most homogenous race in the world. See Young Woo Han, Dashichatneun Wooriyueksa [Korean History Revisited] (Kyungsewon, 2005) at 40.
Korean language belongs to the Altaic language family of north Asia, which includes Turkish, Mongolian, Tungusic and Japanese. The Korean people are thus thought to have a common racial origin with the other peoples of north Asia, especially the Siberian tribes, the Mongols and the Manchus.

A country called ‘Old Chosun’ existed on the Korean peninsula from the fourth century B.C. until about the end of the third century B.C., which was succeeded by Wiman Chosun in about 194 B.C. After this ancient period came the ‘Confederated Kingdoms’ period when Puyo (second century B.C.-494), Koguryo (37 B.C.-668) and the State of Chin (between the second and third century B.C.) co-existed on the Korean peninsula. Subsequently came the ‘Three Kingdoms’ period when Koguryo, Paekche (18 B.C.-660) and Silla (57 B.C.-935) co-existed. During the seventh century, Silla was responsible for unifying the Three Kingdoms, forming a single country. In 935 ‘Koryo’ (from which ‘Korea’ is derived from) became the name of the new country, and in 1392 the name of the dynasty changed to Chosun. The Chosun Dynasty lasted until 1910 when the Japanese annexed Korea.

3. Korean Legal History and Legal Culture prior to the Modern Period

A. Religion and Law – Ancient Times

Arguably, ancient legal history is too remote for the purpose of studying legal culture that influences today. The intervening events and changes are too numerous, and much more significant and relevant for shaping people’s legal consciousness today. However, this does not mean that ancient legal history is irrelevant. It allows one to trace the changes in, and identify the causes of, historical events. Also, the Korean Constitutional Court judges sometimes refer to Korean ancient legal culture dating back some 2,000 B.C. to support their decisions (see Part III.2.B of Chapter 4). For these reasons, Korean ancient legal history is briefly discussed in this section.

In ancient Korea, law and religion appear to have been closely connected to each other. The neolithic people held animistic beliefs, believing that every object in the natural world possessed a soul. Animism is closely related to totemism, which was important in the clan (and later tribal) system of ancient Korea. Animism led to the development of shamanism. Under shamanism, a person who is supposed to have especially intimate contact with or power over spirits is designated a shaman. Although the early shamans may have been men, later Korean custom limited the practice to women, as it does to this day. This indicates that from early times, Korean women undertook significant duties in religion and, to an extent, politics. Given the importance of religion in taking up some of the

15 Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 5, and Young Woo Han, Dasikchanew Wooryueksa [Korean History Revisited] (Kyungsewon, 2005) at 25.
16 Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 5.
18 Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 8.
19 Ibid.
20 Ibid.
21 Ibid.
functions of the law in the early times, it is particularly noteworthy that the role of shaman had been limited to women.

In ancient Korea, the law governing society was customary law, or unwritten law, and since there was no clear distinction between the law, morality and religion, totemic rules regulated the society. The close identification of each clan with a particular totem strengthened group solidarity, whereby the ownership rights of individual may have been given way in favour of collective ownership. On the other hand, the process of electing and removing the chieftains and making of major decisions in the clans depicts a legal, social and political culture that was egalitarian and participatory from this early time.

As part of shamanism, it was believed that if proper incantation was used, it would drive away evil spirits that were harmful to members of the clans. Therefore, those who were thought to have practised incantation intended to harm others were punished. Although limited records are available on the laws of Korea during this period, it appears, as mentioned above, that the law was closely intertwined with the religious beliefs and practices of the time. Also, at these early times, Korean legal culture appears to have characteristics that encompassed egalitarian lineage-centred communities.

B. Old Chosun Laws

It is recorded that the eight laws of Old Chosun, which was said to be all that earlier society had by way of law, multiplied to sixty provisions in the period of Chinese domination. Out of the eight laws, only three are actually recorded (and there are no records of those additional provisions adopted from the Chinese laws); they were as follows:

(a) murderers were punished by immediate execution;
(b) the victim's family was to be compensated in grain by the murderer's family;
(c) thieves were made to serve as slaves of the owners of the property they stole, with the exception of those who repented, who were to pay 500,000 chun instead.

Prohibitions of adultery, sacrilege and witchcraft may also have been observed.

---

22 Byung Ho Park, Hankukupop [The Law of Korea] (Sejongdaewangkinhyumsapwhe [Association for the Commemoration of King Sejong], 1974) at 21.
23 Id at 21-22.
24 In this regard, one notes Habermas' argument that constitutional democracy requires a democratic, participatory form of administration. See Jurgen Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy (Polity Press, 1966) at xxxiii.
25 Byung Ho Park, Hankukupop [The Law of Korea] (Sejongdaewangkinhyumsapwhe [Association for the Commemoration of King Sejong], 1974) at 22.
26 Ibid.
28 Young Woo Han, Dashichatneun Wooryiuekso [Korean History Revisited] (Kyungsewon, 2005) at 82, and Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 17.
29 Ibid.

114
These laws are evidence of considerable development taking place since the days of the primitive clans. The old communal life was gone, as is indicated by the laws on thievery. The concept of private property was firmly established, and this might have triggered the formation of social classes and a widening gulf between rich and poor.

Han Woo-Keun has argued that the 'laws' mentioned above should not be thought of as constituting a fully developed legal system. He argues that this is because the 'laws' derived from tribal customs and were deduced by the observers who recorded them as laws rather than having been consciously established as laws in the modern sense. Nevertheless, the strict and harsh penalties for specific violations of certain norms as indicated by the above-discussed rules suggest the existence and development of a 'legal' culture that is considerably 'formal' in the modern sense.

C. Laws in the Confederated Kingdoms Period

The laws relating to matrilocal marriage (discussed in detail in Part III.5 below) existed prior to the Koguryo period and continue to be force in Koguryo society. The laws prevailed in Korea until the eighteenth century. The rules and culture in respect of matrilocal marriage had thus become part of the deeply rooted legal culture of Korea.

As for the criminal law, since it was believed that gods had ordained that good be upheld and evil punished, the law had religious underpinnings, and criminal judgments were passed and executions carried out in conjunction with the performance of religious ceremonies. This suggests that the law was perceived as being more than merely a tool to regulate the conduct of the people, that it had intrinsic values and was taken seriously. Although few records are available, they suggest that in all of the Korean confederated kingdoms, the crimes of murder, bodily injury, thievery, female adultery and jealousy on the part of a wife were commonly held to be the most serious offences. For example, the law of the kingdom of Puyo included the following:

---

30 Ibid.
31 Ibid.
33 Young Woo Han, Dashichatneun Wooriyuksa [Korean History Revisited] (Kyungsewon, 2005) at 83, and Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 17.
34 Ibid.
35 Ibid.
36 Ibid.
39 This position may be contrasted with Haley's argument about Japan. See John Owen Haley, Authority without Power: Law and the Japanese Paradox (Oxford University Press, 1991) at 14-15. Haley argues that law in Japan did not originate in a religious or moral order due to the 'weak sense of transcendental norms as moral imperatives' of the Japanese. He attributes this to what he regards as the weak normative force of law in Japan.
(a) Murders were punishable by death and their family members were made slaves;

(b) Thieves were punished by repaying twelve times the value of the items stolen;

(c) Adultery was punishable by death.\textsuperscript{41}

Such known laws provide important evidence of the social values of the age. Severe penalties for murder and bodily injury indicate a high regard for individual human life and productivity, and the penalties for thievery show considerable respect for private property.\textsuperscript{42} In addition, harsh penalties for female (and sometimes male\textsuperscript{43}) adultery and jealousy are thought to have been due to the widespread practice of polygamy.\textsuperscript{44} (The widespread practice of polygamy might have been largely due to the fact that married women lived separately from their husbands and were not dependent economically on their husbands.\textsuperscript{45})

D. Law during the Three Kingdoms Period

i. The Hwabaek Institution

The most significant feature of the political/legal process in each of the Three Kingdoms was the role played by conciliatory bodies in political decision making.\textsuperscript{46} Silla’s Council of Nobles, the Hwabaek, provided the clearest illustration of this phenomenon.\textsuperscript{47} The Hwabaek was a council headed by the single aristocrat who held ‘extraordinary rank one’ (sangdaedeung) and was composed of those of ‘extraordinary rank two’ (daedeung).\textsuperscript{48} Its function was to render decisions on the most important matters of state, such as succession to the throne and the declaration of war; the original decision to formally adopt Buddhism also was made by the Hwabaek council.\textsuperscript{49}

A principle of unanimity governed the Hwabaek.\textsuperscript{50} Koguryo and Paekche developed similar conciliatory bodies, and their functions as corporate and consensual assemblies of the high aristocracy were among the distinctive features of the political process of the Three Kingdoms.\textsuperscript{51}

\textsuperscript{41} Young Woo Han, Dashichaineun Wooriyuksa [Korean History Revisited] (Kyungsewon, 2005) at 87.
\textsuperscript{43} Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 25.
\textsuperscript{44} Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ilhokak, Publishers for Korea Institute, Harvard University, 1990) at 21.
\textsuperscript{46} Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ilhokak, Publishers for Korea Institute, Harvard University, 1990) at 34, and Young Woo Han, Dashichaineun Wooriyuksa [Korean History Revisited] (Kyungsewon, 2005) at 122.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ilhokak, Publishers for Korea Institute, Harvard University, 1990) at 34.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
The *Hwabaek* institution is thought to have survived ancient Korean custom involving unanimous decision making in clan assemblages. Given the length of time the custom had survived, it is reasonable to assume that Koreans had viewed the concept of unanimous decision making as an important element of their culture. Since this concept is related to procedural rules of decision making, it may be seen as an aspect of the legal culture of Korea.

But was it a normative legal culture? In other words, did Koreans view this custom, this rule of unanimous decision making as what the law ought to have been, rather than regarding it as merely a preferable process? Applying the methodology for studying legal culture set out in Part IV.3 of Chapter 2, it should be presumed that, unless explained otherwise, people would believe in the legal legitimacy of the rule (this time, regarding the *Hwabaek*). It seems there is no other convincing explanation (other than the people's inner acceptance of the rule) for the preservation of such legal culture. For example, there were no religious reasons for keeping such a rule (although religion and law were often mixed during this time). Nor was it the case that the rule was imposed by foreigners.

Hence, the presumption is that the *Hwabaek* was part of the normative legal culture of Korea. The fact that Koguryo and Paekche had also developed similar institutions further supports this conclusion. This indicates that the customs of unanimous decision making of ancient Korea had been accepted not just by certain geographic groups but by wider groups of people in Korea. Further, it has been said that the *Hwabaek* institution survived until the Chosun Dynasty period when the high officials kept the tradition of deciding important government matters by consensus. Such length of time suggests that the normative legal culture of Korea had supported the *Hwabaek* institution.

If an unanimous decision making process such as that represented by the *Hwabaek* institution was part of Korea's normative legal culture, what does this imply? It seems to imply that Korea's normative legal culture supported the idea that consent (or majority consent if the matter to be decided was of utmost importance) should form the basis for legitimacy of decisions.

Today, under modern legal system, an unanimous, or at least a majority, consent is often required when making fundamental decisions. Such a decision making process is an indispensable part of a legal system that upholds the rule of law. In fact, consent may be seen as the basis for legitimacy and therefore a required element of the rule of law.

---

52 Young Woo Han, *Dashichatneun Wooryuksa* [Korean History Revisited] (Kyungsewon, 2005) at 122.
54 On the other hand, one may note Haley's argument about Japan, whose dominant source of legitimacy has been consent and consensus without the normative control of the law - which is inconsistent with the Western concept of the rule of law. See John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (Oxford University Press, 1991) at 193-195. But there is no similar suggestion that the law did not have normative control in Korea. Further, Haley's proposition may be challenged on the basis that consent has been seen as a fundamental basis for the legitimacy of law. See Part III.4.C.ii of Chapter 2. See also Jurgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (Polity Press, 1966) at xxxiii (arguing that constitutional democracy requires a democratic, participatory form of administration).
55 For a detailed discussion on this proposition, see, for example, Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *S Cal L Rev* 1307 at 1315-1316; Thomas
Korea's normative legal culture relating to unanimous decision making processes may thus be seen as supporting the rule of law concept. The mere fact that such a normative legal culture existed during the Three Kingdoms period and until the time of the Chosun Dynasty does not necessarily mean that such normative legal culture still exists in Korea. It might, since then, have changed or disappeared as an aspect of Korean legal culture.

However, there is no convincing evidence to suggest that this aspect of Korean legal culture has significantly changed. As is discussed in Part III.4 of Chapter 4, the recent decision in the *Special Law on the Establishment of a New Capital City Case* seems to support this point. There, the clear message of the Court was that the people of Korea themselves should decide matters that are of fundamental importance to them through a national referendum, even if such matters are not set out in the Constitution. Some have criticised the decision on the basis that it goes beyond the written text of the Constitution. But perhaps the Court was simply referring to an aspect of normative legal culture — that consent should form the basis of decisions.

### ii. Legal Consciousness in the Three Kingdoms Period

In Koguryo, King Sosurim (371-384) promulgated a code of administrative law in 373 that systematised the state structure. The basic tax levy was a kind of head tax: each adult male was obliged to pay certain amount of tax yearly. For certain tax purposes, the population was divided into three groups, according to income. Property such as land, houses, cows, horses and slaves was freely bought and sold.

There is a lack of historical records to ascertain Koguryo's laws other than the laws described above. Nevertheless, it has been argued that an important characteristic of Koguryo's laws (and the laws of the Three Kingdom's period) is that, rule by law, rather than rule by the individual rulers, was in place.

In Silla, King Pophung (514-540) in 520 promulgated a code of administrative law that is believed to have delineated the seventeen grade office rank structure. During Queen Chindok's reign (647-653) a general reorganisation of the government was instituted: Chipsabu, the Executive Office, became the highest organ of the government, Ch’angbu was entrusted with the management of tax grain, and Ishangbu was created to draft laws and regulations. A legal system thus emerged to replace government by custom or by whim of

---


57 See Part III.4.B.i of Chapter 4.


60 Id at 55.

61 Ibid.

62 Byung Ho Park, *Hankukui pop* [The Law of Korea] (Sejongdaewangkinyumsaupwhe [Association for the Commemoration of King Sejong], 1974) at 25-27.


64 Woo-Keun Han, *The History of Korea* (The Eul-Yoo Publishing Company, 1970) at 60.
the ruler. Also, one should take note of the existence of female sovereigns during this time. In addition to Queen Chindok, there were in the Silla Dynasty Queen Sondok (632-647) and Queen Chinsong (887-897), which reflects aspects of the indigenous culture relating to the roles of women at this time.

There remain few known details about the legal system of Paekche, but it appears to have been similar to those of Koguryo and Silla.

To sum up, written laws were developed during the Three Kingdoms period. Presumably, legal consciousness also began to develop as people started to become familiar with detailed legal rules. There does not seem to be any significant evidence to suggest that law was not strictly enforced.

E. Laws in the Unified Silla Period

During the seventh century, Silla unified the Three Kingdoms. The organs of government had now acquired specialised functions. The highest administrative organ was the Chipsabu (Executive Office), whose head had duties and powers resembling those of a modern prime minister. The Ibangbu, the justice ministry, is recorded as having promulgated some sixty pieces of legislation during the reign of King Muyol. The Sajongbu, or board of censors, had duties to detect and expose all instances of corruption of maladministration in the government. Thus, in the period following unification, a fully developed bureaucratic government had appeared. But few records remain in respect of the detailed laws of the Unified Silla.

F. The Laws of the Koryo Dynasty

Towards the end of the Koryo Dynasty, there was a national movement for reorganising the laws because the kings increasingly tried to manipulate the laws. Such a movement indicates the importance placed by the Koreans on effectiveness of law at this time. The corruption of the Koryo rulers probably explains why the later Chosun Dynasty adopted ‘Confucian legislation’ (to discipline, among others, the rulers), and strict procedures for changing existing rules (see Part III.2 below).

Still, the laws of the Koryo Dynasty, such as those relating to marriage inheritance, reveal significant aspects of Korea’s indigenous legal culture. Under such laws, women

---

65 Ibid.
66 Id at 57.
68 Later evidence in respect of the Chosun Dynasty shows that ‘law in books’ substantially coincided with ‘law in action’. See Parts III.2, III.3 and III.7 below.
69 Woo-Keun Han, The History of Korea (The Eul-Yoo Publishing Company, 1970) at 91.
70 Ibid.
71 Documentation for a Silla village census found in Nara, Japan (dating back to eighth or ninth century A.D.), indicates, for example, that detailed census data were prepared every third year in the village. See generally Chin Kim, ‘The Silla Village Registers and Korean Legal History: A Preliminary Inquiry’ (1979) 7 Korean J Comp L 99. The documents show that a fully developed bureaucratic government existed.
72 Id at 32.
enjoyed a great deal of social and economic freedom; divorce was an easy affair without negative social or economic consequences; widowhood did not lower a women’s attractiveness as a marriage partner, and no social stigma was consequently attached to remarriage. Subsequent Confucian legislation attempted to change such laws.

G. Laws and Legal Culture during the Chosun Dynasty

i. Introduction

As the exact legal history of Korea prior to the Chosun Dynasty is ‘rather shrouded in obscurity’, this Part has thus far examined aspects of history, culture, religion and customs, together with the limited records available in respect of the ancient laws. The point was to deduce a reasonable sense of the legal culture of Korea during the ancient period. One may conclude that Korean legal culture during this time was not fundamentally in conflict with the rule of law concept. The states were not ‘ruled by men’ but by strict laws. The laws relating to property rights reveal the protection of economic freedom, and the Hwabaek institution shows democratic governing processes. Women’s property rights were firmly protected. These features of Korean legal culture also demonstrate considerable continuity for a significant period of time. But this situation had changed (or has been alleged to have changed) during the Chosun Dynasty period. Therefore, it is instructive examine in some detail the laws and the legal culture of the Chosun Dynasty period.

Compared to the ancient period, there are significantly better historical records available in respect of the Chosun Dynasty. Therefore, more specific discussion about Korean legal culture will be possible. Emphasis has been placed upon examining the effects of the attempted changes to laws during this period, which were mainly triggered by the influence of Confucianism. This section sets out a brief outline of the laws and legal culture of the Chosun Dynasty, including the powerful influence of Confucianism in during this time. In Part III below, a more comprehensive analysis of the legal culture of the Chosun Dynasty will be discussed.

ii. Government and Politics of the Chosun Dynasty

Yi Song Gye (1335-1408) seized power of Koryo in 1388, and in 1392 he proclaimed the foundation of a new dynasty – the Chosun Dynasty. The capital city of Korea was moved to Seoul (then called Hanyang) from Kaesung in 1394 (see Part III.4 of Chapter 4 for the relevance of this event in ascertaining Korean legal culture in constitutional review contexts). The Six Ministries – consisting of Personnel, Taxation, Rites, Military Affairs, Punishments and Public Works – were set up as the principal government organs, together with the State Council. The system of central government consisting of such ministries and the king provided effective checks and balances between the ministries and the king. The central

73 Martina Deuchler, ‘Propagating Female Virtues in Chosun Korea’ in Dorothy Ko, JaHyun Kim Haboush & Joan R. Piggott (eds), Women and Confucian Cultures in Premodern China, Korea, and Japan (University of California Press, 2003) at 147.
74 Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 1. Even the Chosun Dynasty records are scarce – see Gyung-Hak Chang, Don-Gak Suh & Hong-Geun Im, ‘Discussion: Korean Legal Traditions’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 203.
75 Young Woo Han, Dashihtaneun Wooriyueksa [Korean History Revisited] (Kyungsewon, 2005) at 287-292. Such checks and balances, especially for restricting and balancing the power of the king, was
government heavily relied on the cooperation and authority of the local elites, which ensured the preservation of a high degree of local identity throughout the dynasty.\textsuperscript{76} The Chosun Dynasty lasted until the Japanese occupation of Korea in 1910, which ended in 1945.

iii. Confucian Legislation

One of the most notable events during the Koryo period was the introduction of the Chinese thinker Chu Hsi’s reinterpretation of Confucianism, known as Neo-Confucianism (see Part II.4 of Chapter 1).\textsuperscript{77} Besides revitalising Confucian thought, Neo-Confucianism brought about organised opposition to Buddhism.\textsuperscript{78} It is particularly significant that Neo-Confucianism was mainly identified with the supporters of Yi Song Gye (who founded the Chosun Dynasty), while Buddhism had greatest influence on the Koryo royal family and the old landlord aristocracy.\textsuperscript{79} Hence, those who became a major force in government in the Chosun Dynasty were mostly Neo-Confucian scholars.

At the beginning of the Chosun Dynasty, the opinion prevailed that, through stimulation from without (rather than within), people’s human properties not only could be guided but also profoundly changed – regardless of whether human nature was originally good or bad.\textsuperscript{80} This belief in the perfectibility of human nature demanded the creation of an appropriate environment in which human nature would be realised to its fullest.\textsuperscript{81} Such an environment could be achieved only through legislation that took the vagaries of human nature into account, that is, through ‘Confucian legislation’.\textsuperscript{82} The elite groups in the Chosun Dynasty also felt that Buddhism had failed – Koryo society being an important lesson and example.\textsuperscript{83} They believed that Korean society could be rebuilt on the Neo-Confucian ideas. Thus, Yi Song Gye, with the assistance of Confucian scholars such as Chong Tojon (1342-1392), Cho Chun (1346-1405), Ha Yung (1347-1416) and Kwon Kun (1352-1409), created a Confucian state ideology.\textsuperscript{84}

The success of the Confucian scholars in transforming Korean society was remarkable – and it is important to appreciate this when considering Korean culture. Thus, it has been noted that it is rare that ‘philosophy that [sic] can convince a whole society to change its patterns of birth, life, marriage, and death’.\textsuperscript{85} The extent of such a success contrasts with the Japanese elites who were selective in what they appropriated from the Confucian tradition,

---

\textsuperscript{76} Adrian Buzo, \textit{The Making of Modern Korea} (Routledge, 2002) at 7.
\textsuperscript{77} Woo-Keun Han, \textit{The History of Korea} (The Eul-Yoo Publishing Company, 1970) at 193. For a discussion of Confucianism and Neo-Confucianism, see Part II.4 of Chapter 1.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} Martina Deuchler, \textit{The Confucian Transformation of Korea: A Study of Society and Ideology} (Harvard University Press, 1992) at 24-25.
\textsuperscript{81} Id at 25.
\textsuperscript{82} Ibid.
\textsuperscript{83} Id at 107.
\textsuperscript{85} Id at 151.

\textsuperscript{121}
and who, like the Confucian scholar Yamazaki Ansai (1618-1682), were interested in preserving their Shinto tradition.  

During the first century of the Chosun Dynasty, the volume of legislation concerned with social issues was unusually high. Both the quantity and the quality of the new legislation were unusual – the concern was to effect a social reform of the Chosun Dynasty based on Confucian ideas. Not only was Confucianism declared the 'state religion' of the Chosun Dynasty, but also new laws were enacted that ran counter to established tradition and therefore gave rise to conflict. It is precisely this aspect of conflict that must be focused upon if one is to fully appreciate the deeply rooted legal culture of Korea. For the sake of convenience, such laws and legislation are referred to as 'Confucian legislation' in this thesis.

iv. Laws of the Chosun Dynasty

The new laws in the Chosun Dynasty period included

(a) the reception of the 'Ta Ming Lu' (the criminal code of the Ming Dynasty of China);

(b) Kyongje Yukjon (Six-Division for Administration);

(c) Kyongguk Taejon (Great Code for Administering the Country);

(d) the Principle of Respect for the Royal Ancestor's Constitution, and other laws.

Not all of these laws could be seen as part of the Confucian legislation, nor inconsistent with the rule of law.

In this period, laws were continuously created, updated and modified based on the new codified system of law. This was the case from the beginning of the Chosun Dynasty until the middle of sixteenth century. Then this process restarted from the eighteenth century until the present day. The reception of the Ta Ming Lu represents the first time that Korea had adopted the entire legal code of a foreign country. But its application was selective, taking into account the indigenous legal culture of the Koreans at the time. This criminal code lasted until 1904 when Korea revised its criminal laws. As discussed in Parts III.2, III.3, III.4, III.5.

---

86 Ibid.
88 Ibid.
91 Id at 33.
92 Id at 35.
III.5.B and III.7 below, evidence suggests that ‘law in books’ substantially coincided with ‘law in action’ during significant periods of the Chosun Dynasty.

v. **Mistaken View about Traditional Korean Society**

There is generally a somewhat ‘limited’ view regarding the so-called ‘traditional Korean society’ in that it is often viewed as a society that is firmly based on Confucianism, in terms of values, ideas, attitudes and even the law. To an extent, this view is correct because during the Chosun Dynasty, the social reforms devised by the elites were aimed at bringing about such results, and they were quite successful.

However, this only represents Korean society and culture as at the eighteenth and nineteenth centuries, or at best, a slightly longer period of time.\(^{93}\) Given the fact that Korea’s known history is over two thousand years old and that the country has rich national cultures and values, including legal culture, it is inappropriate to confine the investigation of Korean legal culture to that which can be traced back within the last three hundred years.\(^{94}\) Also, such a view ignores the fact that ‘Chosun was a dynamic, ever changing society’.\(^{95}\) Nevertheless, to an extent, this is an inevitable consequence given the fact that the records relating to the Chosun Dynasty history have been much better preserved than those relating to previous periods. Further, these records were written mostly by Confucian scholars, who exercised linguistic hegemony in historiography to help achieve a reform based on Confucianism.\(^ {96}\) As a result, Koreans today are much more familiar with the Chosun Dynasty heritage as written by such scholars.\(^ {97}\)

The Japanese occupation of Korea, the Korean War and the division of Korea into North and South did not help preserve ancient records relating to the history and culture of Korea. Many important historical records have been destroyed or stolen during the Japanese

\(^{93}\) This is often ignored or misunderstood. Such a misunderstanding results from the fact that Korean culture has been influenced by Confucianism for a much longer period of time. For example, Choi Dai Kwon states that ‘traditional Korean culture was greatly influenced by two thousand years of Confucian teaching. Naturally, Confucian notions of propriety and law became deeply ingrained in Korean attitudes towards law.’ See Dai-Kwon Choi, ‘Western Law in a Traditional Society Korea’ (1980) 8 *Korean J Comp L* 177 at 177. But the real influence of Confucianism towards Korean law began in the Chosun Dynasty period.


\(^{97}\) This is why there is an emphasis on the history of the Chosun Dynasty among the writers who take the conventional view about Korean legal culture. Yoon Dae Kyu, for example, bases his argument almost entirely on Korean culture formed during the Chosun Dynasty. See generally Dae Kyu Yoon, *Law and Political Authority in South Korea* (Kyungnam University Press, 1990) at 5. See also Part II.1 of Chapter 1.
occupation and the Korean War. Only limited ancient records are available today. 98 Also the
cosmic efforts by the Japanese to discredit Korean indigenous culture and force
assimilation during their period of occupation resulted in considerable distortions in people's
view of Korean legal history.99 As a result, it is easy to place an undue focus upon Confucian
Chosun society when evaluating the legal culture of Korea.

Further, many Koreans still practice Confucianism as their religion (or at least as an
ideology), and a significant number of today's customs and traditions still reflect Confucian
concepts and ideas. It is said that Confucianism has an 'invisible grip' on Koreans' everyday
life and behaviour.100 The persistence of Confucian tradition is often referred to as an
important factor in describing or explaining contemporary Korean society.101 It is also
argued that even if Koreans' actual practices do not always conform to Confucian norms, the
'language and grammar of social interaction in Korea is permeated with Confucian signs and
symbols'. 102 It is said that Confucianism provides Koreans with 'signs, symbols and
strategies and the tools' with which to negotiate the world around them.103

Accordingly, the tendency has been to assume that, not only does Confucianism
provide a tool for Koreans to interact with others within society, but it also makes the deeply
rooted legal culture of Korea Confucianism-oriented. But is this view entirely correct? Part
III below examines this issue in detail.

III. NORMATIVE LEGAL CULTURE OF KOREA

1. Introduction

In this section, a more detailed examination of the legal culture of Korea up to and including
the Chosun Dynasty period will be made. The aim is to ascertain the normative legal culture
of Korea. Normative legal culture generally requires, among other things, the relevant legal
culture to have existed for a significant period of time, and to continue to exist today (see Part
III.4.A of Chapter 2). For this reason, aspects of Korea's modern legal culture that support
certain aspects of its indigenous legal culture will also be examined in this Part. A more
comprehensive discussion of Korea's modern legal culture will be presented primarily in Part
IV.

98 Byung Ho Park, Geumseupokpw Popsasang [Laws of the Recent Times and Legal Philosophy]
(Jinwon Publishing, 1996) at 616.
99 See, for example, Carter Eckert, Offspring of Empire: The Koch'ang Kims and the Colonial Origins of
Korean Capitalism, 1975-1945 (University of Washington Press, 1991) at 237 (stating that the
Japanese assimilation policy involved 'intensive indoctrination through education and practice').
100 Chaihark Hahn, 'Law, Culture, and the Politics of Confucianism' (2003) 16 Columbia Journal of
Asian Law 253 at 270.
101 Ibid.
102 Id at 271. Hahn gives examples of such Confucian signs and symbols used in Korean society. The
first example he gives is that, in interpersonal relationship, the Korean word used for describing a
courteous and well-mannered person is yeui baruda, which means 'to be straight about ritual
propriety'. Similarly, the word describing a rude person is murye hada, which means 'lacking ritual
propriety'. Further, Hahn says that Koreans still expect their political leaders to have such classic
Confucian virtues as ch'ongbin, which means 'honourably poor', the idea being that an honest
government official should never use their position to enrich themselves.
103 Id at 271-272, and see generally Ann Swindler, 'Culture in Action; Symbols and Strategies' (1986) 51
Throughout Korean history, the reception or transplant of foreign laws into Korea occurred in several stages.\textsuperscript{104} The adoption of these laws was a matter of ‘borrowing’ rather than imposition. Also, the tendencies of the Koreans in adopting such foreign laws during this early time could be characterised as careful, selective and slow.\textsuperscript{105} They went a long way to take into account the local customs and attitudes. Thus, despite the series of legal transplants, indigenous Korean legal culture was preserved. This, in itself, could be seen as an aspect of Korean legal culture that highly valued and respected the law and its functions in society. Koreans took the law and the legal system seriously.

The creation of Confucian legislation during the Chosun Dynasty period involved neither strict borrowing nor the imposition of foreign laws. Rather, it was a self-imposition of self-created laws (although reflecting aspects of Chinese laws) for the purpose of achieving particular social reform. As such, the process may be difficult to explain using the theories on legal transplant discussed in Part III.3 of Chapter 2. But what seems clear is that (a) the legal transplants were radical given the existing Korean legal culture, (b) yet they were achieved without apparently significant political problems, and (c) the process was apparently ‘smooth’, so as to lead to the belief that the deeply rooted legal culture of Korea supports Confucian legislation. Perhaps it was precisely because the transplanted laws were largely self-created that the process was so ‘smooth’\textsuperscript{106}. Socio-cultural changes were, at the same time, carried out so that they minimised any resistance to the new laws – although, as it will be seen, there was a continuous resistance.

As mentioned in Part II.3.G.v above, most of the original historical records from the Chosun Dynasty period were written mainly by Confucian scholars, in classical Chinese.\textsuperscript{107} The linguistic hegemony of classical Chinese in official historiography was used as a means of achieving cultural hegemony based on Confucianism.\textsuperscript{108} Therefore, in studying Korean legal history, one must be mindful of the hidden or understated practices of people that such records do not clearly reveal.

\textsuperscript{104} The main stages of the legal transplants were, firstly, the ‘Wen-Chin Lü’ (the laws of Wei and Chin) and the ‘T’ang Lü Ling’ (the laws of T’ang), both received in the period of Koguryo and Silla. Secondly, there was the reception of the ‘T’ang Lü Ling’ and the ‘Sang-Yuan Lü Ling’ (the laws of Sung and Yuan) in the Koryo Dynasty (936-1392). Thirdly, there was the total reception of the Ta Ming Lü (the criminal code of the Ming Dynasty of China) in the Chosun Dynasty period. The Ta Ming Lü, though modified in some respects by the effect of subsequent Korean legislation, was the basis for criminal law in Korea from the time of its inception in the fifteenth century. See Byung Ho Park, ‘Traditional Korean Society and Law’ in Sang-Hyun Song (ed), \textit{Korean Law in the Global Economy} (Bak Young Sa, 1996) at 2.

\textsuperscript{105} In this regard, one notes Buzo’s argument that ‘Chosun Koreans were far from undiscriminating in their approach to China, especially during the Manchu Qing Dynasty, and they continually adopted from China only what they judged suited their own needs’. See Adrian Buzo, \textit{The Making of Modern Korea} (Routledge, 2002) at 10.

\textsuperscript{106} In this regard, one notes the argument of Berkowitz, Pistor and Richard that transplanted law tends to be ‘highly effective’ if it is voluntarily adopted, and if it has been developed ‘internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law’. See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, ‘The Transplant Effect’ (2003) \textit{51 Am J Comp L} 163 at 189.


\textsuperscript{108} Id at 226.
Thus, in relation to, for example, gender issues, it has been said that ‘[a]lthough the Chosun state has been viewed as playing a central role in constructing gender and has been presented as an all-powerful single entity, in practice it was neither univocal nor single-minded but rather pursued multiple purposes and conducted many-armed operations’. Indeed, the purported reform based on Confucianism may not be viewed as ‘all-powerful’ for there was ‘considerable individuality through the little tradition norms of the village’. Such ‘little tradition norms’ have often been ignored in the discussions of Korean legal culture. But it must be remembered that such norms represent those of the majority of Koreans. Such norms did not tend to change easily; as it may be the case that ‘neither capitalism nor feudalism has been successful in achieving the internalisation of the dominant ideology by subordinate classes’.

When considering Korean legal culture during the Japanese occupation period, one must take into account the context of colonialism, and how it opened up yet another kind of ‘semantic field’ in which renewed cultural negotiations took place. Thus, the process of legal transplant and its relationship with Korean legal culture during this time should not be seen as a simple process of imposition and acceptance (or resistance) of new laws. Considerable distortions of both Confucianism and the rule of law existed during this time (see Part IV.1.B below). But at the same time, indigenous legal culture found new opportunities in which demands for new laws and a new legal system could be placed, although its success came mostly after the occupation period.

As well as colonialism, modernity and nationalism have created new ‘cultural spaces’ in which indigenous and imposed norms could interact. The impacts of modernity and nationalism are also not simple – they can lead a society onto multiple paths. For Korea, modernity and nationalism created opportunities for the deeply rooted culture to reassert itself. Thus, the modern legal culture of Korea may be seen as part of the outcomes of such cultural negotiations. Part IV discusses more about modern legal culture, while this Part also refers to it where it is relevant to identify Korea’s normative legal culture.

Each of the ‘cultural spaces’ created by the legal transplants discussed above will be closely examined in this Part. The focus will be on the dynamic interplay of various elements at work in such spaces, and on how the deeply rooted legal culture finds suitable means to express itself and negotiate with imposed norms. By analysing this process, one may form reasonable conclusions about Korea’s normative legal culture.

2. Principles for Interpreting Existing Laws

A. Codified Laws

109 Id at 222.
110 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 8.
111 In this regard, one should note that since Confucianism was institutionally practiced among elites in Korea, it penetrated far less deeply via educational institutions in Korea compared to China and Vietnam. See Benjamin A. Elman, John B. Duncan & Herman Ooms, ‘Introduction’ in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 10. Thus, Korean culture among the majority of the population could be preserved relatively well.
112 James Scott, Weapons of the Weak (Yale University Press, 1985) at 138.
Yi Song Gye, the first king of the Chosun Dynasty, promulgated the code *Kyongje Yukjon* (Six-Division for Administration), which came into effect in December 1397. This law was based on laws that had been in force at the end of the Koryo Dynasty and that were, in the view of the Chosun Dynasty, worth continuing. The intention of the lawmakers was to avoid radical law reform and to conform to the social reality of Korea at the time. From the reign of Yi Song Gye until the reign of King Sejo (1455-1468), *Kyongje Yukjon* was amended and supplemented: omitted provisions were added and new laws were enacted and added in appendix form. However, even when new laws were enacted, they were based on the customary laws of the time, and thus were intrinsically revisions of existing laws.\(^{113}\)

From the reign of King Sejo, *Kyongguk Taejon* (Great Code for Administering the Country) was compiled based upon *Kyongje Yukjon*, and the compilation was completed during the reign of King Songjong (1469-1494). *Kyongguk Taejon* became the immutable and comprehensive code of the Chosun Dynasty.\(^{114}\)

The *Kyongguk Taejon* explicitly states that the penal code of the Ming Dynasty of China, the Ta Ming Lü, would be the basic criminal code of the Chosun Dynasty. The *Kyongguk Taejon* includes regulations in respect of matters of administration, such as tax and population, ritual matters and military organisation. In these areas, Chinese law could only have limited application in view of the specific Korean conditions. Therefore, while the Chinese Ta Ming Lü was supposed to be the basic criminal code of Korea, there was an increasing divergence between the Ta Ming Lü and Korean criminal law.\(^{115}\)

B. Principle of Respect for the Royal Ancestor's Constitution

After the *Kyongje Yukjon* came into force, the 'Principle of Respect for the Royal Ancestor's Constitution' (*Jojongseunghyunjonjungjui*) was established in 1415. This was a principle governing the resolution of any conflicts between existing laws. Under this principle, the 'royal ancestor's constitution' had to be respected and could not be amended (otherwise than as described below). The 'royal ancestor's constitution' meant the established enactments of Chosun Dynasty's royal ancestors that were regarded as 'good ancient law'.\(^{116}\) Therefore, the *Kyongje Yukjon* and subsequently the *Kyongguk Taejon* were treated as immutable and absolute.

The Principle of Respect for the Royal Ancestor's Constitution treated the royal ancestor's law as being a 'good law and fair sense'. Since it was substantially based on long experience, customs and usage, it was good law, serving the nation's interests. The phrase 'legislation entails evils' was a proverb that was frequently quoted throughout the Chosun


\(^{114}\) Hankukminjokmoonhwag Daebaekkwasa [Large Dictionary of Korean Culture] (Hankukjungshinmoonhwewayoukoon, 1991) at 839-840.


\(^{116}\) Such laws would be what Western legal scholars would call *gutes altes Recht* (good ancient law).
Dynasty to assert that a new law should be enacted only for the purpose of rectifying any irrational and contradictory aspect of old laws. Further, it meant that since the enactment of a new law entails as many evils as old ones and thus hampers the implementation of the new law, it was wise to implement old laws as they were (or by analogy) rather than enact new laws.  

New laws such as the *Taejon Soknok, Taejon Husoknok, Sukyo Jibnok* and *Sinbo Sukyo Jibnok* were subsequently enacted as political, social and economical circumstances changed. Nevertheless, ideas such as the old laws being ‘good laws and fair sense’ and ‘legislation entails evils’ tended to restrict creative legislation, and the maintenance of the stability of the law was given priority.

It is not entirely clear whether the later enacted law had the effect of abrogating the earlier royal ancestor’s law to the extent of inconsistency between the two, or whether, as the Principle of Respect for the Royal Ancestor’s Constitution suggests, the royal ancestor’s law was unchangeable. Some argue that, as was then the case in China, newly promulgated codes abrogated and revised earlier law. They also argue that although the Principle of Respect for the Royal Ancestor’s Constitution existed, it was often a tool of the high officials to attempt to limit the discretionary power of the king and to subordinate the monarchy to law.

Irrespective of which view should be taken, it may be seen that, under the Principle of Respect for the Royal Ancestor’s Constitution, existing laws were taken extremely seriously, whether they were indigenous laws or received laws. Also, any revision or amendment of the existing law required substantial justification based on the relevant conditions in Korea at the time. Hence, the formation of indigenous laws in the Chosun Dynasty was a process upon which even the king and the monarchy could not have compelling influence; rather it was a process in which laws that were unique and relevant to the Korean people could evolve.

C. Values embedded in the Principle of Respect for the Royal Ancestor’s Constitution

The Principle of Respect for the Royal Ancestor’s Constitution was established at the beginning of the Chosun Dynasty, and it was used and applied throughout this dynasty. This was so despite the fact that Confucian legislation was introduced throughout the period of the dynasty. This, together with the fact that a significant amount of Koryo laws was preserved at the beginning of the Chosun Dynasty, shows that the values embodied in the Principle of Respect for the Royal Ancestor’s Constitution were something that had been acceptable to Koreans throughout a significant part of their history. In other words, it may be seen that the values embodied in the Principle of Respect for the Royal Ancestor’s Constitution represent part of the legal culture of Koreans that had been firmly established in Korean history.

---


118 Byung Ho Park, *Geunseuipopkwa Popsasang* [Laws of the Recent Times and Legal Philosophy] (Jinwon Publishing, 1996) at 473. Park notes that during this period, the law was continuously created and modified.


If this is correct, may the values embodied in the Principle of Respect for the Royal Ancestor’s Constitution be viewed as forming part of the normative legal culture of Koreans? The first step in answering this question would be to identify what exactly were the values embodied in the Principle of Respect for the Royal Ancestor’s Constitution.

i. **Clarity of the Law**

The very fact that the Principle of Respect for the Royal Ancestor’s Constitution was a rule for resolving any conflicts between existing laws indicates that existing laws were taken very seriously. It was a matter of great importance that laws were clear and unambiguous. As was mentioned in Part II.3.B.iv of Chapter 1, the rule of law requires clarity of law so that addressees of laws can conform their behaviour to the laws.\(^{121}\) Therefore, this aspect of Korean legal culture may be seen as consistent with the rule of law.

ii. **Supreme Authority of the Law**

It has been suggested that, traditionally in Korea, the king was in a sense the head of everyone’s family and that it was unthinkable to betray or disobey the king.\(^ {122}\) The implication of the king’s position was that people would submit to authority without question.\(^ {123}\) Such a culture also created authoritarianism and elitism, whereas egalitarianism was not a feature.\(^ {124}\) But the implication of the Principle of Respect for the Royal Ancestor’s Constitution was that the king ought to have a minimal role in influencing the law\(^ {125}\) (and in fact, this was part of the legal philosophy of the Chosun lawmakers\(^ {126}\)). The law had to be enacted or changed according to established procedures, and not by the exercise of certain individuals’ discretion based on political or policy reasons. Such culture suggests that the ‘rule of men’ concept would not be supported, and that the law had supreme authority.

iii. **Stability of the Law**

The fact that Koreans regarded the law as having supreme authority can also be inferred from the idea that the old law was ‘good law and had fair sense’. Together with the proverb ‘legislation entails evils’, this idea also indicated that Koreans valued stability of the law. In

\(^{121}\) Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *Boston University Law Review* 781 at 785. See also John K.M. Ohnesorge, ‘The Rule of Law, Economic Development, and the Developmental States of Northeast Asia’ in Christoph Antons (ed), *Law and Development in East and Southeast Asia* (RoutledgeCurzon, 2003) at 100 (saying that the clarity of contracts is a theme often emphasised in the economic development literature that deals with the rule of law).


\(^{123}\) Dae Kyu Yoon, *Law and Political Authority in South Korea* (Kyungnam University Press, 1990) at viii.

\(^{124}\) Id at 29.

\(^{125}\) For example, all new laws were supposed to undergo ‘ratification’ by the Censorate of Korea and ‘certification’ by the Board of Rites of Korea. See *Kyongguk Taejon* (Chosen sokokufu chusuin, 1934) at 284. Also, it is generally noted that royal power was checked by the bureaucrats and the system – such that the royal powers and bureaucratic powers were well balanced and held in equilibrium. See Dae Kyu Yoon, *Law and Political Authority in South Korea* (Kyungnam University Press, 1990) at 15.

fact, stability of the law was one of the key concerns of the early Chosun legislators.\textsuperscript{127} As discussed in Part II.3.B.vi of Chapter 1, the rule of law requires the supreme authority of the law and stability of the law.\textsuperscript{128} Again, this aspect of Korean legal culture is consistent with the rule of law.

D. Principle of Respect for the Royal Ancestor’s Constitution – Normative Legal Culture?

Assuming that the legal culture of Korea as it supports the values found in the Principle of Respect for the Royal Ancestor’s Constitution supports the notions of (a) clarity of the law, (b) supreme authority of the law, and (c) stability of the law, did such legal culture form part of Korea’s normative legal culture?

This legal culture appears to have remained in place for a considerably long period of time, and its importance paramount. Then, did the Koreans view that the values evidenced in the Principle of Respect for the Royal Ancestor’s Constitution to be what the law ought to have been? Or did they view that such values were preferable but not strictly required as law?

There seems to have been no religious or similar reason for preferring such values. There was no suggestion that the reason why ancient laws must be kept was because of the Confucian practice of ancestor worship. Rather, there were explicit reasons for requiring the Principle of Respect for the Royal Ancestor’s Constitution: (a) the old law proved to be good law in serving the nation’s interest; the old law was substantially based on long experience, customs and usage, and (b) the enactment of a new law entails as many evils as old ones and thus hampers the implementation of the new law. Further, an implicit reason for requiring the principle might have been that it was an attempt by the high officials to limit the discretionary power of the king and to subordinate the monarchy to law. This is closely related to one of the most important ideals of the rule of law: limiting government discretion.\textsuperscript{129}

Thus, the real purpose for creating and applying the Principle of Respect for the Royal Ancestor’s Constitution was largely due to ‘legal’ reasons\textsuperscript{130} rather than religious or other reasons. The presumption should therefore be that there existed a normative legal culture in Korea that supported the values embodied in the Principle of Respect for the Royal Ancestor’s Constitution. Hence, it may be concluded that there existed a normative legal culture in Korea that supported the notions of (a) clarity of the law, (b) supreme authority of the law, and (c) stability of the law. These values are among the key elements of the rule of

\textsuperscript{127} Id at 77-78.


\textsuperscript{130} This is assuming that ‘legal reasons’ include limiting of the king’s power to change laws. This is similar to aspects of the modern-day constitutional law. See Part III.2.E below.
law (see Part II.3.B of Chapter 1). The above findings support the hypothesis made in Part III.5 of Chapter 1.131

E. Principle of Respect for the Royal Ancestor’s Constitution and the Concept of Constitutional Review

i. Confucianism and the Concept of Constitutional Review

It has been argued that the concept of constitutional review has not been part of the traditional Korean system of government because the notion of a governmental check on the highest power was foreign to traditional government.132 This is why, it is argued, the Confucian emphasis on the morality of leadership and the notion of law as an instrument of effective governance, rather than as a constraint on government, could impede the development of judicial review of legislation in Korea even today.133 The implication is that the deeply rooted legal culture of Korea is in conflict with the concept of constitutional review. Is this proposition true?

The Principle of Respect for the Royal Ancestor’s Constitution was, strictly speaking, not a concept of constitutional or judicial review in the modern sense. Nevertheless, its application resembles similarities to that of modern-day constitutional review to a significant extent.134 Like today’s Constitution, the old laws or the royal ancestor’s laws were seen to have the highest normative force, and against such laws, the validity of other laws and actions were checked and reviewed. As such, the concept of the Principle of Respect for the Royal Ancestor’s Constitution shows substantial similarities to the idea of constitutional review. Thus, the argument that the notion of constitutional review is not consistent with the traditional Korean system of governance is not entirely convincing.

It has been further argued that, even if a system of judicial review could be perceived in countries such as Korea, it would not be quite the same as that in Western countries. This is because the Confucian li, which represents the most important rules to which human beings are subject, and can be described as a kind of higher natural law, constrains human positive law. Accordingly, the argument goes, the only possible form of constitutional review for countries such as Korea would be a review system based on the concept of li, whereby any official law that conflicts with li would become invalidated.135

Again, such an argument appears inconsistent with the observation of the historical evidence relating to the Principle of Respect for the Royal Ancestor’s Constitution. Under

---

131 The relevant hypothesis states that ‘many aspects of Korea’s normative legal culture support notions of clarity, supreme authority and stability of the law’.


133 Id at 767 and 788.

134 Some scholars view that the Kyungguk Taejon represents the supreme embodiment of constitutionalism. See Gyang-Hak Chang, Don-Gak Suh & Hong-Geun Im, ‘Discussion: Korean Legal Traditions’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 204. The Principle of Respect for the Royal Ancestor’s Constitution may thus be seen as a principle for interpreting and applying constitutional rules.


131
that principle, royal ancestor’s law – that is, the official law – was regarded as the supreme norm based on which other norms and rules were measured and reviewed. The concept of Confucian *li* had no place in such a review process.

**ii. Normative Legal Culture Supporting the Concept of Constitutional Review**

To sum up, the normative legal culture of Korea supports the values embodied in the Principle of Respect for the Royal Ancestor’s Constitution. Included within the principle is a notion that is significantly similar to the modern concept of constitutional review. In addition to this principle, there have been other additional significant constraints on royal power to ensure checks and balances.\(^{136}\) It is therefore arguable that the normative legal culture of Korea also supports the concept of constitutional review or a concept similar to it. The idea of having checks and balances on the highest powers may be part of the normative legal culture of Korea.\(^{137}\) As will be discussed in Part IV.3.B below, the fact that Korea had a series of authoritarian regimes after the Japanese occupation period does not necessarily rebut such an idea.

It has been said that judicial review of legislation or constitutional review constitutes one of the most prominent structural mechanisms in a democracy for ensuring a government of law rather than a government of individuals.\(^{138}\) Constitutional review is an important process and concept that guards the rule of law. Hence, the normative legal culture of Korea may be seen as supporting the rule of law if it may be seen as supporting the notion of constitutional review.

As will be seen in Chapter 4, the judicial review of today’s Constitutional Court of Korea represents a tremendous success. Some suggest that the Korean judiciary today is far more autonomous than it has been at any time in its history.\(^{139}\) The Korean judiciary in its institutional form may indeed be more autonomous than it has been before. But the legal culture that supports the Court’s active approach in carrying out constitutional review may not be new. The success of the Constitutional Court may be partially explained by the normative legal culture of Korea that supports the notion of constitutional review.

---

\(^{136}\) Buzo notes that the royal authority of Chosun was constrained by several factors including ‘lack of royal control over the bureaucracy, lack of control over the civil and military examination system that functioned as the bureaucracy’s instrument of recruitment, the operation of institutions such as the Censorate, the Royal Secretariat and the Royal Lectures, the monarch’s inability to exercise decisive control over land ownership and use, and the normative restraints of neo-Confucian thought, which abhorred excessive concentration of royal power’. See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 6. As discussed in Part IV.3.B below, Korea’s recent authoritarian regimes are partly explained by the fact that its modern presidential system does not ensure similar checks and balances on the president's power. In other words, it is more of a systemic problem rather than a cultural issue.

\(^{137}\) It is interesting to note that Friedman argues that this is a distinctive mark of the legal culture of the United States. See Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975) at 210. He says that ‘[t]he distrust of concentrated power among influential Americans is an attitude, not a “philosophy,” not a systematic, consistent world view’. Similar arguments may be made in respect of Korean legal culture.


\(^{139}\) For example, see David I. Steinberg, ‘The Republic of Korea: Pluralising Politics’ in Larry Diamond, Juan J. Linz & Seymour Martin Lipset (eds), *Politics in Developing Countries: Comparing Experiences with Democracy* (Lynne Reiner, 1995) at 400.
3. The Lawmaking Process and Application of Law

The Principle of Respect for the Royal Ancestor’s Constitution suggests that the king during the period of the Chosun Dynasty had a limited influence on the lawmaking process. In this section, more aspects of the lawmaking processes and the practice of application of law during this period will be discussed. These indicate that highly sophisticated and systematic means of organising and applying laws were in place during the Chosun Dynasty period.

The Chosun Dynasty lawmaking process was essentially similar to that of the Ming and Ch’ing dynasties: that is, rather than systematic legislation, increasing the existing body of law through piecemeal increments was more common. The Kyongje Yukjon of 1397, for example, was made up of royal edicts from 1388 to the date of promulgation. Edicts could originate at the spontaneous initiative of the king. But more often they represented the king’s response to a legal case or administrative proposal brought to his attention by a government agency or official. Thus, the king had, contrary to the fiction that new laws were the result of spontaneous royal initiative, limited involvement in the lawmaking process.

The edicts were kept on file in the appropriate administrative agency of the government and were treated as binding precedents. Edicts resolving difficult cases often clarified critical questions and made future judgments easier. This was suitable as a means of filling in logical gaps in the Ming Code, or in adjusting the Ming Code to the needs of Korean society while at the same time upholding the principle of legality and the broad principles embodied in the code. Part of the legal philosophy of the Chosun Dynasty lawmakers was that law must be, on the one hand, consistent with people’s culture, and on the other hand, stable — taking into account the old laws. Hence, sometimes preliminary rules were applied for a period of time in order to ‘test’ whether they were effective and acceptable to people. This indicates that ‘law in books’ was expected to coincide with ‘law in action’.

Accumulation of edicts over periods of several reigns often produced a large collection of overlapping or conflicting provisions. Thus, in the late Chosun Dynasty period, governments used various methods to reduce the adverse impact of the traditional ad hoc approach to lawmaking. One important technique was to assign a particular administrative agency of the government the task of producing a legislative package that contained interrelated provisions dealing with given problems in detail. These systematically drafted

---


141 Ibid.

142 Id at 28.

143 Id at 30.

144 Ibid.


146 Id at 78.


148 Id at 31.
laws, or samok, were included together with ad hoc ‘received edicts’ in collections and codes, particularly from the time of the reign of King Sukchong (1674-1720). Both in terms of quantity and quality, the publication of legal reference works during the Chosun Dynasty period (particularly during the eighteenth century) was also remarkable, which contributed to the certainty and clarity of the law.

Not only was the lawmaking process systematic and detailed, but also the way in which law was applied during the Chosun Dynasty was highly sophisticated. For example, a study of the Simnirok shows that the concept of ‘circumstances’, which represent various extralegal grounds for judgments, as opposed to ‘law’, were used only in limited circumstances. It shows that great efforts were made by the decision-makers to apply the relevant law to the correct facts to arrive at their decisions. For example, in murder cases (among other cases) the techniques of forensic medicine were painstakingly applied to ascertain the probable cause of death. This also reinforces the idea that the normative legal culture of Korea supported the rule of law ideal of judging cases based on strict application of law rather than basing judgments on the exercise of discretion of individuals.

To sum up, an examination of the codified laws and the system of organising and applying laws during the Chosun Dynasty shows that the legal system was highly sophisticated. Carefully designed checks and balances applied against those who held the highest offices were achieved largely by means of the sophisticated system of law. Law was taken extremely seriously, and its application was systematic and advanced. This picture of the legal system of Korea does not seem to be in conflict with ideals of the rule of law. Also, it indicates that ‘law in books’ was respected and followed in practice.

One important point must be clarified here. The above types of laws and legal system reflect the indigenous practice of the Koreans that probably originated and continued from previous times. As such, they were not part of Confucian legislation. Hence, when speaking

---

149 Ibid.
150 For example, there was the Chollok t’onggo (Conspicuous of Code and Precedents) of 1706, which was an attempt to publish in one set the Kyongguk Taejon and all subsequent legislation to date; and the Soktaejon (Supplementary Great Code) of 1746 which, inter alia, recorded the legislative origin of many of its provisions. See William R. Shaw, 'Social and Intellectual Aspects of Traditional Korean Law, 1392-1910' in Chun, Shaw & Choi (eds), Traditional Korean Legal Attitudes (Institute of East Asian Studies, University of California/Berkeley, Korea Research Monograph No. 2, 1980) at 31-32.
151 The Simnirok [Records of Simni Review Hearings] is a late eighteenth-century compilation of case records of the Simni review process. The Simni review process was established to provide special high-level reviews of problematic cases involving the death penalty. See also Part III.6.D.ii below. Case records provide ‘a rare opportunity to glimpse the tensions and conflicts of everyday life, to hear the stories of ordinary people who were not otherwise producing archival texts, and to understand the complex role of legal institutions’. See Sally E. Merry, Colonizing Hawai‘i: The Cultural Power of Law (Princeton University Press, 2000) at 9. Hence, in the Korean context, the Simnirok serves a very useful purpose of finding out the actual legal culture of people particularly since most of the historical records were written by Confucian scholars.
153 Contrast Henderson's account of Tokugawa Japan where private citizens often could not use 'law in books'. See Dan Fenno Henderson, Conciliation and Japanese Law Tokugawa and Modern, Vol. II (University of Washington, 1965) at 175-177. In the Korean context, similar issues did not seem to exist.

134
of ‘Confucian legislation’ one should not over-generalise the concept. As mentioned, evidence suggests that laws other than Confucian legislation were also enacted, which were not inconsistent with the rule of law ideal. The existence of such contradictory rules indicates a dynamic, rather than a monolithic, process of legislative activities. This probably reflects the tension between those proposing Confucian legislation on the one hand, and those resisting such legislation by upholding indigenous legal culture on the other hand. Such tension is well illustrated in the case of Confucian legislation that was aimed at reducing women’s rights and ensuring social status distinctions.

4. Social Classes and the Law

A. The Yangban and Non-Yangban

According to the Chosun Dynasty codes, the following social categories of people exist:154

(a) **Yangban**: these were members of hereditary houses, whose economic position generally derived from ownership of land and slaves.155 They occupied the highest class of the social system.

(b) **Yangin and Sangmin**: the majority of the Korean population during the Chosun Dynasty period was termed yangin (good people) or sangmin (ordinary people). They were common people below the yangban class.156

(c) **Ch’onin**: below the commoners were ch’onin (despised people), including slaves and those in certain occupations including butchers, prostitutes, entertainers and shamans.157

Despite the multiple classes in society during the Chosun Dynasty era, commentators have noted the essentially dichotomous nature of society. That is, one was either a yangban or

---


155 Yangban often participated in national political life. But they constituted a relatively small segment, perhaps not more than ten per cent, of the total population. See Martina Deuchler, *The Confucian Transformation of Korea: A Study of Society and Ideology* (Harvard University Press, 1992) at 12. The influence of yangban could stem from national political and familiarities, from local economic holdings or, in the absence of these, from their position as educated people. It has been argued that this suggests broadly two factors interacting at yangban level: ascriptive factors and considerations of political or administrative authority. It appears that some yangban had both, and some had only the former. See William R. Shaw, ‘Social and Intellectual Aspects of Traditional Korean Law, 1392-1910’ in Chun, Shaw & Choi (eds), *Traditional Korean Legal Attitudes* (Institute of East Asian Studies, University of California/Berkeley, Korea Research Monograph No. 2, 1980) at 32-34.

156 Martina Deuchler, *The Confucian Transformation of Korea: A Study of Society and Ideology* (Harvard University Press, 1992) at 13. They were common farmers and the addressees of tax, tribute, and military-service systems of the central government. From the late seventeenth century on, with the rise of commerce, a small number of them began to acquire some economic prominence in urban centres. Although formally excluded from political office, they were able to exert influence over society by their sheer numbers. See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 4.

157 Young Woo Han, *Dachichateun Wooriuyeksa* [Korean History Revisited] (Kyungsewon, 2005) at 299. The Chosun Dynasty’s policy was to abolish this lowest social category, and to simplify the system of social categories by maintaining the yangban and yangin classes only.
non-yangban.\textsuperscript{158} The society of the Chosun Dynasty was a class society and, stemming from this fact, the legal capacity of an individual in the Chosun Dynasty had the following characteristics.\textsuperscript{159}

(1) As to the capacity to hold and exercise various political rights, only the governing class held full capacity, with capacity of the lower officials extremely restricted. Common people and the ‘despised class’ were considered incompetent to hold such rights, except on special occasions or when a special favour was granted.

(2) Nevertheless, as to the capacities to enter legally approved and protected family relationships, to acquire and hold property rights, and to request legal protection of personality and freedom of life and body, they were, in principle, guaranteed for all classes, sex and age. Hence, in some cases, slaves had their own slaves.\textsuperscript{160}

Despite the protection of rights across different classes of people, it was often inevitable that the people of the higher classes had greater influence and power over various rights. It has been argued that this kind of social distinction still persists in Korea, and that social status defines Korean society today.\textsuperscript{161} It is said that there is contemporary status consciousness and that this is deeply rooted, originating in the centuries of traditional Confucian society that had formal and rigid class distinctions (involving the yangban and non-yangban).\textsuperscript{162} As such, the argument goes, that, although every society is conscious of status, status in Korea takes a heightened meaning.\textsuperscript{163} These arguments suggest that it is possible to conclude that social status distinction is an aspect of Korean legal culture – perhaps even deeply rooted. But is this an aspect of the normative legal culture?

B. Social Status Distinctions – Normative Legal Culture?

It has been argued that during the period of the Chosun Dynasty, the social status of people was ‘legally defined’.\textsuperscript{164} In other words, social status distinction was a legal position rather than a mere social phenomenon. The implication is that laws that discriminated against people by virtue of status in fact existed. On this basis, it may be argued that unless it can be proved otherwise, the prima facie presumption would be that, because such laws in fact existed, the normative legal culture of Korea supported such laws.

However, upon a closer examination, it may not be entirely accurate to say that the social status of people during the Chosun Dynasty period was ‘legally defined’. This is so for three reasons. Firstly, although there were some criteria for determining who would be


\textsuperscript{159} See generally Byung Ho Park, ‘Traditional Korean Society and Law’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 15.


\textsuperscript{162} Ibid.

\textsuperscript{163} Id at 115.

\textsuperscript{164} Id at 121. Also, Yoon argues that the hierarchical order was ‘carefully’ and ‘elaborately’ defined. See Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 6.
regarded as a yangban, yangban status was never clearly delineated legally.\textsuperscript{165} Secondly, although, in principle, the relevant criteria for determining these broad social categories were hereditary, in reality, considerable slippage took place between them and also within each social category. Thus, the yangban and non-yangban distinction was not an entirely accurate reflection of either the ascriptive categories of Korean culture or the social prejudices of members of official class.\textsuperscript{166} A yangban could become a ‘fallen’ or ‘ruined’ yangban (effectively losing their status) due to their inability to pass government exams and/or by losing economic underpinnings.\textsuperscript{167} On the other hand, a yangin could become a yangban through success in government examinations.\textsuperscript{168}

Thirdly, not only was yangban status never clearly delineated legally, but also, the legal system did not support the hierarchical social order to the level desired by the elite class. For example, other than certain exceptional cases, officials and the yangban were prosecuted, tried (often with the routine use of torture in interrogation) and punished for acts of violence against a variety of non-elite persons ranging from shopkeepers to day labours and former slaves.\textsuperscript{169} Such actions could be instituted by people of lower social status themselves against those with higher social status.\textsuperscript{170}

Accordingly, if the law was not clearly supporting social hierarchy and unequal treatment between different classes of people, it cannot prima facie be presumed that the normative legal culture had in fact supported the idea of social status distinctions. Nevertheless, it is still clearly true that the law did not actively prohibit practices relating to such social status distinctions – rather, the law allowed such practices to continue. On that basis, can it be argued that the reason why the law did not actively prohibit such discriminatory practices, like the current Constitution of Korea (see Part II.5 of Chapter 1), was because the normative legal culture in fact supported such practices?

It should be remembered that the culture relating to social status distinctions was part of social reform inspired by Neo-Confucianism. That is, it was a deliberate reform effort without having regard to what Koreans regarded the law should be. This provides a reasonable doubt as to whether social status distinction was supported by the normative legal culture of Korea. Also, one should not view the relevant Confucian reform as having a

\begin{flushleft}

\textsuperscript{166} William R. Shaw, ‘Social and Intellectual Aspects of Traditional Korean Law, 1392-1910’ in Chun, Shaw & Choi (eds), \textit{Traditional Korean Legal Attitudes} (Institute of East Asian Studies, University of California/Berkeley, Korea Research Monograph No. 2, 1980) at 32-34 and Young Woo Han, \textit{Dashichatneun Wooryuexsa} [Korean History Revisited] (Kyungsewon, 2005) at 301.


\textsuperscript{168} Young Woo Han, \textit{Dashichatneun Wooryuexsa} [Korean History Revisited] (Kyungsewon, 2005) at 305.


\textsuperscript{170} Byung Ho Park, \textit{Hankookyepop} [Law of Korea] (Sechongdaewang Kinyeum Sayeuphwai, 1985) at 76.
\end{flushleft}
monolithic paradigm. That is, the relevant reform was not only directed towards the public (and particularly those in lower social categories) but also towards the royal power to achieve the necessary checks and balances.  

Further, the key focus of the reform was not so much to create a strict vertical society, but to ensure that people in different class had autonomous and interactive identity. In other words, the very motivation and effect of such reform may not have created the kind of social inequality that one may retroactively assume today.

In any event, despite the radical and forceful social and political reform based on Neo-Confucianism that had swept across Korea during the Chosun Dynasty period, the official law itself did not change very much. Thus, the law did not afford privileges to the yangban to the level desired by them. This suggests that laws that discriminated against people by virtue of social status were not likely to have gained the inner acceptance of people — other than perhaps the yangban themselves. It may thus be difficult to say that the normative legal culture supported such laws.

If the normative legal culture did not support social status distinctions, then did the general culture support it? If it did, such a notion may be seen as an ‘indigenous cultural norm’ (see Part IV.2.D of Chapter 2) rather than normative legal culture. It is probably reasonable to assume that such indigenous cultural norms existed given the social status distinctions that prevailed in society.

However, even such an ‘indigenous cultural norm’ shows that people from different social classes were not in competition with each other but rather ‘coexisted in complementary and interactive mode’. Thus, people from each class had their own cultural life and reciprocal rights and obligations vis-à-vis people from the other classes, which, if violated, would invoke popular riot. In fact, the relatively continuous social harmony during the Chosun Dynasty period seems to suggest that ‘class-consciousness’ may not have been nearly as significant as it is thought to be today. In other words, rather than a strict vertical relationship, aspects of horizontal relationship and strong interdependence were features of the different social classes. This, in turn, suggests a legal culture that is individualistic and rights conscious.

If it can be concluded that Korea’s normative legal culture during the Chosun Dynasty period did not support the notion of social status distinctions, can it be said that the modern legal culture supports such a notion? Probably not, given the fact that (a) the above analysis indicates that there may be no suggestion of inheriting any legal culture that supports the notion of social status distinctions, and (b) the current official law of Korea expressly

---

171 Adrian Buzo, _The Making of Modern Korea_ (Routledge, 2002) at 5.
172 Id at 7.
173 To put it in another way, the Confucian leaders could not easily change the official law because of resistance. See Part III.6.D.i below.
175 Ibid.
176 Gi-Wook Shin, _Peasant Protest & Social Change in Colonial Korea_ (University of Washington Press, 1996) at 158-159 (quoting E. P. Thompson who argues that class consciousness is not structurally determined by class position or raised by the elite, but rather is historically and collectively constructed through political experience such as participation in protest).
177 Buzo argues that such features of the Chosun society explain the longevity of the dynasty, its social stability and the relative absence of internal unrest. See Adrian Buzo, _The Making of Modern Korea_ (Routledge, 2002) at 5.
prohibits such notions. But then, how can one explain the fact that such social status distinctions still seem to exist in Korean society today? What is the modern legal culture in respect of this issue?

C. Korea’s Modern Legal Culture and Social Status Distinctions

Social categories are ‘contingent and discursively constructed rather than things in themselves, but constructed in relationship to goal-directed political activity’. Thus, one finds that (as discussed in Part IV below) modernity and nationalism during the early twentieth century created opportunities in which deeply rooted legal culture could renegotiate the meanings of social categories. Not only did people from low social categories reassert their rights when the opportunities came, but the public during the colonial period used such concepts as that of nongmin (peasantry) to signify a source of authentic Koreaness, and to preserve an essentialised Korean ethnic identity. This shows that legal culture should not be seen as a passive phenomenon that simply adjusts to the changing environment, but it may be seen as a value system that actively asserts and reasserts itself in different cultural spaces. Thus, although reforms based on Confucianism suppressed the legal culture supporting the notion of equality during the Chosun Dynasty period, it reasserted itself when opportunities came through modernity. In the more recent period, Korea enjoys relative income and land equality, which ‘characterise the Korean development pattern’.

This is not to say that social status distinctions do not exist in modern-day Korea. Social status distinctions inevitably exist in every society that has reached a certain population size and development. Modern legal culture is not too different from the past in this respect. Also, the racial discrimination issues that exist in, for example, the United States may not be too different from the notion of social status distinctions in Korea. The point is that this kind of bias exists in other societies, and there may also be global trends in this area. For example, to a considerable extent, one witnesses that Korean society has transformed from a ‘vertical’ society to a substantially ‘horizontal’ society. This is probably consistent with the position of many other countries in the world, including many Western countries. Further, the fact that many aspects of today’s Korean society are still ‘relatively vertical’ in nature may not be too different to the culture in many other countries, including the United

---

178 See, for example, Article 11(1) and (2) of the Constitution.
180 Id at 290 and 300.
183 Id at 110. The recent crisis in New Orleans brought about by Hurricane Katrina revealed aspects of America’s existing race and class struggles. They seemed particularly highlighted because New Orleans was already a ‘place riven by class and race’. See Richard Lacayo, ‘Rebuilding a Dream’, Time Asia (12 September 2005) at 43.
States.\textsuperscript{185} This may be as a result of the world sharing more and more of a kind of common culture, promoting a kind of ‘universal tribalism’.\textsuperscript{186}

The mere existence of the relatively vertical nature of authority in society should therefore not necessarily mean that people’s attitudes support laws that allow discrimination and inequality. Even though modern ‘Western’ legal culture does not support such laws, a relatively vertical nature of authority does exist in those societies, and it will probably continue to exist in the future.\textsuperscript{187} Accordingly, it is probably unwise to overemphasise social status distinctions in Korea, which may well be (at most) part of indigenous cultural norms rather than the normative legal culture (see the hypothesis in Part III.5 of Chapter 1\textsuperscript{188}).

5. Laws Relating to the Family System

A. Indigenous Laws of Korea and Chinese Confucian Laws

Up until the fourteenth century, the Confucian family system was not forced upon Korean society. But after the beginning of the Chosun Dynasty, the Chinese Confucian family structure was imposed on Korean society.\textsuperscript{189} It has been said that by the seventeenth century, Confucian norms had grown deep roots in Korean society.\textsuperscript{190}

What were the characteristics of the Chinese Confucian family system? Firstly, the permanence of the family system based on the worship of ancestors was respected. Secondly, the patriarchal head represented the family and exercised control within the family. Thirdly, there was a hierarchic order of control and obedience centring on the patriarchal head that discriminated between elder and younger and male and female.\textsuperscript{191} Accordingly, family property was handed down from patriarch to patriarch and members of the same family held the property together. But when the patriarchal head died, his sons inherited equal shares of the family property.\textsuperscript{192}

This should be contrasted with the indigenous laws of Korea in respect of the family system. The indigenous laws were also reflected in the various codes of the Chosun Dynasty, and had the following characteristics.\textsuperscript{193}


\textsuperscript{186} Lawrence M. Friedman, The Horizontal Society (Yale University Press, 1999) at viii and 12.


\textsuperscript{188} The relevant hypothesis states that ‘the concept of Confucian li may not be supported by, or may not constitute, Korea’s normative legal culture; although it may be part of the general culture of Korea’.


\textsuperscript{190} Ibid.

\textsuperscript{191} Byung Ho Park, ‘Traditional Korean Society and Law’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 5.

\textsuperscript{192} Ibid.

\textsuperscript{193} Id at 6-13, and see also Young Woo Han, Dashichatneum Wooriyueksa [Korean History Revisited] (Kyungsewun, 2005) at 35.
(a) As with the Chinese Confucian system, the patriarch had the function of controlling and representing the family, and there was a hierarchical order of control and obedience centering on the patriarchal head.

(b) Whereas the Chinese had patrilocal marriage customs, the Koreans had the custom of matrilocal marriage. Under this custom, the wedding ceremony was held in the bride's house and the couple lived in the wife's home until their children (if any) grew up. Over time, the period of stay at the wife's home became shorter. But even today, the tradition of so-called the 'three-day stay' is sometimes observed by Korean couples who stay at the wife's home for three days immediately after the wedding and then return to the husband's home.

(c) Unlike the Chinese system, all the male and female heirs were entitled to equal distribution of the inheritance (which was stipulated in the Kyongguk Taejon and other legal codes). An exception to this was the eldest son of the family who was entitled to inherit an additional twenty per cent, conditional upon his rendering religious services for the repose of the ancestor's souls. Also, if there was an ancestor's shrine in the house, the eldest son was entitled to inherit the house itself. If there were any disputes in respect of the division of the inheritance, lawsuits could be brought, without application of the five-year limitation period (which was in force then with respect to other types of lawsuits) in which to bring the action. This type of lawsuit was common in the Chosun Dynasty period. These rules in respect of equal division of inheritance could not be varied by testamentary will.

B. Resisting Adaptation of the Chinese Patrilocal Marriage System

As noted above, it took the Koreans a long time to accept the Chinese custom of patrilocal marriage (where the bride goes to live in the bridegroom's home after the wedding). Also, the process of reception of Chinese laws involved many debates amongst the lawmakers. For example, a proponent of the Chinese system, King T'aejong, stated that if the traditional custom were followed for marriage despite the fact that all of the Chinese customs in other fields of society were followed, it would appear ridiculous to the Chinese. Minister Kim Ung-Ki, another proponent of Chinese patrilocal marriage, expressed in 1516 the following opinion.

'Since it is the same as leading a hard life as an employee in a rich man's house for a husband to live by relying on his wife, it is useless to quote the aphorism, 'go to your husband's home and take good care of your parents-in-law and husband!' Since the daughter-in-law does not take good care of her parents-in-law but is apt to ignore them, the husband becomes unable to control his wife and the household, and the wife's morality degenerates. Thus, the order of the high and low is not maintained,'

194 But the exact arrangement of such 'uxorilocal' residence pattern is not clear.
196 Mark A. Peterson, Korean Adoption and Inheritance: Case Studies in the Creation of a Classic Confucian Society (The Cornell University East Asia Program, 1996) at 28-30. Peterson discusses two lawsuits in the Chosun Dynasty period dealing with the question of whether the law on equal inheritance could be varied by a parent's will. Although the first case decided that it could, the subsequent decision overturned the earlier decision.
197 Byung Ho Park, Hankukupop [The Law of Korea] (Sejongdaewangkinyumsaupwhe [Association for the Commemoration of King Sejong], 1974) at 110.
yin and yang are contradicted, and heaven and earth are upset ... Since the man goes to the woman’s home and the children born between them grow up in their maternal home, they are not aware of the importance of their paternal home.\(^{198}\)

In arguing for patrilocal marriage, Minister Kim Ung-Ki clearly points out the need for the husband to have proper authority over the wife and for the children to have greater respect towards the father’s side of the family. Such ideas stem from the Confucian notion of the Five Relationship.\(^{199}\) This clearly reflects the overriding determination of the elites in the early Chosun Dynasty period to effect social reform through new legislation. Minister Kim’s statement suggests that the rationales for the proposed legislation on marriage included the need for children to become aware of their ‘paternal home’. When one notes that the hallmark of Confucian Korean society in the late Chosun Dynasty period was a kinship system that rested on highly structured patrilineal descent groups,\(^{200}\) one can appreciate how the proposed legislation was largely based on considerations relating to Confucian concepts.

However, opponents of Chinese patrilocal marriage saw dangers in blindly adopting foreign laws irrespective of local customs and values. For example, the Office of the Inspector General\(^{201}\) expressed in 1554 the following view.

‘The etiquette established by the former kings has been followed since it came to conform to human feelings and native customs. The institution of patrilocal marriage cannot be followed ...

Since our country is situated far from China, our land and customs are different from those of China. Though there is no difference between the two in terms of the three principles of human relations and the moral rules to govern the Five Human Relations, our institutions cannot help but be different from those of China. ... While in terms of normal etiquette the wife should go to the husband’s home, in our country the husband goes to the wife’s home. While there is no need of staying at and taking care of parents’ tombs, we have a custom of staying and taking care of parents’ tombs for three years. Then, should the custom of staying at parents’ tombs be discarded, while the institution of receiving the bride is adopted? Because it is impossible to make a uniform decision on these matters, how can we follow the Chinese institutions in a uniform manner?\(^{202}\)

The view of the Office of the Inspector General appears to involve two elements. Firstly, it identifies and recognises features of Korean culture that are distinguishable from Chinese culture. Secondly, it proposes that, accordingly, the laws in connection with such distinguishable features should also be different to the Chinese laws; otherwise, ‘human feelings and native customs’ would be ignored. Where the differences in culture stem from


\(^{199}\) See Part II.2 of Chapter 1.


\(^{201}\) The Office of the Inspector General was a surveillance organ involved in criticising public policy, scrutinising official conduct and rectifying public mores. See Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ichokak, Publishers for Korea Institute, Harvard University, 1990) at 110.

different moral values (for example, arguably, the custom of staying at and taking care of one’s parents’ tomb for three years), then the adaptation of rules that ignore such differences would be morally problematic.

This debate demonstrates that the adaptation of foreign laws in the Chosun Dynasty period required careful consideration in light of existing local customs and values. There was a tendency to safeguard existing indigenous rules unless there were sufficiently good reasons to do the contrary.\(^{203}\) Thus, there was a clear tension between those who wanted Confucian legislation and those who wanted to keep indigenous legal norms that were deeply rooted in Korea. This raises a reasonable doubt as to the existence of any inner acceptance of such Confucian legislation by the majority of people, that is, other than a few elite minorities.

C. Equal Distribution of Inheritance

It has been said that the custom of matrilocal marriage and the system of equal inheritance were the most essential factors that characterised the family system of Korea.\(^{204}\) Thus, it is impossible to discuss the traditional family system of Korea or Korean history in general without considering these factors.\(^{205}\) Therefore, it is now appropriate to turn to the principle of equal inheritance among sons and daughters that was seen as a firmly entrenched principle in Korea at least leading up to the late Chosun Dynasty period.

The system of equal inheritance among male and female heirs was, until the twentieth century, generally not found in any other Asian countries. One exception was Vietnam, which had an equal inheritance system together with the rule that one-twentieth of the property to be inherited was granted to the person who would observe religious services, similar to the rule observed in Korea.\(^{206}\) In the case of China, it was only in the Nan Sung period that a daughter received a share of the inheritance equal to one-half of the share of a son. In the case of Japan, the eldest son inherited all the family property.\(^{207}\)

The institution of living together as a family and holding common property prevailed in China and was stipulated in the laws of the Koryo Dynasty as well as in the Ta Ming Lü

\(^{203}\) This should be viewed less as a system of political control and more as a rule of law-type of culture because there were already sufficient institutional systems that ensured strict checks and balances against the king’s power. See Part III.2.E above.


\(^{205}\) Ibid.

\(^{206}\) Byung Ho Park, Hankukupop [The Law of Korea] (Sejongdaewangkinyumsauphwe [Association for the Commemoration of King Sejong], 1974) at 145. It is sometimes argued that, historically, the status of women in Vietnam had remained higher than that of women in China, Japan and Korea (or any other East and South-East Asian countries). See Mariam Darce Fenrier & Kimberly Mancini, ‘Vietnamese Women in a Confucian Setting: The Causes of the Initial Decline in the Status of East Asian Women’ in Kathleen Barry (ed), Vietnam’s Women in Transition (MacMillan Press, 1996) at 21 and 33. Fenrier and Mancini (at 32) reference Vietnam’s traditional equal inheritance system as the major evidence to support their argument. But they themselves do not seem to be aware of Korea’s indigenous equal inheritance system, as they state (citing Alexander B. Woodside’s statement) that the Vietnamese female property rights of inheritance were ‘unique in the history of East Asian classical civilisations’ (id at 33).

that was adopted by the Chosun Dynasty. However, no attempt was made to realise such an institution." Since sons and daughters had their own separate households when married, economic community as existed in China was inconceivable.

The firmly entrenched indigenous law regarding equal distribution of inheritance, however, gradually changed from the eighteenth century onwards. Since then, there was an increasing level of discrimination in favour of the eldest son of the family vis-à-vis the other sons and daughters, and in favour of the sons vis-à-vis the daughters when it came to the distribution of inheritance. The key reason for the change, as it were, was attributable to the social reform aimed at effecting the Confucian tradition of preserving the paternal family lineage. Thus, the eldest son, who would represent the paternal family and observed ancestor worship, and the sons, rather than the daughters, were accorded greater rights in respect of the family inheritance.

To sum up, there were significant differences between the indigenous laws and customs of Korea and China relating to the family system. Two most notable differences related to the rules relating to marriage and inheritance. In both cases, the indigenous laws of Korea afforded women equal (and sometimes greater) rights vis-à-vis men. The Confucian legislation during the Chosun Dynasty period purported to change this situation. It is in this context that Korean legal culture relating to women’s rights should be examined.

6. Women in Korea

A. Discrimination against Women – Normative Legal Culture?

It has been argued that in Korea, traditionally, women generally had a lower social status than men, and the law’s application produced a discriminatory effect on women vis-à-vis men. The conventional view would suggest that this is an aspect of Korea’s legal culture. Under Confucianism, women enjoy an inferior role and status compared to men. Harsh treatment of women is said to have persisted throughout the Chosun Dynasty period, with women denied basic rights, including the right of inheritance.

It is true that the implementation of Confucianism in Korea meant a rigorous regimentation of women. By according political and economic prestige to men, the Confucian legislators limited women’s status and authority to within domestic confines. Hence, it might be reasonable to conclude that there was a culture of discrimination against women in the Chosun Dynasty period. It has been said that, generally, it is often women whose status changes when legal transplant takes place. In the case of Korea, the legal

---

208 This discrepancy between ‘law in books’ and ‘law in action’ probably resulted from the wholesale adaptation of the relevant Chinese code.


211 Kyung Sook Bae, Women and the Law in Korea (Korean League of Women Voters, 1973) at 30.


transplant involving Confucian legislation appears to have changed women’s status negatively.

However, upon a closer examination, it seems to be an over-generalisation to say that the legal culture in respect of women’s rights has definitely changed. Such a view ignores the complexity of cultural negotiations regarding gender that took place. For example, it should be remembered that the official records during this period were written mainly by Confucian scholars, the *Sillok* (Annals) being the most representative of the historical records. These official records were written almost entirely in Chinese characters (as opposed to the Korean alphabet, the *Hangeul*) in classical Chinese style. Significantly, these records omitted to cover practices that were contrary to Confucian ideals, including the actual women’s roles and activities of the time. Thus, the linguistic hegemony of classical Chinese in official historiography was employed as a means of domesticating, degendering or temporising women. However, more ‘unofficial’ records in *Hangeul*, many of which were written by women themselves, reveal that women actively participated in public spheres – the notable example being the institution of the queen dowager regency that allowed women to act as legal agents for their husbands in the justice system in certain instances.

Where Confucian legislation had elements of gender bias, one must ask whether there was a change in the normative legal culture. Was there an inner acceptance of such laws by Koreans? Or were the laws resisted and subject to continuous negotiation?

B. Resistance to the Patrilocal Marriage System and the Normative Legal Culture Supporting Equality between Women and Men

As discussed earlier, prior to, and until the late Chosun Dynasty period, patrilocal marriage prevailed in Korea. Gradually, after the implementation of Confucian legislation, the period of stay at the wife’s home became shorter. Nevertheless, such legislation was resisted to a considerable extent by the women. The fact that the rationale of the legislation was to implement Confucian values, as encouraged by a small elite group of Koreans, suggests that the rest of the country did not view patrilocal marriage as representing what the law should have been. Rather, it appears that the legal culture supported patrilocal marriage and the values embodied in such a custom. What kind of values did patrilocal marriage embody?

Matrilocal marriage was significant in terms of affording rights to women: it conferred upon women economic status and independence from husband’s families. The wives resided separately, presumably most often with their natal families, and their husbands lived with them on a visiting basis. Even upon death, a wife’s property passed to her husband’s family only through her children. If she did not have children, her property reverted back to her natal group. Thus, a woman never became a member of her husband’s


215 Id at 221.


218 Id at 69.

219 Id at 81.
house; despite her marriage she was a permanent outsider.  

Hence, it may be argued that the matrilocal marriage system protected women's economic rights and independence, helping to create gender equality. Did normative legal culture support the egalitarian value embodied in the matrilocal marriage system?

The length of time in which matrilocal marriage prevailed was considerable – at least from the Koguryo period until the 18th century – over 1,500 years. This indicates the extent to which such custom was firmly rooted in Korean society. Also, Koreans viewed such custom as law (and it was in fact law). These factors suggest that the concept of matrilocal marriage was probably part of the normative legal culture of Korea.

As discussed, the matrilocal marriage concept entails an egalitarian way of treating men and women. Thus, it may be noted that the normative legal culture of Korea significantly supported the notion of gender equality in this regard. In some ways, the residence pattern under matrilocal marriage may be seen as providing greater rights to women than men because of the way in which it affected children. This is because, growing up in their mother’s house, children developed close emotional ties to their maternal kin. Further, the locality of the mother’s residence often became a man’s place of origin.

Today, equality between women and men is guaranteed under the Constitution and other laws of Korea. Such modern legal culture is also consistent with the indigenous legal culture relating to the matrilocal marriage system – and as such it arguably forms the normative legal culture of Korea. Such normative legal culture may not be said to have disappeared by virtue of the Confucian legislation of the Chosun Dynasty period unless there is convincing evidence that proves otherwise. This will be further discussed in the context of the inheritance system in the next section.

C. Korea’s Inheritance System and Women

The picture of social life in Korea before the Chosun Dynasty period shows that siblings enjoyed equal status regardless of sex, and the sibling bond stood in opposition to the conjugal bond. As mentioned in Part III.5.C above, this was particularly the case in respect of the system of inheritance. The principle of equal inheritance among sons and daughters (which appear to have existed during the times of the Silla and Koryo dynasties as well) was deeply rooted. Given the extent to which the principle was entrenched as law in Korea, it is probably reasonable to suggest that normative legal culture of Korea supported the principle of equal inheritance.

220 Ibid.
221 Even after the matrilocal marriage system was abolished, the law allowed each member of the family to own his or her assets. See Byung Ho Park, Geunseuipokwa Popsasang [Laws of the Recent Times and Legal Philosophy] (Jinwon Publishing, 1996) at 65.
223 Articles 11(1) and (2) of the Constitution.
226 See Part III.5.C above.

146
This firmly entrenched indigenous law regarding equal distribution of inheritance gradually changed from the eighteenth century onwards as a result of the efforts of the Confucian elites. If such changes were solely based on Confucian ideals, and not based on any consideration as to what the general public felt about what the law ought to be, then could there have been an inner acceptance of new laws? May it be said that normative legal culture of Korea changed in the last 300 years such that it no longer supports the principle of equal distribution of inheritance?

Before examining this issue, it is important to keep in mind the way in which the official laws relating to inheritance actually changed over time. Even though the inheritance law had changed somewhat due to Confucian legislation, the change was not dramatic – and the fundamental principles of equal inheritance could not be changed.\textsuperscript{227} The official law regarding equal inheritance did not change significantly.\textsuperscript{228} The Confucian legislation was not entirely successful. Real substantial changes to the inheritance law, however, came about during the Japanese occupation period.

It is crucial to examine the developments in respect of the inheritance law in Korea during the Japanese occupation period, which is a point that is often overlooked. On 25 June 1910, Korea was annexed to Japan and Japanese laws were imposed in Korea. Under the Japanese rule, the system of inheritance in Korea became as follows.\textsuperscript{229}

(a) The daughters were deprived of the right to inherit.

(b) Where there were only two brothers in the family, the elder son was entitled to two-thirds of the inheritance, and the younger son was entitled to the remaining one-third.

(c) Where there were three or more brothers in the family, the elder son was entitled to one-half of the inheritance. The remaining half was divided equally among the other sons (no matter how many of them there were).

(d) However, the sons other than the elder son could claim their respective share of the legacy only if and when they established their branch families.\textsuperscript{230}

It has been said that this system of inheritance was designed to bring about the assimilation of the Korean legal system to the Japanese system by promoting the eldest son’s exclusive inheritance through the introduction of the Japanese-style household head system.\textsuperscript{231} The imposition of this system has been said to have been an alienating experience for Koreans.\textsuperscript{232} It has been noted that despite this, many Koreans today mistakenly believe that this system of


\textsuperscript{228} Mark A. Peterson, \textit{Korean Adoption and Inheritance: Case Studies in the Creation of a Classic Confucian Society} (The Cornell University East Asia Program, 1996) at 24.


\textsuperscript{230} Nevertheless, if the elder son did not agree to the establishment of such branch families, then the other sons could not establish their branch families, and therefore could not claim their share of the legacy.


\textsuperscript{232} Ibid.
inheritance was the indigenous inheritance system handed down from the Chosun Dynasty. Thus, Mark Peterson comments:

'This fact [of the equal inheritance system] is surprising, if not shocking, to the vast majority of contemporary Koreans who tend to assume that the late dynasty practice ... in which inheritance is provided only for sons, with a lion's share going to the eldest son, primogeniture, originated in the earlier times.'

To sum up, in the first place, there had been a gradual acceptance by the Koreans of Confucian concepts, which were used by the ruling class as a means of social control. Subsequently, there was the imposition of the Japanese-style household head system. These together produced the image of traditional Korean society as chauvinistic and authoritarian. But neither the Confucian system of inheritance nor the Japanese-style household head system were based on any consideration of what the general public in Korea viewed as to what the law ought to be in respect of their inheritance system. Such foreign laws were simply 'imposed' on the public, and such imposed laws lasted a relatively short period of time (certainly when compared to the length of time that the principle of equal distribution of inheritance lasted in Korean history). Hence, there is a reasonable doubt as to whether such new laws had gained an inner acceptance of people.

It is necessary to recognise that the indigenous legal culture of Korea was remarkably free from gender bias, and that there had been considerable emphasis on fairness in the treatment of individuals regardless of their sex (see Part III.5 above). Such was the normative legal culture of Korea during a large part of the country's history. Also, as mentioned in Part III.6.E below, modern Korean laws and legal culture support gender equality, which is, in turn, backed by the country's deeply rooted legal culture.

D. Interaction and Conflict between Korea's Normative Legal Culture and Confucianism

Suppose that the normative legal culture of Korea, even during the Chosun Dynasty period, in fact supported the notion of gender equality. As Chiba's formulation of 'postulative values' (see Part III.6.A of Chapter 2) would suggest, the normative legal culture would thus 'resist' and 'criticise' any official law that was inconsistent with the normative legal culture. The notions of gender bias and of gender equality would have been in conflict. Thus, it will be helpful to ask the following questions. Firstly, whether, and to what extent, the official laws that had the effect of discriminating against women in the Chosun Dynasty period were resisted by people. Secondly, whether, and to what extent, the reforms based on Confucian values successfully changed the legal system during the Chosun Dynasty period. Set out below are some of the points relevant to these issues.

i. Resisting Confucianism

It has been said that 'everyday forms of resistance' — that is, 'patient, silent struggle stubbornly carried out' — is not trivial. In fact, they may be more powerful than overt,

---

233 Ibid.
234 Mark A. Peterson, Korean Adoption and Inheritance: Case Studies in the Creation of a Classic Confucian Society (The Cornell University East Asia Program, 1996) at 19.
235 See Gi-Wook Shin, Peasant Protest & Social Change in Colonial Korea (University of Washington Press, 1996) at 137-138 (quoting James Scott's Weapons of the Weak (Yale University Press, 1985)).
direct and violent rebellions. Women’s resistance against Confucian legislation during the Chosun Dynasty period certainly had such characteristics. Women continuously resisted the Confucian values and ideology imposed on them by, for example, ‘developing strategies’ to secure for themselves and for their offspring the best means of survival. 236 Thus, for the male onlookers, women were ‘always scheming and calculating, and conflict and tension were part of everyday life’. 237 Evidence suggests that such struggles continued throughout the Chosun Dynasty period. Part of the Confucian reformers’ means of dealing with such resistance was to try to indoctrinate women with Confucian ideologies. But the persistent ‘everyday forms of resistance’ indicates that the Confucian legislation was probably never really accepted by the majority of the Koreans, especially not by the women.

At a more formal level, one may refer to the queen dowager’s right during the Chosun Dynasty period to legitimate or choose the new king or to act as his regent when the king’s succession became problematic due to his sudden death, coups d’état or the accession of a king in his minority. Such a right allowed the queen dowager to exercise considerable power at various times. Haboush argues that this was a new right conferred upon the queen dowager (which did not exist as a formal legal right at the time of the Koryo Dynasty) as a negotiated women’s right. 238

The official records created by Confucian scholars considerably downplay the queen dowager’s role since it was inconsistent with Confucian ideals about women’s public roles. 239 The Confucian scholars who wrote the official records of major events of Korea did not record in great detail the roles played by the queen dowagers who exercised such power. But records made by the queen dowagers in Hangeul (as opposed to classical Chinese) show that her public role was significant — the notable examples include Queen Chonghui’s (1418-1483) and Queen Chongsun’s (1745-1805) regencies, which were both active and powerful. 240

This evidence shows that women at different levels resisted Confucian legislation that purported to reduce women’s rights. There were continuous negotiations over women’s rights, albeit apparently covert, informal and passive. Unfortunately, those with the cultural hegemony were those in power and who wrote the official history. Thus, the details of the negotiations in the area of women’s rights have not been given due attention. But an unmistakeably real struggle went on, especially by women, to resist the Confucian legislation.

---


237 Ibid. Compare similar ‘resistance’ by the Japanese women during the Tokugawa period. See Herman Ooms, Tokugawa Village Practice: Class, Status, Power, Law (University of California Press, 1996) (describing poor women in a village during the Tokugawa period who engaged in a protracted confrontation against the relevant authority).


239 Id at 229-230.

240 Id at 231-234.
Women and the Criminal Law

A study carried of Simnirok cases reveals the following aspects of the legal treatment of women in Chosun Dynasty times. Firstly, there were extremely few criminal cases where women were defendants. Secondly, the male victims of crimes outnumbered female victims by far. Thirdly, in respect of violence between husband and wife there was discriminatory treatment under the code in favour of the husband. For example, while murder of a husband by his wife usually resulted in the death penalty, murder of a wife by her husband usually resulted in a reduced sentence.  

The discriminatory treatment of women reflects the fact that women were subordinated to men within given social strata. On the other hand, it appears that women were less victimised in crimes than men and were less likely to be charged with criminal offences than men. It has been suggested that this may be the result of the physical isolation of women within the home, as well as the possible underreporting of offences involving female victims. However, such reasoning is not entirely convincing because there were also extremely few women defendants. If there was underreporting of female victims because of discrimination against women, the same reasoning cannot be used to explain the possible underreporting of women offenders.

It appears that, in criminal cases other than treason and rebellion, women of yangban status enjoyed certain privileges that women of the lower classes did not seem to have. A yangban woman could be jailed only after a report was submitted to the judicial authorities. In case of conviction, she usually avoided punishment by paying compensation. After 1745, a woman could not be arraigned except in cases of rebellion and treason – she did not have to appear in court and could be represented by her son or son-in-law or even by a slave. Apart from the bias based on social status between women themselves, these regulations in fact treated women more favourably than men.

Thus, it appears that it is not entirely accurate to say that the criminal law treated women more harshly than men. It is true that, in many cases, certain special privileges applied only to women of yangban status. But as far as gender issues are concerned, the criminal law did not seem to have been significantly discriminatory. Further, the bias based on social status may not have been as severe as one may imagine. For example, when social inferiors (such as ch'onin) were involved in legal proceedings against the yangban, the results of the legal proceedings did not tend to produce discriminatory outcomes. Thus, despite

242 Ibid.
244 Ibid.
245 Taegon t'ongp'yon (Pophech'yo, 1963) at 590 and 597.
247 For example, the criminal law's favourable treatment of yangban women meant that yangban women submitted to flogging only in rare cases. But records show that in 1702 there was an instance of flogging of a yangban woman because she killed a slave girl out of jealousy. In that case, after she confessed the crime, she was flogged and banished. See Ch'ugwanji (Chosen sotokufu, 1937) at 477.
social status differences, there were significant attempts by the law to bring about just outcomes.

iii. Punishment of Male Representatives for Women’s Misbehaviour

It is interesting to note that, in general, the law in the Chosun Dynasty period rarely inflicted sanctions against women’s misbehaviour on the women themselves but rather on their male representatives – their husbands and sons. From early Chosun Dynasty times, men were responsible for preventing women from breaking laws and for keeping them in their place. Why did this happen? One way of interpreting such regulation is to view it as yet another form of Confucian legislation, the implication being that men were responsible for women who were subordinated to men. But another way of viewing such regulation is as representing a negotiated outcome between Confucian ideologies and the indigenous legal culture of Korea. That is, women resisted Confucian legislation that was biased against women. Hence, while Confucian ideology may have successfully (albeit slowly) penetrated into Korean society during the Chosun Dynasty period, Confucian legislation could not have its way entirely. It had to concede to women’s privileges.

This is also shown by examining the petition system at the time. The petition system gave women and people of low social status explicit rights to act in the justice system, but required the written petition be in the form of classical Chinese. This was a practical and subtle way of effecting gender and class discrimination. Nevertheless, women and commoners managed to emerge as active participants in the justice system, often making successful written petitions in Hangeul, rather than in Chinese. That is, despite the relevant petition requirement, the Hangeul petition was occasionally accepted based on considerations of fairness. Even Yangban women, who presumably could write or ask someone to write in Chinese, also sometimes petitioned in Hangeul. The reason for this is not clear. But it suggests a complex picture in which cultural struggles and negotiations took place in respect of the gender issues. It also shows that Confucian legislation had limited success in fundamentally changing the existing legal system.

E. Korea’s Modern Legal Culture and Gender Equality

The above analysis shows that while attempts were made through Confucian legislation to create a situation of gender inequality, the normative legal culture of Korea tended to support the notion of gender equality (see the hypothesis in Part III.5 of Chapter 1). But does the modern legal culture also support gender equality? Korea’s official laws today support the

---

248 Id at 280.
249 Id at 266.
251 Id at 252-254.
252 Id at 254. It is not clear why this was the case. One explanation is that the petitioner did not think that her petition would be rejected just because it was in Hangeul.
253 The relevant hypothesis states that ‘significant aspects of Korea’s normative legal culture support the notion of gender equality, although many aspects of Confucian culture create gender inequality’.
notion of equality between men and women.\textsuperscript{254} In the recent past in particular, there has been an ‘explosive’ emergence of rules governing anti-sexual discrimination\textsuperscript{255} They include Article 17(3) of the Framework Development Act for Women’s Development of 1995, Article 7 of the Act for Sexual Discrimination and Remedies of 1999, and other related provisions and the amendments to the Sexual Equality Employment Act.\textsuperscript{256} In the absence of any reasonable explanation to the contrary,\textsuperscript{257} the existence and growth of such legislation is convincing evidence that the normative legal culture that supports gender equality continues to exist in Korea.

Further evidence of such a normative legal culture includes the fact that, in 1999, the Presidential Commission on Women’s Affairs was created. This was later changed to the Ministry of Gender Equality, which has the jurisdiction, among other things, to investigate, arbitrate and recommend corrective action in cases of gender discrimination.\textsuperscript{258} Self-regulating rules relating to sexual equality and prohibition of sexual harassment within universities and workplace have increased dramatically in recent years.\textsuperscript{259} Women are not timid in reporting violations of such regulations.\textsuperscript{260} The number of female lawyers has increased dramatically, and Korea saw the appointment of a female Minister of Justice in 2004. More than ever, now, it is clear that the notion of gender equality is part of the normative legal culture of Korea. Society’s practice as well as ‘law in books’ evidences the deeply rooted legal culture that supports gender equality. Such legal culture, in turn, supports the rule of law.

7. Ownership

A. Individual and Communal Ownership

It has been argued that there was no real concept of a right in traditional Korean society.\textsuperscript{261} While it is true that the concept of ‘right’ corresponding to the present legal concept did not exist in Chosun Dynasty times, the ‘rights’ to enjoy certain exclusive benefits were

\textsuperscript{254} See Part II.5 of Chapter 1.
\textsuperscript{256} For a discussion of this legislation, see Dai-Kwon Choi, ‘The Emergence of Formalised Intermediate Norms in Korea: The Case of Sexual Harassment’ in Tom Ginsburg (ed), \textit{Legal Reform in Korea}\ (RoutledgeCurzon, 2004) at 88.
\textsuperscript{257} Choi argues that the reason why there has been such an increase in such legislation is because the Confucian norms that used to govern the society have disappeared – hence, ‘formalised norms’ in the form of legislation and rules have emerged instead. See id at 92. As an example of Confucian norms, Choi discusses the rule of \textit{naewoebop}, which required the sexes to avoid meeting each other unless they were relatives. But \textit{naewoebop} is not about gender equality (or inequality). It may have had the effect of preventing sexual harassment, but its disappearance does not explain why there are now so many pieces of gender equality-type legislation in Korea. It is reasonable to assume that the reason why there is now so much such legislation is because people want it – they believe it should be part of the law.
\textsuperscript{258} Id at 88.
\textsuperscript{259} Ibid.
\textsuperscript{260} There has been a dramatic increase in the reporting of such violations. See id at 86.
guaranteed by virtue of various concrete rules.\textsuperscript{262} For example, in the Chosun Dynasty period, each person could own his/her property, and even the property within the family could belong to the individual members of the family. The nature of the ownership had the following additional features.\textsuperscript{263}

(a) In the case of the property of the head of the family, although it would be subject to the prospective rights of inheritance of his children, it nevertheless belonged to the head of the family prior to the disposition.

(b) In so far as the family members lived together as a family, the property of each family member could be used chiefly under the control of the head of the family. Hence, to this extent, individual ownership was not absolute in its strict sense. However, when the property was disposed of, the consent of the owner of the property (that is, the wife or the children) was sought, provided that the owner had the capacity to consent.\textsuperscript{264}

Given the lack of, or very limited, communal ownership of family property, it is arguable that the communal nature of households in Chosun Dynasty times was not very strong. Further, there was no communal ownership (for example, of farmlands or other real estate) within the villages or clan villages. An exception was the property used for worship of the common ancestor of the clan (chongjung uit'o), which was subject to some communal restrictions.\textsuperscript{265}

This aspect of the law and legal culture seems contrary to the popular assumption that Koreans lack personalistic traits of legal culture and that they generally fail to emphasise the importance of, and guard, the inherent rights of individuals.\textsuperscript{266} It appears that, at least as far as property rights are concerned, Korean legal culture in the Chosun Dynasty period supported a personalistic rather than collectivist type of legal regime. Also, it is noted that the property laws applied regardless of the social status or sex of the individuals concerned. This shows a remarkable degree of ‘legalisation’ (as the term is referred to by Friedman\textsuperscript{267}), meaning that a web of rules and regulations had penetrated into various sectors of the public regardless of their social status or sex. This in turn suggests a high level of rights-

\textsuperscript{262} Byung Ho Park, ‘Characteristics of Traditional Korean Law’ in Chun Shin-Yong (ed), Legal System of Korea (International Cultural Foundation, 1975) at 27. A similar debate relating to rights exist in Japan. See, for example, Eric A. Feldman, The Ritual of Rights in Japan: Law, Society, and Health Policy (Cambridge University Press, 2000) at 1-4. Feldman argues that the conventional view about the concept of rights in Japan tends to be inaccurate because it does not distinguish between (a) jurisprudential rights, (b) cultural myths about rights, and (c) the strategic assertion of rights. He concludes that concepts functionally similar to rights can be found in early Japanese history, and the fact that the Japanese assert rights differently to Westerners does not mean that the Japanese are not rights conscious. Similar arguments may be applied in the Korean context.


\textsuperscript{264} See also Byung Ho Park, Geunseupokw Ra Popsasang [Laws of the Recent Times and Legal Philosophy] (Jinwon Publishing, 1996) at 65.


\textsuperscript{266} Michael C. Kalton, ‘Korean Ideas and Values’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 105. See also Part II.1.1 of Chapter 1.

\textsuperscript{267} Lawrence Friedman, ‘Introduction’ (2003) 4 Theoretical Inq L 437 at 443.
consciousness on the part of the Koreans, as well as a considerable egalitarianism,\textsuperscript{268} which may have been part of the culture of the people.

Some have suggested that such personalistic kind of legal culture was unique to Europe,\textsuperscript{269} the argument being that one of the most essential and unique aspects of European legal culture has been the personalistic trait. From this perspective, it is argued, the primacy of the individual as subject, end and intellectual point of reference in law has been recognised.\textsuperscript{270} Further, it has shaped the notion of private law as a bundle of subjective entitlements among responsible persons, as well as the evolution of criminal law from strict liability to culpability.\textsuperscript{271} But, as may be seen, such personalistic traits of legal culture are not unique to the Western legal culture. Such aspects of legal culture were also a feature in Korea. In that sense, the indigenous legal culture of Korea, like the European legal culture, supported the notions of the freedom to make decisions and personal responsibility.\textsuperscript{272} Such notions are closely connected to ownership rights.

The extent to which a personalistic kind of legal culture was firmly embedded in Korea is reflected by the fact that even Confucian legislation was unable to take away an individual’s rights to property. This is further discussed below.

B. Land Ownership

Private ownership of land in the Chosun Dynasty period was protected in absolute terms under the \textit{Hojon Chont'aekjo}. The \textit{sasong} was the procedure for seeking a legal remedy in respect of disputes of land ownership. The law provided a conceptual legal basis for justifying control of property irrespective of the actual control of the property – and this was the basis of the legal title to the property. There was a system of documentary title of land, and security interests could be created over such title.\textsuperscript{273} Nevertheless, this legal title to the property could be ‘weakened’ and thus invite challenges if not supported by the exercise of actual control of the property. Tenancy rights could be bought and sold – although they tended to be ‘weak’ rights.\textsuperscript{274}

The exercise of actual control of property was of great significance primarily due to the Chosun Dynasty’s policy of encouraging full utilisation of the lands. The following rules applied, in respect of any unused lands.\textsuperscript{275}

---

\textsuperscript{268} See Friedman’s discussion of the early English culture in the context of its legalisation process. See id at 445.

\textsuperscript{269} See, for example, O. Lee Reed, ‘Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study’ (2001) 38 \textit{Am Bus L J} 441 at 454.

\textsuperscript{270} Franz Wieacker, ‘Foundations of European Legal Culture’ (1990) 38 \textit{Am J Comp L} at 20.

\textsuperscript{271} Id at 21.

\textsuperscript{272} To be sure, such ‘individualism’ may be what Friedman refers to as ‘utilitarian individualism’, rather than ‘express individualism’ – the latter form of individualism being a characteristic of the modern culture. See Lawrence M. Friedman, ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 \textit{Yale L J} 1579 at 1585.


\textsuperscript{274} Id at 94 and 97.

\textsuperscript{275} Byung Ho Park, \textit{Hankukuiipop} [The Law of Korea] (Sejongdaewangkinyumsaupwhe [Association for the Commemoration of King Sejong], 1974) at 161-163.
(a) If the land was not used for a period of three years, others could till it, provided that a petition was made first to the authorities concerned.

(b) The persons using the land did not thereby become owners of the land: they could only make use of the land until the original owner claimed the land.

(c) Moreover, if the original owner paid taxes even though he/she did not use the land, no one was allowed to till it even by petitioning the authorities.

The land reform efforts at the start of the Chosun Dynasty period were based on the premise that all land belonged to and was administered by the state.\textsuperscript{276} In this way, the communal ownership concept could be implemented, thereby strengthening the relationship between the ruler and the subject according to the Confucian system. Although the state was probably in a better control of the land in the early Chosun years than ever before, the existence of land in the hands of individuals had always been an established fact.\textsuperscript{277} Therefore, the authorities were unable to extend their initial aim any further, and the land law described above seems to be the ‘negotiated outcome’ of the situation. Confucian legislation could not modify the indigenous concepts relating to property rights that required full utilisation of, and freedom to, transfer (both to others and by way of inheritance) one’s own land.\textsuperscript{278}

It has been argued that it was perhaps because of this fact (that is, the government could not turn the private ownership of the land into a public communal ownership) that moved the authorities to devise rules and regulations for gaining authority over inheritance.\textsuperscript{279} The ‘agnatic’ concept had far-reaching implications for the distribution of property among the heirs. In particular, the heir’s pivotal role in descent group affairs demanded for him a greater share of the patrimony than his siblings.\textsuperscript{280} This differential treatment gradually led to the changes in equal inheritance among siblings, male and female.

To sum up, attempts were made through Confucian legislation to modify private ownership rights, to create a communal and state ownership rights. Nevertheless, the firmly rooted legal culture relating to private ownership rights meant that official laws relating to property rights could not be modified according to the Confucian system. Regarding this firmly rooted legal culture, it has been said that ownership was protected not only by the law but ‘by the people’s consciousness of law’.\textsuperscript{281} As such, Koreans expected their ownership to be respected by others and they believed that the law ought to protect their rights. They firmly believed in the legal legitimacy of their rights – for a considerably long period of time in Korean history. It may thus be said that these ownership rights form part of the normative

---

\textsuperscript{276} Martina Deuchler, \textit{The Confucian Transformation of Korea: A Study of Society and Ideology} (Harvard University Press, 1992) at 205.

\textsuperscript{277} Ibid.


\textsuperscript{279} Martina Deuchler, \textit{The Confucian Transformation of Korea: A Study of Society and Ideology} (Harvard University Press, 1992) at 205.

\textsuperscript{280} Id at 206.

legal culture of Korea (see the hypothesis in Part III.5 of Chapter 1\textsuperscript{282}). A Korean normative legal culture relating to property rights may be similar to the corresponding European legal culture, and consistent with the relevant modern legal culture.\textsuperscript{283} Further, such a normative legal culture supports the rule of law, which requires that an individual’s right to own and dispose of property must be guaranteed.\textsuperscript{284} In fact, some even argue that individualism/autonomy may be the most fundamental aspect of culture that supports the rule of law.\textsuperscript{285}

8. Legal Proceedings

A. The Judicial System during the Chosun Dynasty period

Legal proceedings during the Chosun Dynasty period, called \textit{songsa}, did not strictly distinguish between civil and criminal proceedings.\textsuperscript{286} Legal proceedings at first instance were heard by local courts. Following the decisions the local courts, appeals could be made to higher courts in each province, and even higher appeals could be made to the central court, the \textit{Hyungjo}.\textsuperscript{287} Appeals could also be made to another central body, the \textit{Sahyunbu}. But it was different from the \textit{Hyungjo} in that appeals to the \textit{Sahyunbu} were made if it was alleged that the judges in the previous cases were biased or acted unjustly. Upon receiving such appeals, the \textit{Sahyunbu} would appoint substitute judges to hear the cases. Final appeals could be made to the king; these appeals were called \textit{sangyeun}. All the judicial bodies were under the king’s authority. Also, when necessary, special ad hoc adjudication bodies were set up to hear cases.\textsuperscript{288}

In addition to the court system, during King Tejong’s rule (1400-1418), a petition drum, the \textit{Shinnmungo}, was placed in front of the king’s palace, which could be sounded to indicate one’s grievance. People were also allowed to approach the king when the king was travelling to directly petition him – this system was called \textit{kyukjeng} and \textit{sangyeun}.\textsuperscript{289} Thus, it may be seen that an elaborate system of adjudication existed during the Chosun Dynasty period, despite the attempted social reforms based on Confucianism initiated by the elites. The evidence suggests that one ought not to assume that litigation was inconsistent with Korean legal culture and that Koreans had a preference for mediation and compromise rather than adjudication.\textsuperscript{290}

\textsuperscript{282} The relevant hypothesis states that ‘many aspects of Korea’s normative legal culture support individualistic and personalistic traits of legal culture. Koreans tend to be considerably rights-conscious’.


\textsuperscript{286} Byung Ho Park, \textit{Hankookyeyup} [Law of Korea] (Sechongdaewang Kinyeum Sayeuphwai, 1985) at 68.

\textsuperscript{287} Id at 72.

\textsuperscript{288} Id at 73.

\textsuperscript{289} Young Woo Han, \textit{Dashichatneun Wooriyuexka} [Korean History Revisited] (Kyungsewon, 2005) at 291.

\textsuperscript{290} Compare Part II.1.H of Chapter 1.
Further, even though a system of social hierarchy existed, the law during the Chosun Dynasty period recognised the capacity of individuals to sue others irrespective of their social status. People of a lower social status could bring lawsuits against those with higher social status. Anyone could sue any other person, and a group of people could bring a single action — much like the modern-day class action.

Legal proceedings could be initiated orally or in writing. Gradually, the form of documentation required to initiate legal proceedings was standardised during the Chosun Dynasty period. The judges could not be related to the parties, and the rules prohibited the parties or their relatives to visit the judges. There were limitation periods for initiating legal proceedings to ensure that litigation was carried out efficiently. Matters relating to certain property-related disputes had five-year limitation periods, whereas certain exceptional matters that were of high importance applied thirty-year limitation periods. After the plaintiffs initiated proceedings, the defendants responded by submitting written defences. Once the defendants responded, the proceedings formally started.

The parties themselves usually argued their cases, and the arguments had to be made in writing as well as orally in order to reduce future disputes. Evidence could be submitted to support their cases, and there were elaborate rules to discern the validity of the evidence submitted. Once the proceedings formally commenced, the parties were prohibited from delaying the proceedings. For example, if one of the parties failed to attend the hearing for more than thirty days within a fifty-day period, judgment was entered automatically against this party. When the parties felt that they had presented their arguments sufficiently, they requested a decision. But sometimes judgments were given at the initiation of the judges. The judgments were given both orally and in written form, and elaborate and sophisticated reasoning was applied in the judgments.

B. Korean's Traditional Attitudes towards Litigation

The above description of the judicial system and legal proceedings in the Chosun Dynasty period indicates that a sophisticated system of litigation existed in Korea. Not only was the system of litigation sophisticated — also, available records from the early Chosun Dynasty through the seventeenth and eighteenth centuries indicate that where land, slave ownership or grave plots in particular were at stake, Koreans of all classes possessed a strong sense of entitlement and were very litigious. There was a flood of petitioners. Institutions for

---

292 Id at 77.
293 Ibid.
294 Ibid.
296 Byung Ho Park, *Hankookyeupop* [Law of Korea] (Sechongdaewang Kinyeum Sayeuphwai, 1985) at 78.
297 Id at 80.
298 Id at 81.
299 Id at 82.
300 Id at 76.
301 See the *Taejon hoet'ong* [Second Composite Edition of Great Code and Supplements] of 1865, and William R. Shaw, 'Social and Intellectual Aspects of Traditional Korean Law, 1392-1910' in Chun,
handling such litigation, from the county magistrate's office up through various special appeal facilities (such as the petition drum outside the royal palace in the capital), were virtually overloaded with petitioners bringing all manner of complaints, appeals and suits. This is all very much in contrast to conventional views on Korean legal culture in respect of litigation.

As for criminal cases, it is true that there was a degree of reluctance for involvement by people (for example, to serve as witness). This may be partly due to the hardship faced by those involved in criminal cases: torture of witnesses as well as suspects was a common feature of criminal investigations. Nevertheless, a study of the Simniro Review Hearings, suggests that despite psychological and legal barriers and the element of risk involved in engaging state-provided appeal mechanisms for expressing criminal grievances, even people at the peasant level readily made use of these mechanisms. Again, this shows that Koreans tended to be litigious, and that this may be part of the deeply rooted legal culture of Korea.

C. Korea's Modern Legal Culture and Litigation

Such 'litigious' aspects of Korean legal culture have persisted since the Chosun Dynasty period. Currently in Korea, some suggest that the annual growth of litigation has exceeded that of the United States, and Korea has higher per capita civil litigation rate compared to several Western European countries and Japan. To be sure, such claims are not easy to

---

Shaw & Choi (eds), Traditional Korean Legal Attitudes (Institute of East Asian Studies, University of California/Berkeley, Korea Research Monograph No. 2, 1980) at 42.

This drum, the Shinmungo (meaning 'drum of stating and hearing'), symbolised a meeting place where the people stated and the king heard their grievances, and it remained a central metaphor for the petition system throughout the Chosun Dynasty. See JaHyun Kim Haboush, 'Gender and the Politics of Language in Chosun Korea' in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 244.


Conventional views held that Koreans had been averse to litigation due to the fact that the black-and-white designation of one party to a dispute as right and his or her opponent as wrong is seen as repugnant to the fundamental valuation of harmony according to Confucian ideals. See Part II.1.H of Chapter 1.


Id at 47.

Some Western scholars, such as William Shaw and Luke Nottage (see 'Song (ed), Korean Law in the Global Economy' (1996) 26 VUWLRR at 600-609) have recognised this 'litigiousness' aspect of Korean legal culture. But this topic does not seem to have been adequately followed up and researched subsequently.

See generally Jeong-Oh Kim, 'The Changing Landscape of Civil Litigation' in Dae Kyu Yoon (ed), Recent Transformations in Korean Law and Society (Seoul National University Press, 2000). See also Kyong Whan Ahn, 'The Influence of American Constitutionalism on South Korea' (1997) 22 S III U L J 71 at 84 (Ahn says that '[i]law suits have skyrocketed in the past two decades, and judges constantly complain about work overload').
prove given the discrepancies in the judicial systems of these countries.\textsuperscript{309} Nevertheless, the author’s research indicates that while the litigation rate of, for example, the United States is certainly higher than that of Korea, the difference is not as large as many people would expect (for the reasons discussed in the next paragraph); also, Korea’s litigation rate appears to be higher than that of Japan.\textsuperscript{310}

The numbers of court cases may provide a rough idea of the respective countries’ litigation rates. But other factors are relevant in assessing the litigation rates. For example, the low court filing fees and the frequent use of contingent fee arrangements for retaining litigation lawyers in the case of the United States seem to facilitate a high litigation rate.\textsuperscript{311} The rather low rate of litigation in Japan may be due to several reasons including its small number of lawyers.\textsuperscript{312} The numbers of courts per 100,000 people in Korea, Japan and the United States in 2002 were approximately 0.145, 0.42 and 5.56, respectively. This shows that access to courts in Japan should be generally easier than in Korea, while access to courts in the United States is much easier than the other two countries as far as court resources are concerned.\textsuperscript{313} This factor should also be taken into account in interpreting litigation rates. While these comparisons may not always be meaningful in assessing the ‘litigiousness’ of a

\textsuperscript{309} Tom Ginsburg & Glenn Hoetker, ‘The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation’ Illinois Law and Economics Working Paper No. LE04-009 (September 2004) at 26-27 (saying that ‘[l]itigation rate provide a notoriously difficult field for cross-national study because institutional environments vary so widely’).

\textsuperscript{310} For example, during 2002, the total number of civil cases heard by the courts was approximately 1,054,872 for Koreans and 16,654,225 for the United States. Assuming that the populations of each of these countries were 47,600,000 and 280,000,000, respectively, the numbers of court cases per 100,000 people in these countries were approximately 2,216 and 5,948, respectively. But given the differences in the number of lawyers and courts in each country, the figure for the United States is not as high as many people would expect. The litigation rate for Japan, on the other hand, is more difficult to compare because of the differences in the way in which the statistics are published. But the author’s preliminary research suggests that the litigation rate in Korea tends to be higher than that in Japan, which is broadly agreed by other commentators. See, for example, John O. Haley, ‘Arbitration and Litigation: Litigation in Japan: A New Look at Old Problems’ (2002) 10 Willamette J Int’l L & Dispute Res 121 at 124, 125 and 135 (Haley’s study shows that the litigation rate in Korea is considerably higher than that of Taiwan as well). For a recent and comprehensive analysis of Japan’s litigation rate, see Tom Ginsburg & Glenn Hoetker, ‘The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation’ Illinois Law and Economics Working Paper No. LE04-009 (September 2004). See also Christian Wolffshlager, ‘Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics’ in Harald Baum (ed), Japan: Economic Success and Legal System (Walter de Gruyter, 1997) at 89-142. The author’s own analysis has been based on the statistics obtained from the respective governments’ highest courts and other judicial/government bodies. See www.supremecourts.gov, www.uscourts.gov, www.scourt.go.kr, www.stat.go.jp, www.nso.go.kr and www.census.gov. Because of the way in which each country maintains its own statistics, and due to the differences in each jurisdiction’s court systems, a precise comparison was not possible. Hence, the figures represent a rough estimate only.


\textsuperscript{313} Considering such factors, plus the fact that there are a lot more lawyers per person in the United States than in Korea, it seems that Koreans are not necessarily less litigious than Americans. This is interesting given the fact that the Americans are often regarded as among the most litigious people in the world. Friedman says that ‘claims-consciousness’ is an aspect of American legal culture. See Lawrence M. Friedman, The Legal System: A Social Science Perspective (Ressell Sage Foundation, 1975) at 212.
country, they nevertheless indicate that the conventional views on Koreans' attitudes to litigation are not convincing from a statistical point of view.314

D. Korea's Normative Legal Culture and Litigation

i. Litigiousness, Rights-Consciousness and Efficient and Low Cost Litigation

Both historical and modern evidence suggests that it may not credibly be assumed that Koreans are innately averse to litigation. In both traditional and modern Korean society, Koreans have been found to be litigious and rights-conscious. Just as they so often used the petition drum to make direct appeals to the king, the contemporary constitutional petition (see Part II.3 of Chapter 4) has become 'a battle cry for ordinary citizens'.315 Such attitudes have not significantly changed, and they arguably form part of the normative legal culture of Korea.

Further, it appears from the review of the system of litigation from the Chosun Dynasty period that, in relation to legal proceedings, significant emphasis was placed on the idea that delays should be reduced and efficiency in respect of the proceedings achieved as much as possible. This is evident because, firstly, in a single proceeding during the Chosun Dynasty time, both civil and criminal hearings could be heard, thereby making the process flexible. Secondly, there were strict rules, called, *samdodeukshinpop*, that disqualified a party for failing to appear at the hearing. Thirdly, there were strict rules that prevented further appeals after decisions had been made in favour of a party three times, in order to ensure that litigation would not be unreasonably prolonged.316 Fourthly, there were clear rules about limitation periods for the bringing of proceedings. Fifthly, litigation was not costly, and so the rich did not necessarily have an unfair advantage.

One writer has argued that, for the above reasons, compared to the modern-day adjudication system of Korea, the traditional system of litigation was not less efficient either procedurally or cost-wise.317 Certainly, one of the key problems faced by the modern-day Western-style litigation system relates to the issues of cost and delay.318 Could it be the case that Korean legal culture in fact *demands* a more efficient and cost-effective system of justice?

---

314 The author's research in this regard is preliminary in nature given the scope of this thesis. More comprehensive research is desirable in this area particularly given the high litigation rate of Korea indicated above. Such a high level of litigation rate in Korea may be analysed using Ginsburg's methodology in Tom Ginsburg & Glenn Hoetker, 'The Unre... Working Paper No. LE04-009 (September 2004). Thus, Korea's recent increase in the number of lawyers in Korea, for example, may largely be attributable to the litigation rate in Korea. The numbers of lawyers in Korea in 1990, 1995, 2000 and 2004 were 1,803, 2,852, 4,228 and 6,273, respectively. See www.koreanbar.or.kr (visited in January 2005). Also, the high litigation rate in Korea may be explained by the increase in the economic activities coupled with the economic down turn Korea faced during the 1997 financial crisis (both of these factors, according to Ginsburg, positively influence litigation rates).

315 Kyong Whan Ahn, 'The Influence of American Constitutionalism on South Korea' (1997) 22 S Ill U L J 71 at 77 (Ahn links the petition drum to the current constitutional petition system).

316 Byung Ho Park, *Hankookyeupop* [Law of Korea] (Sechongdaewang Kinyaem Sayeuphawai, 1985) at 84.

317 Id at 69.

which may be a reasonable inference drawn from the type of the justice system that existed during the Chosun Dynasty period? In this regard, it is interesting to note that up to the fifteenth century, there were lawyers (called wejibuin) in Korea, who, for a fee, represented parties to legal proceedings. But they were banned towards the end of the fifteenth century because they were seen as causing too many lawsuits and delays in proceedings.\(^\text{319}\) Currently, the cost of retaining lawyers (for litigation or transaction work) may be seen as too high – which may be mainly due to the structural issue of having too few lawyers and judges in the system.

\textit{ii. The Western, Chinese and Japanese Litigation Systems Compared}

The kinds of issues discussed above may not be peculiar to the Korean context; one may refer to similar issues in the Chinese and the Japanese contexts. It is often argued that, similar to Korea, China’s legal culture is not consistent with the modern Western-style litigation system because litigation would violate the Confucian \textit{li}.\(^\text{320}\) However, it has also been argued that, earlier scholarship notwithstanding, Chinese commoners were quite willing to engage in formal litigation, and a tradition of civil law roughly comparable to Euro-American traditions prevailed.\(^\text{321}\) Melissa Macauley argues that, historically in China, some widows who engaged in litigation abuse actually exploited statutes and legal practice designated to ‘protect’ and subordinate them under law, using the very structure that underscored their weakness under law to attack their enemies or attain justice.\(^\text{322}\) Instrumental to this traditional litigiousness of the Chinese were the ‘litigation masters’, the Chinese legal facilitators who accompanied the rise of the commercial revolution in the twelfth century.\(^\text{323}\)

Macauley further argues that the modern Western-style system of justice has historical roots in the role of state building and the coterminous diminution of power among secular and religious power holders in competition with centralising state authorities in early modern Europe.\(^\text{324}\) She argues that, for example, state building within the German principalities of the Holy Roman Empire in the sixteenth century was predicated in part on their adoption of Roman law as a means of centralising their administrations judicially and bureaucratically. The purpose was to displace the multifarious forms of feudal customary


\[^{320}\] See, for example, Pitman B. Potter \textit{The Chinese Legal System: Globalisation and Local Legal Culture} (Routledge, 2001) at 9.

\[^{321}\] Melissa Macauley, \textit{Social Power and Legal Culture – Litigation Masters in Late Imperial China} (Stanford University Press, 1988) at 14. Macauley cites scholars such as Mark Allee, Kathryn Bernhardt, David Buxbaum, Alison Conor, Philip Huang, Jing JunJian, Hugh Scogin and Madeleine Zelin.

\[^{322}\] Id at 7. For a discussion of Japanese women’s active engagement with the authorities during the Tokugawa period, see Herman Ooms, \textit{Tokugawa Village Practice: Class, Status, Power, Law} (University of California Press, 1996)

\[^{323}\] Melissa Macauley, \textit{Social Power and Legal Culture – Litigation Masters in Late Imperial China} (Stanford University Press, 1988) at 1. Macauley says that some of these litigation masters were plain writers and legal specialists in towns and cities; others were ‘incidental litigation masters’, men to whom timid or illiterate people turned for help. Some were clerks and functionaries; most were educated, literate men, usually students, teachers, farmers and literate itinerants such as fortune-tellers. According to Macauley, they did not ‘incite [others] to litigation’; people usually came to them; they wrote legal accusations and rebuttals against the accusations of others. They wrote prompting plaints to galvanise the courts into action; they helped devise legal strategies (ibid at 328-329).

\[^{324}\] Id at 8.
law by which nobles had exercised local authority. Macaulay argues that this is why the self-aggrandising states of early modernity wanted to get involved in the petty squabble of the villages. She says that the central government’s initiatives in creating law and legal practices for the purpose of state-building, in turn, created barriers for the lower class in accessing justice. The poor resented the incomprehensibility of dispute resolution procedures and the cost of bringing disputes to more distant tribunals.

Comparing the Western legal tradition to Chinese legal culture, the litigation masters contrast sharply with Western-style adjudication. The Western model, according to Macaulay, has been built on a tradition that may not be cost-efficient and user-friendly. Obtaining the services of litigation masters was apparently not as costly as hiring lawyers today, and the poor and the people with lower social status were not barred from ‘taking an advantage’ of the justice system. Thus, may the conventional view about the Chinese ‘aversion to litigation’ be explained (at least partly) by the fact that the modern Western-style justice system is too formal and expensive?

Similar arguments may be made about Japanese attitudes towards litigation. Some writers have argued that, as with the Koreas and the Chinese, the Japanese tend to prefer informal dispute resolution rather than litigation that is attributable to their lack of ‘legal consciousness’. But it has also been argued that the tendency of the Japanese to avoid litigation is explained less by cultural reasons and more by the fact that modern litigation processes in Japan are very time-consuming and expensive. Could, therefore, the real problems be related to the modern Western-style system of justice, rather than the legal culture of the Japanese in respect of litigation?

Regardless of the extent to which one may rely on Macaulay’s thesis, it is certainly true in the case of the modern Western-style system of justice that cost and delay are real problems. Court delays and high court costs may be factors that undermine the rule of law.

325 Ibid.
326 Id at 9.
328 John O. Haley, Authority Without Power: Law and the Japanese Paradox (Oxford University Press, 1995) at 83-119. Others have put forward other reasons for the low litigation (and arbitration) rate in Japan such as structural disincentives. See Luke Nottage, ‘Japan’s New Arbitration Law: Domestication Reinforcing Internationalisation?’ (2004) Int ALR 54 at 54-55. See also John K.M. Ohnesorge, ‘The Rule of Law, Economic Development, and the Developmental States of Northeast Asia’ in Christoph Antons (ed), Law and Development in East and Southeast Asia (RoutledgeCurzon, 2003) at 100 (arguing that ‘[l]ow litigation rates in Northeast Asia arguably have more to do with material disincentives such as legal fee structures and inconvenient court procedures and fees than with cultural aversions to judicial conflict resolution’). Ginsburg’s analysis, which is very recent and comprehensive, shows that the size of the bar and civil procedural reforms have the most significant impact on the litigation rate in Japan. See generally Tom Ginsburg & Glenn Hoetker, ‘The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation’ Illinois Law and Economics Working Paper No. LE04-009 (September 2004).
Litigation is also becoming increasingly complex and questions may arise as to the courts’ competence in handling such cases. Not only may such cases be difficult for courts to handle, but there may be a considerable amount of litigation risks for the parties involved, undermining the merits of the case. Hence, there has been an emphasis on efficiency as an integral component of justice (while some others dispute such a correlation). There has even been a suggestion from a prominent Canadian judge that complex litigation may, in the near future, be denied access to court.

To sum up, in today’s Western-type litigation systems, there are real problems associated with delays, expenses, complexity of cases and compromise of fairness. It is thus not surprising that people who are new to litigation may find it uncomfortable to use the system as an effective means of resolving disputes. In such circumstances, it is probably wise to resort to alternative dispute resolution mechanisms, which is in fact what is now increasingly encouraged in many Western countries. Lord Woolf in his report on litigation in Britain recommends that litigation should become less adversarial and more co-operative, with increased openness and cooperation between parties and courts encouraging alternative dispute resolution options. Interestingly, Lord Woolf’s recommendation sounds similar to the conventional view about the legal cultures of Korea, Japan and China on litigation.

Even with the Western litigation system, legal culture may be important for determining the appropriate court system. Writers have suggested that the fastest courts (that is, the courts with the least delays) tend to be the courts in which the legal culture of the community supports a speedy pace of litigation. On the other hand, many of the slower courts do not tend to regard the existing pace of litigation to be a significant problem. Others have suggested that the legal culture also tends to govern the conduct as well as the pace of litigation. Hence, there is a clear connection between legal culture and the system of justice. In the case of Korea (and probably Japan and China), it may be the case that the legal culture demands a more speedy and cost-efficient system of justice.

331 Ibid.
iii. Conclusions

Returning to Korea’s legal culture and litigation, the above arguments lead to several points. Firstly, the Western-style legal system may not be the best system against which one should measure litigiousness of the people using it. The inefficiency and the cost barriers associated with the system may discourage people to resort to it – rather than their lack of rights-consciousness discouraging them. Secondly, this argument is, to an extent, supported by comparing the Chinese and the Japanese situations. There are some convincing arguments to suggest that the Chinese and the Japanese would be more willing to use the court system if their court systems were more efficient and less expensive. Thirdly, Korea’s modern legal culture indicates a strong sense of entitlement and a litigious environment. It is, in turn, reasonable to suggest that this is related to Korea’s deeply rooted legal culture supporting such values (see the hypothesis in Part III.5 of Chapter 1).337

Further, the deeply rooted legal culture of Korea seems to demand a low cost and efficient system of justice. Today, such a legal culture is reflected in the Constitution where the ‘right to a speedy trial’ is guaranteed.338 Also, Part III.6 of Chapter 5 provides evidence to support this point in the commercial transaction context. There it is argued that Korean parties often do not hire lawyers even in significant commercial transactions. Even when they do, they are often unwilling to pay high fees to their lawyers. This can cause, and has in the past caused, major problems for Korean parties. As a result, Korean parties are often exposed to huge legal risks, and this has not helped their image regarding their rights-consciousness and respect for law. Rather, this has been seen as yet further evidence of Koreans’ presumed relationship-based rather than rule-based approach to business dealings.

While there may be truth in these arguments, one way of looking at it may be that Koreans tend to believe that legal representation should not be expensive. This is related to the earlier argument that Koreans demand a cost-efficient system of justice. In other words, Korean legal culture may be such that Koreans believe that low-cost legal representation should be a matter of right, and not something that should cost a prohibitively large amount of money. Why should legal representation be so costly that it can be prohibitive for those who do not have the means? In commercial contexts, such rationale is more difficult to justify. But legal representation is not cheap in other areas either. It is perhaps this aspect of Korean legal culture that makes Korean parties reluctant to engage expensive lawyers even when that becomes necessary.

Litigiousness, in one sense, supports the rule of law because it implies rights-consciousness and may be linked to individualism and autonomy. But it may also legitimise the exploitation of other people to advance personal or group interests (which is a behaviour that legal rights are intended to curb) and, hence, inconsistent with the rule of law.339

337 The relevant hypothesis states that ‘many aspects of Korea’s normative legal culture support individualistic and personalistic traits of legal culture. Koreans tend to be considerably rights-conscious’.

338 Article 27(3) of the Constitution. It has been argued that this provision of the Constitution is connected to Korea’s indigenous legal culture. See Woo Yea Hwang, ‘Efforts to Expedite Judicial Process in Korea’ (1990) 18 Korean J Comp L 174 at 174.

Litigiousness, like the concept of 'harmony', may thus be seen as neither compatible nor incompatible with the rule of law. The culture that demands a low cost and efficient system of justice, on the other hand, may be seen as supporting the rule of law because greater access to justice is encouraged in such a culture.

9. **Summary**

A detailed analysis of some of Korean laws and legal culture prior to, during, and after the Chosun Dynasty period reveals that the common assumptions about the legal culture of Korea do not provide an entirely accurate picture of the country’s legal culture. The conventional view largely conforms to the idea that Korean legal culture had traditionally lacked, or conflicted with, rule of law ideals. However, the actual findings on the normative legal culture of Korea in fact tend to suggest that significant aspects of Korean normative legal culture support rule of law ideals.

The Principle of Respect for the Royal Ancestor’s Constitution suggests Korea had a normative legal culture that supported the notions of (a) clarity of the law, (b) supreme authority of the law, and (c) stability of the law. This is very different from the assumption that the law and legal institutions in Korea had been undervalued and despised, and that the force of the moral example of those in authority was the primary mechanism by which government operated.

Regarding the Confucian legislation in the Chosun Dynasty that tended to discriminate against women, firstly, such laws were consistently resisted (particularly by women). As a result, the laws during the Chosun Dynasty period contained significant elements that had the effect of maintaining a balance against the discriminatory effects of the law in general. Therefore, in some cases, the law actually treated women more favourably than men. Nevertheless, laws such as those relating to inheritance in particular, which contained agnostic concepts, had far-reaching economic and social consequences for women.

However, even carefully designed Confucian legislation could not achieve comprehensive social reforms in, for example, land ownership. This indicates that the normative legal culture relating to private ownership rights had been firmly rooted. Also, although the society was basically a hierarchical society, it is doubtful whether the law was so status-biased as one might have expected. Further, regarding litigation, Koreans had been litigious and rights-conscious, which is partly evident from their elaborate adjudication system. Also, they demanded an affordable and efficient system of justice so that people should not be prejudiced because of their financial means or social status.

Aspects of Korea’s modern legal culture have been introduced above, including those relating to social status, gender equality and litigation. In the next section, further aspects of Korea’s modern legal culture will be discussed. But it should be remembered that this thesis is not necessarily about modern legal culture – it is about the deeply rooted legal culture of Korea. But it is reasonable to assume that many aspects of deeply rooted legal culture are reflected in Korea’s modern legal culture. After all, that is probably what it meant by a

[340] In this regard, one notes Buzo’s comment that Korea saw the influence of ‘capitalism, Marxism-Leninism, colonialism, nationalism, hot and cold war, the rise and collapse of global Communism, and
deepl y rooted' legal culture. Thus, an examination of Korea’s modern legal culture forms an important part of this chapter.

IV. MODERN LEGAL HISTORY AND LEGAL CULTURE OF KOREA

1. Legal History and Legal Culture of Korea during 1866-1945

A. Introduction

Korea’s legal history since the late Chosun Dynasty period until 1945 is defined by colonialism. Japan annexed Korea and changed Korean laws during this period. The indigenous Korean laws that had been continuously existing up until this time suddenly lost force. New laws were transplanted that had the form of Western-type laws, but which, in substance, considerably lacked rule of law elements. Korean legal culture was significantly influenced by the transplanted legal system. Despite such significance, this is still an under-researched area. It is also a sensitive area, particularly between the Korean nationalists and the Japanese apologists. Hence, this area is ‘like stepping into a minefield’. The intent of this Part IV.1 is not to engage in such type of debate, but to describe distinctive features of the legal transplant during this time and their relevance for the achievement of the rule of law.

Colonialism is a complex process, and a unitary, homogenised view of colonialism may be inappropriate. It may be too simplistic to say that the Japanese imposed Western-style laws upon the Koreans and that the Koreans either accepted or resisted such laws. But as mentioned in Part II.1 of Chapter 2, culture (and its changes) is a complicated concept that cannot be explained by a simple model. It might be helpful to view colonialism as having provided a ‘cultural space’ for groups to reconstruct their own being by negotiating, contesting, defending, renewing, re-creating, and altering it through the new circumstances. After all, changes of this kind ‘do not simply come in response to structural conditions; they require human action’.

Asia-Pacific economic dynamism. Meanwhile, even as such people [sic] sought to impose their visions on Korea, Korean cultural values continued to shape their outlook. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 1.

341 Yang says that ‘there have hitherto been few studies of law and society covering the period of Japanese rule. Scholars have concentrated instead on the [Chosun] dynasty law, usually from a narrow, biased perspective that treats all legal phenomena today as linked to the premodern [Chosun] dynasty law’. See Kun Yang, ‘Law and Society Studies in Korea: Beyond the Hahn Thesis’ (1989) 23 Law & Soc’y Rev 891 at 897. The author observes that since the date of Yang’s article, there have still been very few studies in this area.


344 Sally Engle Merry, ‘Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia’ (2003) 28 Law & Soc Inquiry 569 at 569. Merry argues (at 569) that what legal transplants of colonialism engender ‘is no longer understood as a simple process of imposition of law . . . it was never complete. Nor was it completely successful’.

What does this mean for Korean legal culture? To be sure, this was a period in which human rights and the rule of law were suppressed in Korea – probably more so than in any other period of Korean history. Also, there were conscious efforts by the Japanese to instil in the minds of the people – both the Koreans and foreigners – the idea that indigenous Korean laws were 'uncivilised' and 'barbaric', in order to justify their annexation. This had influenced Korean's 'internal legal culture' at least in the early days because Korean lawyers and judges received Japanese training and education. Further, it promoted a Korean historiography that systematically downgrades the past, which partly explains the nature of the source from which conventional views about Korean legal culture draw.

Also, the Japanese (like the French in Vietnam) used Confucianism as a 'convenient, conservative social ideology that could legitimate their rule'. Such a distorted use of both Confucianism and the rule of law did not help Koreans to establish a proper perception of both their indigenous laws and the Western laws. Indeed, President Park Chung Hee's use of Confucianism – first, his denouncement of Confucianism to achieve economic development, and then later his championing Confucianism to legitimate illegal amendment of the Constitution – reflects precisely such problems.

However, colonialism has other dimensions. It provided a dramatic opportunity to redefine and re-create Korean laws afresh. Thus, the cultural negotiations that took place during the Chosun Dynasty period between, say, women and men, and between people from different social classes, found a new semantic field in which to commence dialogue. Colonialism broke the existing balance and the sophisticated equilibrium relating to various value systems in society – sometimes through impoverishment, market forces, oppression, and politics. This, followed by or together with 'modernity' (discussed in more detail in

---

346 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 5 and 48. Buzo says (at 48) that 'Koreans were constantly reminded in demeaning and humiliating terms that their cultural heritage summed up all that was backward, reprehensible and useless in the modern world, and that only in Japanese culture and practice could they find what they required to become a "modern" people ... the Japanese did great damage to the cultural psyche'. He says (at 5) that such an image of Korea has prevailed for much of the twentieth century and rather ironically has been enthusiastically promoted by mainstream nationalist historiography in both Koreas. [But] [In fact, a notable feature of Chosun society was the rich circulation of ideas, independent of state ideological control'. Also, Lee says that 'such critics of assimilationism [of Korea] as Yamaishi Tadashi contended that assimilation was neither possible nor desirable because Koreans were highly civilised'. See Chulwoo Lee, 'Modernity, Legality, and Power in Korea Under Japanese Rule' in Gi-Wook Shin & Michael Robinson (eds), Colonial Modernity in Korea (Harvard University Press, 1999) at 28.


Part IV.2 below), has meant that Korea’s deeply rooted legal culture has found a completely new ‘contact zone’ (see Part II.1.D of Chapter 2) in which to express itself.

This picture is further complicated by the fact that Korean nationalists ‘waxed nostalgic for the old Chosun regime’, romanticising Confucianism during the Japanese occupation.352 Thus, the tradition of blindly associating Confucianism with Korean culture still persists, without fully realising that the Confucianism prevailing today may be a mixture of notions ‘imagined’ (by the nationalists) or ‘promoted’ (by the colonisers). It is in this complex cultural context that one should try to ascertain Korean legal culture during the colonial period and beyond.

B. Korea’s Reception of Foreign Laws

i. Korea’s Initial Encounter with Western Laws

The ‘Hermit Kingdom’ might be an appropriate description for Korea given the Korean people’s traditional reluctance to interact with other civilisations.353 Western law found its way into the Korean peninsula through the writings of missionaries in China during the eighteenth century. But the Korean Confucian scholars were quick to criticise this ‘Western learning’ and bitterly opposed it.354 However, since 1866, Korea began to be compelled to face the West by several incidents involving the West’s attempts to come into contact with Korea. Some of these attempts involved use of force, such as that of Japan, resulting in the Treaty of Kanghwa in 1876.355 On another occasion when Korea came into contact with this time, the United States, the Treaty of Peace, Amity, Commerce and Navigation between the two countries was signed on 22 May 1882.356 In 1894 and thereafter, sweeping reforms


353 However, Buzo argues that the ‘Hermit Kingdom’ tag was itself a Western invention and that Chosun was not more isolationist than China or Japan. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 9. He says that Chosun isolationism was based on a rational assessment of the merits of domestic economic and diplomatic self-sufficiency.


355 The Treaty of Kanghwa was also an incident whereby the Koreans were faced with concepts of international law, which were unfamiliar to them. They were accused upon international law grounds of not respecting Japanese flags flying its warship.

356 It is interesting to note the fourth paragraph of Article 4 of this treaty, which states: ‘It is however mutually agreed and understood between high contracting powers that whenever the king of Chosun shall have so far modified and reformed the statutes and judicial procedure of his kingdom that, in the judgment of the United States, they conform to the laws and course of justice in the United States, the right of extraterritorial jurisdiction over United States citizens in Chosun shall be abandoned, and thereafter United States citizens, when within the limits of the Kingdom of Chosun, shall be subject to the jurisdiction of the native authorities’. It has been argued that what was implied by this paragraph of the treaty was a recognition on the part of the United States that the traditional legal system was not civilised enough under the prevailing standards of international law. As such, it has been argued that the paragraph amounted to a demand on the part of the United States that Korea had to ‘Westernise’ its legal system in order for it to escape the onus of extraterritoriality. See Pyung-Choon Hahm, ‘Korea’s Initial Encounter with the Western Law 1866-1910 A.D.’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 49.
(referred to as the ‘Kabo Reforms’) were coerced upon the Korean government by the Japanese army, and a Western-style judicial system was established in Korea.\(^{357}\)

There was a question from the outset as to whether such a sudden reform would be effective and workable.\(^{358}\) On this point, it is instructive to refer to the edict issued by the king on 12 July 1895, which states, among other things, that the ‘incongruities between the continuing old ways and the new reform measures had been so great as to render the people incapable of either comprehending or trusting the new laws’. In respect of the Kabo Reforms, some view that complete reception of a modern, Western legal system occurred because it was thought to be ‘modern’, regardless of its relevancy to actual social conditions.\(^{359}\) On the other hand, it has been argued, traditional institutions, except a few such as those relating to the family law, were discarded as ‘outmoded’, irrespective of their relevancy to the needs of society.\(^{360}\)

\textit{ii. Discontinuation of Indigenous Laws}

In January 1896, a collection of new laws and edicts, the Popkyu Yup’yon, was published, and in June 1899, a law revision commission was established. In August 1899, a new constitution of Korea was proclaimed consisting of nine provisions.\(^{361}\) On 18 November 1905, five out of eight of Korea’s cabinet ministers signed a ‘protectorate treaty’ with Japan as a result of the latter’s coercion. By this agreement, the Korean ministry of foreign affairs was abolished, and a Japanese Resident-General was stationed in Seoul to represent Japan and to supervise and direct Korea’s diplomatic matters. Also, the Japanese military occupied Korea completely. These actions of the Japanese were protested at the Second International Conference on Peace at The Hague in 1907 by secret representatives of Emperor Kojong of Korea.\(^{362}\) But The Hague did not recognize the Korean representatives’ right to be heard at

---

357 Among others, the following law reforms were made: (a) A cabinet with a prime minister and eight ministers with portfolios now included a minister of justice rather than a traditional minister of ‘punishment’. (b) The ministry of justice was entrusted with the administration of courts, police and prisons. (c) Over two hundred major laws were promulgated between 30 July 1894 and 17 December 1894. (d) Thirty-four laws and edicts were promulgated from 19 April 1895 to 24 April 1895. (e) The Law of the Constitution of the Courts was promulgated as Law No. 1 on 19 April 1895, and two edicts outlining court procedure and remuneration for judges and prosecutors were promulgated on the same day. (f) By the Law of the Constitution of the Courts, a two-level system of courts was adopted. (g) The first school for the express purpose of training judicial officers in the western law, the Popkwanyangsongso (Training Institute of Judicial Officers) was established by a royal decree on 19 April 1895. See generally Pyung-Choon Hahn, ‘Korea’s Initial Encounter with the Western Law 1866-1910 A.D.’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 50-51.

358 The fact that aspects of the new laws might be ‘incomprehensible’ was mainly due to the fact that Korean society lacked the ‘necessary infrastructure to accommodate the laws’—not necessarily because the new laws were in conflict with the legal culture of Korea. See Takao Tanase, ‘The Empty Space of the Modern in Japanese Law Discourse’ in David Nelken & Johannes Feest (eds), Adapting Legal Cultures (Hart Publishing, 2001) at 187 (discussing similar issues in the Japanese context).

359 Pyung-Choon Hahn, ‘Korea’s Initial Encounter with the Western Law 1866-1910 A.D.’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 50-60.


361 The constitution contained very basic and general provisions, such as the power of the king of Korea to enact new laws (Article 6) and command the army (Article 5). See Chongko Choi, Hankukpopinmun [Introduction to Korean Law] (Bak Young Sa, 1994) at 17-18.

The Hague based on the prevailing international law and politics at that time. As a result of Kojong's action, Ito Hirobumi, the Resident-General in Korea, forced the emperor to abdicate in favour of his incompetent son, obtained a new treaty which greatly increased the Resident-General’s powers and dissolved the Korean army.

Despite the politically unsettled circumstances, a penal code, the Hyongpop Taejon, was promulgated. Although the code was penal in nature, it also contained procedural rules for civil matters. The new code might have been the start of a process of adaptation of Western law to indigenous Korean law by the Koreans, using traditional principles. However, by an agreement signed between Korea and Japan on 24 July 1907, Korea lost its power to promulgate any law without prior consent of the Resident-General. Also, high officials of the government could be appointed or dismissed only upon the consultation with the Resident-General. Hence, the opportunity for the Koreans to adopt Western laws voluntarily had been lost.

In December 1907, a new Law of Constitution of the Courts was promulgated, under which 'four levels of courts and three instances of hearing' were established. These were the Supreme Court, Courts of Appeal, Local Courts and District Courts. All the courts were headed by Japanese officials. In July 1908, the Hyongpop Taejon was revised: over 270 out of 680 articles were deleted. The Japanese decided to modify the Hyongpop Taejon by eliminating articles that were 'difficult to administer'. Thus, many of the indigenous laws of Korea suddenly lost force. Rules in respect of civil and criminal procedures were promulgated. A legislative research bureau, headed by a Japanese jurist, was established.

iii. Transplanting Japanese Laws

On 25 June 1910, the annexation treaty was signed, and on 29 June 1910, the Korean emperor ceded sovereignty to the Japanese emperor. The Imperial Edict No. 324 of 29

---

363 It has been argued that Japan had already entered into 'secret arrangements' with the United States whereby the latter traded the Philippines for Korea, and with Great Britain whereby the latter traded India for Korea. See Alexis Dudden, *Japan's Colonisation of Korea: Discourse and Power* (University of Hawaii Press, 2005) at 62-63.


365 The promulgation edict of the code stated: 'Penal law is indispensable in government, its promulgation is a primary task in statecraft. Our empire's laws and statutes have not yet been fully promulgated, causing different and incompatible rules and regulations, both old and new, to be continuously formulated as well as terminated. This has caused our people to commit more and more wrongs at the same time greatly confusing our magistrates. Deeply regretting this state of affairs, we have had an imperial code compiled by using the ancestral constitutions as the substance and taking the laws of other nations as reference. We have named this new code Hyongpop Taejon. We hereby publish it to the whole world. It shall forever show the people what to fear and to avoid. Our magistrates shall have a convenient standard by which to carry out faithfully our policies. O our people! Respectfully carry out our wishes'.

366 Subsequently, and prior to the annexation of Korea, Korea lost its power over the judiciary. Pursuant to a memorandum exchanged between Korea and Japan on 12 July 1909, the judicial and prison affairs of Korea were 'entrusted' to Japan. In October 1909 the Korean ministries of justice, prisons and the judiciary were abolished and replaced by the Residency-General system. On 1 November 1909, the former Korean courts began operations as the Courts of the Residency-General. See Edward J. Baker, *The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919* (Harvard Law School Studies in East Asian Law, 1979) at 25.

367 Id at 31.
August 1910 provided that a matter in need of enactment of a law in Korea should be regulated by an ordinance of the Governor-General (called a *seirei*). The first Governor-General was General Terauchi. The first *seirei* dated 29 August 1910 provided that the Korean and Japanese laws that had previously been in effect in Korea would continue to have effect. *Seirei* No. 7 of March 1912 (called the *Chosun Minjirei*) dealt with civil matters. *Seirei* No. 11 of March 1912 (called the *Chosun Keijirei*) dealt with criminal matters, and it defined the extent to which Japanese criminal laws were applicable in Korea.

It has been said that although the operation of two separate sets of independent legal systems (one for the Koreans and another for the Japanese) proved confusing, the distinction between the two groups could not easily be abolished.\(^{369}\) This produced discriminatory effects – thus, for example, although flogging was illegal for Japanese criminals, it was legal for Korean criminals.\(^{370}\) Further, there had been severe violations of human rights and the principles of fair trial by the Japanese against the Koreans, which had drawn intense criticism from the United States, Canada and elsewhere.\(^{371}\) It was not until 1920 that the practice of confining Korean judges and prosecutors to those cases where only Koreans were involved was finally abolished.\(^{372}\) Even in 1925, if both parties to a civil suit were Koreans, Korean laws were applied, although in principle Japanese law was said to be applicable in Korea.\(^{373}\) In civil suits between Koreans and non-Koreans a more difficult situation existed – here again, Japanese laws were applied, but 'with equitable modifications'.\(^{374}\)

Although Japanese laws were increasingly applicable in Korea, initially Koreans were not comfortable adopting the new laws. This was so despite the fact that the state-centric legal and political structure introduced during the Japanese colonial period sat well with Korea’s Confucian traditions.\(^{375}\) By 1940, most laws in Korea were Japanese laws, administered by Japanese judicial officers, in the Japanese language. The deprivation of the Korean language strongly indicates the coercive nature of the imposition of Japanese laws on Korea. Also, the fact that the laws were administered in the Japanese language suggests an increased distance on the part of Koreans in respect of the law. This was part of Japan’s attempt to force complete cultural assimilation, which also included forced worship before

---

\(^{368}\) The ordinance included the following laws: (a) Japan’s laws were made applicable in Korea where there were no specific provisions in the *Chosun Minjirei* or other special enactments made specifically to have effect in Korea (Article 1). (b) A civil matter involving only Koreans was to be regulated as a rule by Korean custom in so far as the applicable Japanese law was not one concerned with matters of public order (Article 10). (c) In matters of family law and succession the Korean custom was generally to be followed unless otherwise specifically provided by law (Article 11).


\(^{373}\) Ibid.

\(^{374}\) Ibid.

imperial shrines, the use of Japanese in school and forced adoption of Japanese names (under the Name Order of 1939).  

iv. The Rule of Law and Legitimacy of Legal Transplant

From an international point of view, the period from 1905 to 1945 (when the Japanese occupation of Korea ended) represented a time when Korea’s legal system did not quite catch up with changes in the international realm. Japan had learned its lessons about half a century ahead of Korea in encountering the West. But Korea’s ‘closed-door policy’ cost the country the opportunity to learn the ‘language of the West’. When Korea lost sovereignty to Japan, it was partly due to Japan’s purposeful use of the international law (and politics).  

To be sure, during this time, many Koreans quickly learned the ‘language of international law’ to protest the Japanese occupation of Korea. For example, Yi Ho Wi, who participated in So Chae Pil’s Independence Movement, used concepts such as Korea’s ‘territorial integrity’ and ‘sovereignty’ for protesting Japan’s occupation of Korea, and he endeavoured to implement reforms to Korea’s legal systems to make them more ‘modern’. However, such attempts came too late, and the Japanese by this time had succeeded in showing the international audience its apparent legitimacy for occupying Korea.

The (alleged) necessity of legal transplant was one of the key ‘excuses’ used by the Japanese for annexing Korea, with the Japanese claiming that Korean law was ‘uncivilised and barbaric’. It is important to note Japan’s efforts to discredit Korea’s indigenous laws and legal culture during this period, necessary to justify its annexation of Korea. Japan argued that Korean judges had extensive discretionary powers, tried cases without calling witnesses, drew up unreliable memoranda of evidence, gave judgments without a statement of reasons and provided no finality of judgments. In short, according to Japan, Korea

376 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 38.
377 For a detailed description of how Japan did this, see Alexis Dudden, Japan’s Colonisation of Korea: Discourse and Power (University of Hawaii Press, 2005).
379 In this regard, Edward Baker argues that ‘[the Japanese] repeatedly voiced their contempt for what they considered the backwardness of Korean culture. In fact, they were to continue to use this as an excuse for their policies throughout the period concerned.’ See Edward J. Baker, The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919 (Harvard Law School Studies in East Asian Law, 1979) at 41.
380 Alexis Dudden, Japan’s Colonisation of Korea: Discourse and Power (University of Hawaii Press, 2005) at 112-115. See also Sally Merry’s discussion of Hawai‘i’s adoption of Anglo-American law to create a ‘civilised’ nation. See Sally E. Merry, Colonizing Hawai‘i: The Cultural Power of Law (Princeton University Press, 2000) at 4 and 8. She argues (at 19) that a fundamental feature of the colonising process is the claim to be ‘civilising’ a ‘barbaric’ or ‘savage people’. The official Japanese explanation for changing Korea’s legal system was that there was an ‘urgent necessity of applying progressive and remedial measures in order to rescue the people from the evil effects of centuries of misrule and to promote national improvement’. See Residency-General of Korea, Annual Report for 1907 on Reforms and Progress in Korea (1908) at 3.
381 Edward J. Baker, The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919 (Harvard Law School Studies in East Asian Law, 1979) at 20. But Baker (at 20) notes that instances where court judgments were overturned ‘seem to be cases where anti-Japanese attitudes were a factor’. 172
lacked the rule of law. Also, Japan argued that "so long as the judicial branch of the government was not separated from the executive, the evils and abuses of the old system, which are so deeply rooted, could not be fully removed." Such a 'deeply rooted' culture, Japan argued, was connected to Confucianism. It has been said that the Japanese 'ideologically manipulated and in some cases even invented' this tradition of Confucianism to legitimate their domination over Korea. Ironically, conventional views about Korean legal culture seem to echo these arguments of the Japanese.

However, when the Japanese introduced a 'form' of Western law to Korea, it was significantly lacking the rule of law elements (such as fair trial) that were supposed to be embodied in such law. For example, the separation of judicial power from administrative power (which was one of the 'excuses' for the Japanese to interfere with the Korean system) was no longer effected. The police could decide the question of guilt and impose punishment (including flogging – which often resulted in death) without any involvement by the judiciary. There was a complete 'fusion of judicial and administrative power' as had never existed before in Korea. Also, some of the new laws, such as those relating to inheritance, contained provisions that discriminated against daughters vis-à-vis sons to an extent unseen even in the Confucian legal system of the Chosun Dynasty. Women's rights did not improve, but deteriorated (and were disregarded, in the case of the 'comfort women' (chongsindae)).

---

382 Such an argument is seen as particularly well-suited to justify political interference. See Maxwell O. Chibundu, 'Globalising the Rule of Law: Some Thoughts at and on the Periphery' (1999) 7 Ind J Global Leg Stud 79 at 83. Chibundu (at 83) argues that the rule of law 'in its unelucidated form commands virtual universal approbation, it transcends the moral and functional dichotomy, and ... it has become a prevalent and universalist justification for what might otherwise appear to be self-interested prescriptions of policy'.

383 Residency-General of Korea, Annual Report for 1907 on Reforms and Progress in Korea (Seoul, 1908) at 23 (emphasis added).


385 Lee says that 'the colonial rulers never offered "the English idea of liberty" to the colonial subjects.' See Chulwoo Lee, 'Modernity, Legality, and Power in Korea Under Japanese Rule' in Gi-Wook Shin & Michael Robinson (eds), Colonial Modernity in Korea (Harvard University Press, 1999) at 31. Lee (at 47) says that the Japanese viewed Anglo-American liberalism as dangerous to implement in the colony. Also, one notes Ohnesorge's comment that transplanting a legal infrastructure does not necessarily mean that the rule of law spirit will also be transplanted. See See John K.M. Ohnesorge, "The Rule of Law, Economic Development, and the Developmental States of Northeast Asia" in Christoph Antons (ed), Law and Development in East and Southeast Asia (RoutledgeCurzon, 2003) at 112.

386 The Judicial Department became subject to the supervisory power of the Governor-General, thus restricting the courts' independence. Also, the police were given extensive powers of summary judgment. See Edward J. Baker, The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919 (Harvard Law School Studies in East Asian Law, 1979) at 25.


390 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 16 and 45. On the use of 'comfort women' Buzo (at 45) comments that '[u]nder this practice, tens of thousands of young Korean women were recruited, ostensibly for regular employment in support of the Japanese war effort but then forced
The official Japanese view of indigenous Korean civil law was that ‘[t]he Koreans had little or no conception of private rights ... Civil law guaranteeing private rights had practically no existence’.\textsuperscript{391} In this respect, Edward Baker remarks that ‘[s]ince there was in fact usage covering many civil law areas, in addition to many provisions of a civil nature in the traditional codes, these statements may signify a Japanese intention simply to write the law as they thought it ought to be, using Korean custom only when it was acceptable to them’.\textsuperscript{392} Also, the Japanese carried out a cadastral survey in Korea because (they argued) the Korean land system was in a ‘chaotic state’.\textsuperscript{393} In this regard, Baker notes that:

‘[t]he importance of the cadastral survey in Korean history and in the history of twentieth-century Korea has led me to undertake research further on it. ... Now, however, I tentatively conclude that an analogous concept of ownership already existed in traditional Korean society and that, rather than changing the pattern of ownership, the survey largely confirmed the ownership of an already well developed Korean landlord class.’\textsuperscript{394}

During this time, it was crucial politically for Japan to prove the legitimacy of its occupation by showing that a European-style justice system was now operating in Korea for the first time. Hence, Japan eagerly displayed to the world photographs of the newly built European-style ‘Court of Cassation’ in Seoul, including images of trial scenes inside that court.\textsuperscript{395} However, as discussed above, the newly transplanted laws significantly lacked rule of law elements even though they may have had the ‘appearance’ of Western laws.\textsuperscript{396} The following were some of the features of the transplanted laws.

(a) In the area of procedural laws, procedural error did not constitute grounds for reversal of the decision.\textsuperscript{397} In both civil and criminal cases, issues and evidence not presented at the preliminary hearing could not be presented at trial.\textsuperscript{398}

\textsuperscript{391} Residency-General of Korea, \textit{Annual Report for 1907 on Reforms and Progress in Korea} (1908) at 25.
\textsuperscript{393} Residency-General of Korea, \textit{Annual Report on Reforms and Progress in Chosun Korea 1910-11} (1910) at 13.
\textsuperscript{394} Edward J. Baker, \textit{The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919} (Harvard Law School Studies in East Asian Law, 1979) at 37. Also, Lee says that ‘Japanese colonialists had believed that Koreans had only a vague notion of private rights. The findings of the researchers, however, did not confirm this belief. Korea was found to have customs that conformed to the juridical categories for which the Japanese civil code provided.’ See Chulwoo Lee, ‘Modernity, Legality, and Power in Korea Under Japanese Rule’ in Gi-Wook Shin & Michael Robinson (eds), \textit{Colonial Modernity in Korea} (Harvard University Press, 1999) at 26.
\textsuperscript{395} Alexis Dudden, \textit{Japan’s Colonisation of Korea: Discourse and Power} (University of Hawaii Press, 2005) at 101-105 (for the photos, see figures 6 and 7 on these pages).
\textsuperscript{396} Kyong Whan Ahn, ‘The Influence of American Constitutionalism on South Korea’ (1997) 22 \textit{S Ill U L J} 71 at 72. Ahn (at 72) says that the Japan’s ‘creative adaptation’ of Western law in Korea was for Japan’s ‘exploitative purposes’ in Korea.
\textsuperscript{398} Residency-General of Korea, \textit{Second Annual Report on Reforms and Progress in Korea 1908-9} (1909) at 61.

174
(b) From 1912, it became unnecessary for a court of the first instance to give a statement of reasons for its decision in minor criminal cases unless the case was appealed to a higher court.\textsuperscript{399} (It should be remembered that the alleged lack of giving statements of reasons for decisions was one of the 'excuses' for Japan's intervention in the Korea's legal system.)

(c) As mentioned earlier, the use of flogging as a punishment remained. The estimated total number of people flogged between 1913 and 1920 was as high as 600,000.\textsuperscript{400}

(d) Regulations severely restricted the freedom of press and assembly.\textsuperscript{401}

(e) Laws restricted various kinds of economic freedom, often resulting in hardship.\textsuperscript{402}

Thus, it has been noted that the 'practices that had been severely criticised by the Japanese themselves' only a few years before were reinstated in new forms that were often worse than their original forms'.\textsuperscript{403} Further, there were laws that more directly and severely suppressed the rule of law. These include the Rules on the Punishment of Police Offences of 1912, which gave the police virtually unlimited power to regulate people's behaviour.\textsuperscript{404} Another law was the Peace Preservation Law of 1925, which provided for punishments against any involvements that undermined the imperial household or the Shinto shrines.\textsuperscript{405} In this regard,

\textsuperscript{399} Residency-General of Korea, \textit{Annual Report on Reforms and Progress in Chosun Korea 1912-13} (1912) at 46.

\textsuperscript{400} Henry Chung, \textit{The Case of Korea} (Fleming H. Revell, 1921) at 82. The problem with flogging was that it became the central method of punishment. See Chulwoo Lee, 'Modernity, Legality, and Power in Korea Under Japanese Rule' in Gi-Wook Shin & Michael Robinson (eds), \textit{Colonial Modernity in Korea} (Harvard University Press, 1999) at 32. Lee (at 32 and 33) says that by 1916, 47 per cent of all convicted persons were flogged, and the majority (70 per cent) of them was flogged upon summary judgments.

\textsuperscript{401} The Peace Preservation Regulations of the Residency-General forbade the publication of items that might disturb public order. Also, the Peace Preservation Law of July 1907 gave the Ministry of Home Affairs the power to dissolve any association or forbid any gathering it deemed necessary in order to preserve peace and order. See Edward J. Baker, \textit{The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919} (Harvard Law School Studies in East Asian Law, 1979) at 33-34. In August 1940, all non-official Korean-language newspapers were closed down. This should be contrasted with Chosun society where there was 'rich circulation of ideas, independent of state ideological control'. See Adrian Buco, \textit{The Making of Modern Korea} (Routledge, 2002) at 5 and 44.

\textsuperscript{402} For example, the Rent Control Order of December 1939 froze agricultural rents and empowered local officials to order rent reductions if necessary. Also, the Staple Food Management Law of 1943 required that all rice be delivered to government warehouses, to be paid at officially determined (low) prices and milled and distributed by government agencies. See Gi-Wook Shin, \textit{Peasant Protest & Social Change in Colonial Korea} (University of Washington Press, 1996) at 134. As a result of these laws, peasants in particular suffered significant economic hardship, leading to protests and rebellions.


\textsuperscript{404} Chulwoo Lee, 'Modernity, Legality, and Power in Korea Under Japanese Rule' in Gi-Wook Shin & Michael Robinson (eds), \textit{Colonial Modernity in Korea} (Harvard University Press, 1999) at 37. Lee (at 44) says that 'external sanctions by means of law was redundant'.

\textsuperscript{405} Id at 45-51.
Protective Surveillance Centers were established, and their officials empowered to watch and control the communications of such ‘thought criminals’ until they were ‘converted’.406

The impact of this colonial experience on Korean law and legal culture should not be underestimated. Aspects of Korea’s indigenous legal system, which had been established for a continuous historical period were suddenly discarded. The ‘official reason’ for this was due to the allegedly ‘uncivilised’ and anti-rule nature of the indigenous laws. Korean judges and lawyers, both trained under the Japanese legal system, were constantly presented with such views.407 Also, Korean lawyers were prohibited from going abroad to study law,408 and they were obliged to teach laws that were ‘creatively adapted’ by the Japanese,409 thus significantly shaping the ‘internal legal culture’ of Korea.410 Even though Korea received Western-type laws during the Japanese occupation period, it is doubtful whether it also received the rule of law concept with it; rather, it was undermined.

C. Attitudes towards Western Law

The sequence of events as outlined above indicates Korea’s initial encounter with Western-style law. It has been argued that such events, together with unpleasant memories of Japanese rule, produced ill-will on the part of Koreans towards Western law and legal systems.411 As such, this ‘unfavourable heritage continues to afflict the Westernised legal system of Korea even to this day’.412 When Japanese rule finally came to an end in 1945, the Koreans began to operate a Westernised legal system of their own. But, it is argued, the Koreans had to contend with the legacy of ill-will and apathy towards the new system.413 Hence, the argument goes, the Japanese colonial government created a distrust of law in the minds of the Koreans that persists in Korean society.414

406 Id at 48. Lee says that ‘[a] thought criminal was certified when he converted.’ (Ibid.) He goes on to say that ‘converting ideological offenders was a uniquely Japanese method, which had no parallel even in Nazi Germany.’ (Ibid.)
407 See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 48 (arguing that ‘by the mid-1930s, most members of the Korean colonial elite had been educated and socialised almost entirely under Japanese auspices’).
409 Kyong Whan Ahn, ‘The Influence of American Constitutionalism on South Korea’ (1997) 22 S III U L J 71 at 72. Ahn (at 72) says that ‘Japan’s own creative adaptation of continental European law and state theory was oppressively stamped in Korean minds until 1945’.
410 The impact of colonisation on Korea’s ‘internal legal culture’ was flagged even during the Japanese occupation period. For example, the Kyonghyang Shinmun (a newspaper founded by the Catholic church in Korea in 1906 with Bishop Demange, a French missionary, as the president) repeatedly pointed out the fact that Western countries, unfortunately knowing nothing about Japan’s disguised attempt behind the effort to modernise the Korean law, were misled by Japanese propaganda and even supported it. The newspaper urged Koreans to know their laws. See Chongko Choi, ‘On the Reception of Western Law in Korea’ (1981) 9 Korean J Comp L 141 at 166. Ahn Kyong Whan argues that ‘[t]he influence of Japanese law still persists, particularly in criminal law and public law’. See Kyong Whan Ahn, ‘The Influence of American Constitutionalism on South Korea’ (1997) 22 S III U L J 71 at 72.
411 Pyung-Choon Hahm, ‘Korea’s Initial Encounter with the Western Law 1910-1948 A.D.’ in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 60-61.
412 Ibid.
413 Id at 67-68.
414 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 24-25.
This sort of argument has been put forward to support conventional views about Korean legal culture. The implication is that such a ‘bad’ experience with Western law has resulted in a lack of respect for the law on the part of Koreans. As such, the legal culture of Korea arguably conflicts with many of the ideals of the rule of law. This appears to be an interpretation of Korean legal culture that places undue emphasis on the strong nationalism that stood against the Japanese colonialism at the time. But such an argument ignores the complexity of the legal transplant that took place in Korea. That is, it is too general to say that the ‘bad’ experience of the legal transplant has negatively shaped Korean legal culture. The cultural negotiations that took place during and after the colonial period were far too complicated to be summed up in such a statement.

This nationalistic focus may be ‘a narrow and unforgiving gate through which the facts of history, as well as the historians must pass’. Excessive nationalism may result in a failure to identify the exact effects of the legal transplant process. Would a substantial proportion of the Korean public today actually be aware of the coercive nature of the transplant process in respect of Western law? If so, how would that affect their legal culture? Also, was the hostile attitude of the Koreans towards the Japanese or the laws themselves? If it was towards the laws themselves, what aspects of the laws? If the Koreans were hostile towards laws that were harsh and oppressive, how did that change their attitudes towards the laws that upheld the rule of law? One must be more specific about analysing the effects of this legal transplant.

Colonialism created a situation where aspects of Korean legal culture were distinctly influenced. This process continued throughout the post-colonial period, which is discussed in the next section. It suffices here to refer to two points already mentioned. Firstly, because the Korean lawyers and judges were trained under the Japanese, their ‘internal legal culture’ was influenced by them. Korean lawyers and judges therefore learned to administer laws that significantly lacked rule of law elements. Secondly, upon colonisation Korean indigenous laws suddenly lost force altogether and distorted views about the laws were constantly presented by the colonisers. This would not have helped people to form fair and accurate views about Korea’s deeply rooted legal culture.

---

415 Carter J. Eckert, ‘Exorcising Hegel’s Ghosts: Toward a Postnationalist Historiography of Korea’ in Gi-Wook Shin & Michael Robinson (eds), Colonial Modernity in Korea (Harvard University Press, 1999) at 366. Eckert (at 368) argues that to understand the strong nationalistic feeling among Korean historians, ‘one must remember that for well over a millennium, civilization in Northeast Asia had flowed largely from China through Korea to Japan. ... Japan, on the other hand, had always been regarded as an inferior country in the sinocentric cosmos. For this reason alone, its occupation and colonization of the peninsular were psychological shocks for many Koreans, provoking mixed feelings of shame and wrath’.

416 This kind of distinction resembles the way in which one may distinguish culture from legal culture, discussed in Part II.5 of Chapter 2.

417 It has been said that there were considerable efforts by the Japanese to force assimilation through ‘intensive indoctrination through education and practice’. See Carter Eckert, Offspring of Empire: The Koch’ang Kims and the Colonial Origins of Korean Capitalism, 1975-1945 (University of Washington Press, 1991) at 237.

418 In this regard, one notes Buzo’s comment that ‘[b]y 1945, no possibility existed of reconstituting the Korean state on the basis of indigenous political tradition, or of consciously incorporating elements of the old into the new’. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at vii. He also notes (at 35) that the essence of the Japanese colonisation period was that ‘Koreans were forced to submit to a regime which aimed clearly and unambiguously at the extinction of Korea as a separate, identifiable, autonomous culture'.
D. Colonialism, Globalisation and the Rule of Law

It is noteworthy that the Japanese relied on an alleged need to transplant a legal system based on the rule of law as a major justification for colonising Korea. Thus, the view that Korea lacked the rule of law has become widespread, which (at least) partly explains the conventional views about Korean legal culture. Sally Merry argues that not unlike the earlier colonialism/imperialism, contemporary globalisation subtly also encourages the view that Asia's 'traditional culture' is inferior. Hence, just as with colonialism, the rule of law remains an implicit measure of civilisation in globalisation narratives.

In other words, the conventional view about its indigenous legal culture is sustained not only by Korea's colonial legacy but also by current globalisation narratives, which tend to bias towards indigenous legal cultures. Even now, in the post-colonial period, holders of the conventional view have been quick to make connections between indigenous legal culture and any faults in the legal system. As will be seen below, this ignores the specific reality of how Korea's indigenous legal culture has shaped significant aspects of Korea's modern legal culture. The continuous paradigm created first by colonialism/imperialism and then globalisation has not helped in the accurate assessment of Korea's indigenous legal culture.

2. Legal History of Korea from 1945 until the Present

A. Modernisation and Social Changes

Modernity defines Korean society and culture after the Japanese occupation period — although, to be sure, modernity is relevant for the previous period as well. The concept of modernity originated in the West, but it takes diverse forms and is frequently associated with rationalism, citizenship, individualism, legal-rational legitimacy, industrialism and so on. For Korea, there has been a complex and multifaceted process by which it has evolved into a modern state. Also, there has been a process of rethinking Korean culture in national form, accelerated by the failure of the ancient regime's inability to defend its sovereignty against Japan. Hence, in addition to modernity, the modern history of Korea should also be understood in terms of nationalism — the two concepts mutually influence each other.

It has been argued that 'colonialism intervened in Korea's path to modernity, but this did not automatically make Koreans mere passive recipients of modernity. Koreans

420 Id at 588.
421 There is a debate as to precisely when Korea's modernisation began. Some say it was 1876 when the Treaty of Kanghwa was entered into, while others refer to 1910 when Japan annexed Korea. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at vii.
425 Id at 4-5. In addition, 'colonialism' also influences modernism and nationalism in such an inquiry (ibid).
participated directly and indirectly in the construction of a unique colonial modernity'.426 This is because ‘modernity does not necessarily efface tradition; tradition is often revitalised or even re-invented in reaction to modernity as another resource in identity formation’.427 Also, one must remember that, ‘indices of modernisation must be taken alongside evidence of the strong persistence of tradition’.428 Hence, modern legal culture is not simply a product of Western culture or of a historical contingency; deeply rooted legal culture also shapes modern legal culture in a dynamic way.429

The modern legal culture in respect of women’s rights was discussed in Part III.6.E above. It should be emphasised that modernity provided Korean women with a distinctive opportunity to renegotiate their rights. This process started towards the end of the Chosun Dynasty period, when Korea’s modernisation began. For example, in a petition to Emperor Kojong dated 1 September 1898, women leaders asked for the establishment of a girls school ‘for the purpose of contributing to the strengthening of the nation through loyalty and patriotism’.430 Thus, Korean women attempted to seize opportunities created through modernity and much-shared nationalistic sentiment at the time. They subsequently became active in public spheres, forming various women’s bodies and movements.431 The earlier ‘passive resistance’ became more overt and direct acts. The legal cultural change in Korea in this period was not a simple matter of assimilation into Western legal culture. But the intervention of Western legal culture created a ‘semantic field’ in which Korea’s deeply rooted legal culture could renegotiate, and place a new demand upon, the laws and the legal system.

Part III.4 suggested that the modern and normative legal cultures of Korea do not support social status distinctions. In this regard, one finds that modernity and nationalism have also created an opportunity for the renegotiation of the law’s treatment of social status distinctions.432 As early as the colonial period, the concept of nongmin (peasantry) was used by Koreans to signify a source of authentic Koreanness and to preserve an essentialised Korean ethnic identity.433 Ever since, the nongmin concept has continued to occupy an important place in the national imagination – reimagining Korea as residing in the

426 Id at 11.
427 Id at 16.
428 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 43.
429 It has been argued that foreign influence has had little influence on Korean culture and politics, including the reversion to democratisation in 1987. Similar argument is made even in relation to North Korea where direct Soviet and Chinese influence on North Korea’s culture is said to be limited. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 10.
431 Id at 200.
Also, the liberating movement of the *paekchong* (people who were regarded inferior to even the low-status slave) in this period also indicates a new cultural shift.\(^{435}\)

Given the low social category of *nongmin* in Korea, why did Koreans view it as the ‘essentialised Korean ethnic identity’? The immediate reason was that the concept was used to resist Japanese occupation and to assert national identity.\(^{436}\) But it could also be seen as the indigenous legal culture in respect of social status distinctions finding a new cultural space to negotiate. It is important to note that the concept of *nongmin* was not merely a convenient slogan for the elites to establish political support. The peasants themselves were active and assertive, making their own history through protests and resistance.\(^{437}\)

One explanation for such movements was people’s understanding that the *yangban* had failed to keep Korea’s sovereignty and economic capability, and that it was now the *nongmin* who produced most of Korea’s wealth.\(^{438}\) Hence, the traditional Confucian-based system, which legitimised the humiliation of low class people and the *paekchong* in particular, was challenged. Another explanation is that it was ‘basically defensive and restorative against threats to subsistence and intrusions by the colonial state and impersonal market forces’\(^{439}\) (and yet it was also a ‘forward-looking’ endeavour to ‘exploit the new opportunities transformation creates’).\(^{440}\) Thus, modernity and nationalism allowed the normative legal culture in respect of social status distinctions to express itself in terms of new laws and a new legal system.

### B. The United States Military Government

The United States military government in Korea began upon the surrender of the Japanese on 2 September 1945 and by the Proclamation No. 1 of 7 September 1945. The United States military government lasted for three years. Koreans became subject to the proclamations, ordinances, regulations, orders and enactments of the Supreme Commander for the Allied Powers. Ordinance No. 21 of 2 November 1945 provided that ‘all laws, regulations, orders or notices issued by any former government or having legal effect as of 9 August were continued in force unless especially repealed or modified by the Military Government’. The effect of this ordinance was that existing Japanese laws would continue in force.

---

\(^{434}\) Ibid. Such a movement ‘gave voice to a burgeoning sense of ethnic pride in Korean achievement and potential after decades of subjugation to foreign standards’. See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 140.


\(^{436}\) Lee contrasts the lack of interest of the Koreans to assimilate themselves to the Japanese to the Taiwanese position who ‘drew on the notion of assimilation in struggling to improve their situation within the colonial order’. See Chulwoo Lee, ‘Modernity, Legality, and Power in Korea Under Japanese Rule’ in Gi-Wook Shin & Michael Robinson (eds), *Colonial Modernity in Korea* (Harvard University Press, 1999) at 29.


\(^{440}\) Id at 15.
Nevertheless, the military government did enact laws that were concerned with 'welfare and democracy' for the Korean people.\textsuperscript{441} But overall, the United States military government with its military trained minds was poorly suited to deal with Korea and generally adopted repressive policies, often intervening to deny Korean labour basic rights.\textsuperscript{442} Hence, it cannot be said that this period provided Korea with a significant opportunity to adopt a legal system that was firmly based on the rule of law.

It has been said that, on the whole, the United States military government's influence on the Korean legal system was slight.\textsuperscript{443} The Japanese codes remained in effect; the organisation of the judiciary, the procuracy, the bar, the legal education and its curriculum and the bar examination remained fundamentally unchanged.\textsuperscript{444} Further, the United States military government suppressed peasant participation in politics, accusing peasant groups of Soviet-backed North Korean manipulation.\textsuperscript{445} The impact of the United States military government should not be undermined when considering the legal culture of Korea. Aspects of legal culture formed during the colonial period (discussed above) continued throughout the United States military government period and beyond.

C. Modern Laws of Korea

\textit{i. Modern Legal History}

With unification of the two Koreas under the trusteeship of the United States and the Soviet Union failing, Korea was formally divided into the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea) in 1948. North Korea was under the control of Kim Il Sung, and Rhee Syngman was elected as the President of South Korea. On 25 June 1950, the Korean War began, and after three years, a truce was signed on 27 July 1953. After the war, both South and North Korea developed their own legal systems: for North Korea, it was along the communist lines, and for South Korea, its legal system was based on the Western democratic model.

\textsuperscript{441} The following new laws were created: (a) Ordinance No. 121 of 17 November 1946, establishing a 48-hour week with overtime pay for industrial, commercial and governmental employees. (b) The Child Labor Act (Public Act No. 4) of 19 June 1947, regulating child labour according to categories of occupations. (c) Labor Department Orders No. 1 and No. 2 of 15 September 1947, regulating employment conditions. Also, in the area of criminal procedure, laws that protected the rights of the accused were enacted pursuant to Ordinance No. 176 of 20 March 1948. The law provided, among other things, the following: (a) The police were required to obtain a warrant for an arrest. (b) If an arrest was without a warrant, the police needed to secure a warrant within 48 hours. (c) A person arrested by the police had to be informed of the charges against them immediately after arrest with a right to legal counsel. (d) An arrested suspect was to be given the right to apply to a competent court for an inquiry into the legality of the restraint. In respect of basic liberties, the Proclamation of the Rights of the Korean People was enunciated on 5 April 1948 under which eleven 'inherent liberties' were enumerated, much like those found in the American Bill of Rights. See Pyung-Choon Hahn, 'Korea's Initial Encounter with the Western Law 1910-1948 A.D.' in Sang-Hyun Song (ed), \textit{Korean Law in the Global Economy} (Bak Young Sa Publishing, 1996) at 73.

\textsuperscript{442} Adrian Buzo, \textit{The Making of Modern Korea} (Routledge, 2002) at 62.


\textsuperscript{444} Pyung-Choon Hahn, 'Korea's Initial Encounter with the Western Law 1910-1948 A.D.' in Sang-Hyun Song (ed), \textit{Korean Law in the Global Economy} (Bak Young Sa Publishing, 1996) at 69 and 74.

As a result of the transplant of Japanese laws, Korea’s legal system is similar to the Japan’s, with some influence from the American model. Thus, the Korean legal system essentially belongs to the civil law and its system of codified laws. The six basic codes of law in Korea are the Constitution, the Civil Code, the Commercial Code, the Code of Civil Procedures, the Criminal Code and the Code of Criminal Procedure. In addition to the codes, there are statues, Presidential Decrees and Ministerial Ordinances.

Significant revisions of laws have taken place since the establishment of the Republic of Korea. Korea’s modern laws largely support the rule of law concept. Korean law is increasingly becoming sophisticated, and ‘gaps’ in law are rapidly becoming filled with highly workable and detailed legislation.\(^446\) This should not be underestimated given the state of the laws inherited by the Republic. Unlike colonised countries that inherited British-style legal systems,\(^447\) Korea’s laws as at 1953 significantly lacked rule of law elements while its indigenous laws were largely forgotten (see Part IV.1.B.iv above). This suggests that a significant part of the rule of law concept as manifested in Korea’s contemporary laws have been consciously adopted by the country. They have not been imposed by any foreign powers.

It is beyond the scope of this thesis to provide a detailed discussion of the current laws and the legal system of Korea. But a brief outline of current official laws would be helpful to illustrate how significant aspects of the modern laws of Korea support the rule of law. As discussed in Part IV.3.C.ii of Chapter 2, the prima facie presumption is that the normative legal culture supports the official law unless proven otherwise. Thus, to the extent that Korea’s official law supports the rule of law, the assumption is that the normative legal culture would also support the rule of law. Set out below is a broad outline of the modern official laws of Korea.

\(\text{ii. Constitutional Law}\)

The modern Constitution of Korea was proclaimed on 17 July 1948. Subsequently, the Constitution went through several amendments. Most of these arose out of the wishes of several Korean presidents to increase their power and/or prolong their tenures.\(^448\) It was not until the 1987 amendment, which achieved a more mature, democratic constitution that both the major and the opposition parties of the National Assembly agreed to the amendment.\(^449\)

Aspects of Korea’s constitutional laws are further discussed in Chapter 4.\(^450\) It suffices to note here that the Constitution and the Constitutional Court currently act as the guardian of the rule of law in Korea. The fundamental rights provided for by the Constitution

\(^{446}\) See the hypothesis in Part IV.3.C.iii of Chapter 2.

\(^{447}\) These are generally said to have inherited legal systems that support the rule of law. See, for example, Sally Engle Merry, ‘Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia’ (2003) 28 Law & Soc Inquiry 569 at 589 (discussing British colonialism in Central Africa).

\(^{448}\) Chongko Choi, Hankukpopinmun [Introduction to Korean Law] (Bak Young Sa, 1994) at 22. Examples include Presidents Rhee Syngman and Park Chung Hee. For a further discussion of this issue, see Part IV.3.B below.

\(^{449}\) Id at 25.

\(^{450}\) Also, for an overview of the Korean Constitutional Court system, see Jibong Lim, ‘Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions’ (2002) 24 Loy LA Int’l & Comp L Rev 327 at 333-348.
are rigorously protected and enforced by way of judicial review of the Court. The Court enjoys strong political and public support, and its decisions are well respected.

iii. Administrative Law

Although there is no administrative law code for Korea, a bundle of legislation relates to, and constitutes, Korean administrative law. During President Kim Young Sam’s government, there were administrative reforms aimed at expanding citizen recourse and achieving transparency in government decision-making. For example, sections 5 and 7 of the Basic Law on Administrative Regulation establish the general principle of cost–benefit analysis, requiring government agencies to conduct regulatory impact analyses.

iv. Civil Law

Until the Treaty of Kanghwa was entered into between Korea and Japan in 1876, civil matters were mainly regulated by the customary laws of Korea. The Civil Code of Korea was promulgated on 22 February 1958 and was based largely on the laws of Japan, Germany and Switzerland. Certain aspects of the Civil Code are still based on some of the customary laws of Korea. Chapter 4 discusses some of the Constitutional Court cases dealing with these customary laws. Generally speaking, the result of the judicial review has been to uphold laws supporting the rule of law.

v. Commercial Law

The Commercial Code of Korea was promulgated on 20 January 1962, and it consists of chapters on general principles, commercial transactions, company law, insurance law and maritime law. These laws attempt to accommodate Korea’s rapidly expanding economy. In addition, large corporations (including chaebol groups) are increasingly adopting rigorous internal codes of conduct that act as ‘soft law’ governing their business conduct and activities. Chapter 5 further discusses the extent to which Korea’s commercial law has

---

451 The legislation includes the Government Organisation Act, the Regional Government Act, the National Public Officer Act, the Regional Public Officer Act, the Administrative Decisions Act, the Administrative Proceedings Act, the Act on Assembling and Public Protest and the Military Service Act. Together with the Constitution, much of this legislation affords various rights to (as well imposing obligations on) Koreans.

452 Promulgated on 22 August 1997.


454 Chongko Choi, Hankukpopinnun [Introduction to Korean Law] (Bak Young Sa, 1994) at 50.

455 Act No. 471.

456 Chongko Choi, Hankukpopinnun [Introduction to Korean Law] (Bak Young Sa, 1994) at 56.

457 See the case studies in Chapter 4.

458 Act No. 1000.

459 Other related statues include the Act on Cheques, the Insurance Business Act and the Securities Exchange Act.

460 See Part II.1 of Chapter 5.

461 See Craig P. Ehrlich & Kang Dae-Seob, ‘A Look at Korean Corporate Codes of Conduct’ in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 95-113. Ehrlich and Kang note that these codes are not yet rigorous enough. Nevertheless, given the current trend of adopting such codes, they are a positive development.
been developed to provide comfort to international investors in cross-border financing transactions.

vi. Criminal Law

Korean criminal law has been influenced by Japanese, German and Chinese laws as well as Korean customs.\(^{462}\) The Criminal Code\(^ {463}\) was promulgated on 18 September 1953.\(^ {464}\) The National Security Law\(^ {465}\) was initially used by President Rhee Syngman as a weapon against certain communist groups that allegedly threatened Korea’s national security. This law has been heavily criticised because of the way in which it has been used to undermine individuals’ rights and freedom and the rule of law.\(^ {466}\) There has been continued resistance and protests against such laws,\(^ {467}\) and the prospect for eliminating improper use of such laws is improving in Korea, particularly under the current Roh Moo Hyun government.\(^ {468}\) Part IV.3.B below discusses the implications of the recent authoritarian regimes of Korea for Korean legal culture.

vii. Civil and Criminal Procedures

Prior to the modern period, there was no distinction between civil and criminal proceedings in Korea (see Part III.8.A above). In April 1960, the Civil Procedure Code\(^ {469}\) was promulgated, and on 23 September 1948 the Criminal Procedure Code\(^ {470}\) was promulgated. There have been significant efforts to ensure efficiency in the judicial process.\(^ {471}\) The ‘right to a speedy trial’ is guaranteed by the Constitution.\(^ {472}\)

viii. Other Laws

An increasing number of other statutes have served to fill in ‘gaps’ in laws.\(^ {473}\) This indicates a significant degree of what Friedman refers to as ‘legalisation’.\(^ {474}\) Recently, the National

---

\(^{462}\) Chongko Choi, *Hankukpopinmun* [Introduction to Korean Law] (Bak Young Sa, 1994) at 76.

\(^{463}\) Act No. 298 (18 September 1953).

\(^{464}\) There are several related statutes including the Act on Assault and the Act on Prohibiting the Transfer of Assets to Overseas.

\(^{465}\) Act No. 10 (1 December 1948). Yang argues that the predecessor of this law might be the Law for the Maintenance of Public Order, which was used by the Japanese during the colonial period for similar purposes. See Kun Yang, ‘Law and Society Studies in Korea: Beyond the Hahm Thesis’ (1989) 23 *Law & Soc’y Rev* 891 at 897.

\(^{466}\) See, for example, Kuk Cho, ‘Korean Criminal Law and Democratisation’ in Tom Ginsburg (ed), *Legal Reform in Korea* (RoutledgeCurzon, 2004) at 72-73.

\(^{467}\) Other laws include the Social Security Act (Act No. 2769, 16 July 1975) and the Security Surveillance Act (Act No. 4132, 16 June 1989).

\(^{468}\) See, for example, Kuk Cho, ‘Korean Criminal Law and Democratisation’ in Tom Ginsburg (ed), *Legal Reform in Korea* (RoutledgeCurzon, 2004) at 71-84.

\(^{469}\) Act No. 547.

\(^{470}\) Act No. 341.

\(^{471}\) Article 27 (3) of the Constitution. For a discussion of Korean legal culture in this regard, see Part III.8.D above.

\(^{472}\) See the hypothesis in Part IV.3.C.iii of Chapter 2.
Assembly enacted the Act on Foreign Workers,\textsuperscript{475} which affords increased rights to foreign workers working in Korea. This is seen as a significant step forward in achieving the rule of law.\textsuperscript{476}

\textbf{ix. The Judicial System}

Article 101(2) of the Constitution states that ‘[t]he court shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels’. Other than the Supreme Court, there are High Courts, District Courts, Family Courts and Specialist Courts.\textsuperscript{477}

Judicial autonomy, an important element of the rule of law,\textsuperscript{478} is well observed in Korea.\textsuperscript{479} The Chief Justice of the Supreme Court is appointed by the President with the consent of the National Assembly.\textsuperscript{480} The term of office of the Chief Justice is six years and he or she cannot be reappointed.\textsuperscript{481} The other Supreme Court justices are appointed by the President on the recommendation of the Chief Justice and with the consent of the National Assembly.\textsuperscript{482} Their terms of office are also six years, but they may be reappointed.\textsuperscript{483} In addition to the way in which the Supreme Court judges are appointed, the Constitution also prescribes certain restrictions for removing them from office,\textsuperscript{484} thus protecting the judges to a considerable degree from political or other influence. The creation of the Constitutional Court in 1988 was also a stepping stone to realising the rule of law through the judiciary (see Part II.3 of Chapter 4).

3. Modern Korean Legal Culture and the Rule of Law

A. Introduction

As discussed in Parts IV.1 and IV.2 above, Korea did not inherit a legal system that supports the rule of law from the colonial period, and the three years of the United States military government did not effect substantial changes to this situation. This was followed by three

\textsuperscript{474} Lawrence Friedman, ‘Introduction’ (2003) 4 Theoretical Inq L 437 at 443. According to Friedman, ‘legalisation’ means a web of rules and regulations penetrating into various sectors of the public irrespective of factors of sex or social status.

\textsuperscript{475} The Act came into force on 1 August 2004.


\textsuperscript{477} District Courts and Family Courts are courts of first instance. They have single-judge courts and appellate courts to hear appeals of cases decided by the single-judge courts. High Courts hear appeals from administrative agencies and from collegiate divisions of District Courts. The Supreme Court hears appeals from High Courts and appellate divisions of District and Family Courts. See generally the Court Organisation Act (Act No. 3992, 4 December 1987).


\textsuperscript{479} Kyong Whan Ahn, ‘The Influence of American Constitutionalism on South Korea’ (1997) 22 S Ill U L J 71 at 80.

\textsuperscript{480} The Constitution, Article 104(1).

\textsuperscript{481} The Constitution, Article 105(1).

\textsuperscript{482} The Constitution, Article 104(2).

\textsuperscript{483} The Constitution, Article 105(2).

\textsuperscript{484} The Constitution, Article 106.
years of destructive war between the two Koreas, which left continuous political and military tensions between them. Thus, when Korea (South) tried to establish its legal system after the war, it was left with very little resources to create a rule of law society. It is in this context that one must view the modern laws and legal culture of Korea. It was not just the 'economic miracle' that Koreans achieved; their legal system is also a remarkable achievement from the rule of law perspective.

The latter achievement is often under-appreciated. Conventional views about Korean legal culture still seem to prevail among many commentators, both Korean and non-Korean. One of the reasons for this seems to be related to the series of authoritarian regimes in Korea in recent years – notably, those of Presidents Rhee Syngman, Park Chung Hee and Chun Doo Hwan. The implication is that their regimes conflict with rule of law ideals. This section will first examine Korea's legal culture under these authoritarian regimes. Then, Korea's modern legal culture as evidenced in survey results will be analysed.

B. Authoritarianism or the Rule of Law?

Authoritarianism explains aspects of modern Korean government: it has been a characteristic of many of its leaders. Many writers associate this characteristic with Confucian traditions, where rulers are expected to govern the country by their discretion rather than through the rule of law. It has been argued that traditional legal culture required benevolence of its rulers, and so long as the rulers possessed such qualities, they could enjoy limitless authority, unrestricted by the law. For example, the yangban were largely free from law, and should a yangban's act be challenged by law, it was regarded as humiliating. Hence, it is argued

485 Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 68. Referring (at 68) to the occupying powers in Korea prior to this time, Buzo comments that ‘they were occupying powers, not nation builders' (emphasis in original). Buzo (at 106) describes the Japanese legacy of the legal system in Korea in 1948 as ‘a system in which the constitution, the electoral process and the nation’s democratic institutions were corrupted, civil rights and the due process of law frequently disregarded, freedom of expression restricted, and political opposition suppressed and discouraged'.

486 Vogel, referring to Korea’s economic recovery after the war, says ‘[n]o nation has tried harder and come so far so quickly, from handicrafts to heavy industry, from poverty to prosperity, from inexperienced leaders to modern planners, managers, and engineers’. See Ezra Vogel, The Four Little Dragons: The Spread of Industrialisation in East Asia (Harvard University Press, 1991) at 65. Also, Aliber says that '[t]he economic success of Korea in the past twenty-five years has been phenomenal – almost without parallel in modern economic history... This sustained rapid increase for more than twenty-five years has no effective parallel in other countries.' See Robert Z. Aliber, Financial Reform in South Korea' in Lee-Jay Cho & Yoon Hyung Kim (eds), Korea’s Political Economy: An Institutional Perspective (Westview Press, 1994) at 341.

487 See for example, Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 40 (arguing that the Korean bureaucracy has been authoritarian and paternalistic due to Korea’s Confucian past), and Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ichokak, Publishers for Korea Institute, Harvard University, 1990) at 348 (implying that Rhee Syngman's authoritarian rule was related to Confucianism).

488 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 18. Hence, it has been said that Korean people still expect their political leaders to be 'honorably poor', unsullied by material greed. See Chaikhoheem, 'Honesty, Confucian Civic Virtue, and Ritual Propriety' in Daniel A. Bell & Chiheung Hahn (eds), Confucianism for the Modern World (Cambridge University Press, 2003) at 42. For a similar argument made in respect of the imperial Chinese culture, see Howard J. Wechsler, Offerings of Jade and Silk: Ritual and Symbol in the Legitimation of the T'ang Dynasty (Yale University Press, 1985).

489 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at 18.
that the authoritarianism shown by the recent Korean government supports conventional views about Korean legal culture. There can never be a sharp distinction between the elite and the masses because the elite has to solicit support from the masses even in a very authoritarian regime. Thus, the conventional view is that although modern official laws may support the rule of law, the legal culture does not, and this has been shown by successive authoritarian regimes.

Under the authoritarian regimes of Presidents Rhee Syngman, Park Chung Hee and Chun Doo Hwan, constitutional rights were suspended and criminal law was used as an instrument to maintain the regimes and suppress dissidents. For example, in 1980, the former President Kim Dae Jung was sentenced to death for violating the National Security Law and the Anti-Communist Act for his alleged sedition in connection with the Kwangju incident. The Kwangju incident itself was an event in which Chun illegitimately attempted to rise to power by killing thousands of Kwangju citizens and protesters.

Are such events indicative of the influence Confucian tradition on Korea's legal culture? Has the Confucian tradition contributed to the authoritarianism shown by some of Korea's modern rulers, together with the passive and blind obedience of its subjects? It has been suggested that traditionally in Korea, the king was in a sense the head of everyone's family and that it was unthinkable to betray or disobey him. This meant that people would submit to authority without question, and that authoritarianism and elitism were

---


491 Examples include the following: (a) President Rhee Syngman's use of the National Security Act, and the constitutional amendments made by him in order to extend his tenure during the First Republic. (b) Continuing corruption during the Second Republic under President Yun Po Son. (See Young Woo Han, Dashitchaneun Wooryuexka [Korean History Revisited] (Kyungsewon, 2005) at 592). (c) The 'Yuain Constitution' of President Park Chung Hee during the Third Republic. Pursuant this, Park was able to continue his presidency by the election of a newly formed committee and expand presidential power over the National Assembly and the judiciary. (See Young Woo Han, Dashitchaneun Wooryuexka [Korean History Revisited] (Kyungsewon, 2005) at 596-597). Further, Emergency Measure No. 9 introduced in May 1975 made it a criminal act to criticise the president. (Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ilchokak, Publishers for Korea Institute, Harvard University, 1990) at 369). (d) The Kwangju incident in May 1980 where Chun Doo Hwan's army killed hundreds of civilians while suppressing public protests. Chun used the incident to rise to power to become the President during the Fifth Republic.


493 Act No. 3318 (1980).

494 The sentence was later commuted to life imprisonment in 1981 and then to a twenty-year term in 1982.

495 For a discussion of the Kwangju incident, see Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson & Edward W. Wagner, Korea Old and New: A History (Ilchokak, Publishers for Korea Institute, Harvard University, 1990) at 373-375.

496 See Suk Tae Lee, 'South Korea: Implementation and Application of Human Rights Covenants' (1993) 14 Mich J Int'l L 705 at 707. Lee says that '[t]hese human rights violations reinforce the deeply-rooted Korean notion that the law is an instrument at the State’s disposal, not a device to regulate state power'.


498 Dae Kyu Yoon, Law and Political Authority in South Korea (Kyungnam University Press, 1990) at viii.
fostered. But did Korea’s tradition reflect the above-discussed incidents under its authoritarian regimes? In considering this question, the following observations are made.

Firstly, the fact that Presidents Rhee Syngman, Park Chung Hee and Chun Doo Hwan were authoritarian rulers does not necessarily mean that they had followed some indigenous traditions. The fact may be that they were simply dictators. As discussed in Part III.2.E above, Korean kings had never quite achieved the monopolisation of power as these three Presidents did. The kings had limited roles and rights in effecting changes to the law, and they were subject to the laws themselves. Further, royal powers were carefully and effectively checked by the administrative system and bureaucrats.

But in the modern democratic presidential system, the Presidents’ powers were not as carefully and effectively checked and balanced by the other government entities. Ahn says that when Korea adopted the American presidential system, they ‘misunderstood’ it, and mistakenly afforded the President too much power. This created an environment in which some of the Presidents could not overcome their temptation to exercise powers ultra vires (and some writers relate such weakness to the influence of the colonialism). In other words, it may have been an institutional, rather than a cultural reason that was largely responsible for the creation of the authoritarian regimes (indeed, Rhee Syngman, for example, with his United States background, was hardly a person underpinned by Confucian culture). One should not over-attribute political weaknesses to legal culture.

---

499 Id at 29.
500 See, for example, Kyongguk Taejon (Chosen sostoku chu suin, 1934) at 284.
501 In fact, in 1948 the Korean National Assembly demanded legislative oversight, but the United States insisted on greater presidential accountability. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 75.
502 Kyong Whan Ahn, ‘The Influence of American Constitutionalism on South Korea’ (1997) 22 S Ill U L J 71 at 98-100 (saying (at 99) that ‘[m]any Korean politicians were confused’ and adopted a system pursuant to which ‘the legal powers vested with the president widely exceed the scope of his American counterpart’).
503 See, for example, Byung Ho Park, Geumseuiropkwa Popsasang [Laws of the Recent Times and Legal Philosophy] (Jiawon Publishing, 1996) at 158-159. Park argues that the Japanese were responsible for creating an environment in Korea where the law could be used for authoritarian purposes. Shortly after the Japanese left Korea, those who gained power used the system to suppress rule of law ideals and increase their power. See also Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 20 and 47 (arguing (at 20) that the Japanese system ‘provided subsequent Korean leaders with a powerful model for authoritarian rule’).
504 Buzo makes a similar argument when he says that ‘[t]he normatively strong but functionally weak [Chosun] monarchy has disappeared, and in its developmental stage, the [Republic of Korea] evolved an exceptionally strong state, capable of penetrating into selected areas of civil society and influencing the outlook and values of groups and individuals ... Military-backed authoritarianism appears more and more to be the product of a particular set of circumstances rather than an essential expression of Korean political tradition’. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 12.
The second observation to be made is that the authoritarian regimes under discussion had been strongly and persistently resisted by the public.\textsuperscript{506} For example, the student protest of 19 April 1960 was a result of the public discontent in respect of President Rhee Syngman's election scandals and illegal constitutional amendments. This protest, in which shootings by the police resulted in about one hundred and thirty deaths, was directed against Rhee's authoritarian-style leadership.\textsuperscript{507} As a result of the protest, Rhee resigned a few days later on 26 April 1960. Also, after President Park Chung Hee illegally amended the Constitution in 1972 to prolong his tenure, there were several violent protests by students, religious leaders and the media.\textsuperscript{508} In relation to President Chun's authoritarian regime, the protests by this time had become much more frequent and violent. In 1986 alone, 3,400 people were arrested for protesting, and four university students carried out suicide protests.\textsuperscript{509} 

Such protests show that, unlike what conventional views tend to suggest, the Korean public's response to leadership has not been one of blind obedience. Although some of the past Presidents, notably Chun Doo Hwan, were regarded as lacking moral leadership, others, such as Park Chung Hee, were seen to have had led a moral leadership and to have been responsible for Korea's remarkable economic growth.\textsuperscript{510} Nevertheless, even in the case of Park Chung Hee, the public did not tolerate his attempts to illegally amend the Constitution. The public did not protest because he lacked *li* as a leader (compare Part II.1.D of Chapter 1), but they protested because of the *illegality* involved in his amending the Constitution.\textsuperscript{511} The student protests may be seen as an attempt to achieve the rule of law by constraining the highest levels of government.\textsuperscript{512} Further, such protests may be deeply rooted in Korea's indigenous culture.\textsuperscript{513} More recently, the legal culture underlying public protest was clear when a large demonstration was held in November 2003 in support of improved conditions for migrant workers in Korea. Clearly, this was a demand for the rule of law.

A third explanation for Korea's authoritarian political history may be that the Korean government had to effect a quick economic recovery after the War.\textsuperscript{514} This may be why it used a variety of discretionary tools to create a strong, autonomous and state-directed

\textsuperscript{506} Each leader had initially promised true democracy whereby popular needs and expectation would be met; this was how they were elected. See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 111.

\textsuperscript{507} Young Woo Han, *Dashichatneun Wooriyueksa* [Korean History Revisited] (Kyungsewong, 2005) at 590.

\textsuperscript{508} Id at 596.

\textsuperscript{509} Id at 607.

\textsuperscript{510} Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 105 (arguing that Park 'laid much of the groundwork for the years of rapid economic growth from the mid-1960s onwards').

\textsuperscript{511} See Young Woo Han, *Dashichatneun Wooriyueksa* [Korean History Revisited] (Kyungsewong, 2005) at 596.


\textsuperscript{513} Buzo notes that in Chosun society 'ideas, concepts and opinions circulated beyond the realm of the state and formed a species of "public opinion"'. See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 5. He says that the expression of 'public opinion' in the form of remonstrance, petitioning of authority or riot and insurrection was common in Chosun society.

\textsuperscript{514} Id at 74 (referring to Rhee's regime, Buzo comments that, 'in fact, many aspects of Rhee's behaviour were the result of the habitual extreme weakness of the cards in his hand').
economic growth.\textsuperscript{515} Of course, this does not excuse authoritarianism. But the point is that economic reasons (coupled with a strong sense of imminent threat from North Korea) may have provided incentives to use authoritarian rules.

To sum up, Korea’s current official laws generally support rule of law ideals. Institutionally, the court systems are based on Western-style judicial systems and are well organised. The Constitutional Court, in particular, acts as the guardian of the rule of law (this is discussed in more detail in the next chapter). But Korea recently experienced authoritarian regimes under which rule of law ideals were heavily suppressed. However, such incidents should not be over-emphasised in interpreting the country’s legal culture. It is difficult to find a convincing connection between such incidents and Korea’s indigenous culture.\textsuperscript{516} If anything, these incidents show the strong public demand for the rule of law – expressed through continuous protests. Such demands are consistent with the normative legal culture supporting the rule of law. The past suppression of such demands by a handful of dictators in Korea did not change the deeply rooted legal culture of Koreans supporting the rule of law. One historian sums up the position as follows:

‘For all the theorising about authoritarianism in the Korean political tradition, South Koreans had a well-developed, if seldom articulated, sense of their civil rights. The profound abhorrence of concentration of power helped the country to avoid despotism in pre-modern times, and when measured against the opportunities of power in the modern era, it has provided a remarkably constant check on modern political leadership in the [Republic of Korea]. There was a balance of power within the Korean community that made for a tough social texture that constrained authoritarian leaders and softened the impact of their rule on families and individuals.’\textsuperscript{517}

One may note President Roh Moo Hyun’s recent reform efforts. These include the creation of the Judicial Reform Commission and reforms in respect of the prosecution system,\textsuperscript{518} indicating a further step towards the rule of law. It has been said that democratisation has also transformed Korean criminal law and procedures, reflecting and producing social change.\textsuperscript{519} For example, in 1988 a committee was established in the National Assembly to repeal or revise laws that infringed upon fundamental rights and contradicted the Constitution.\textsuperscript{520} Such reform efforts will further strengthen Korea’s rule of law environment.

C. Surveys of Korean Legal Culture

So far, Korean legal history has been examined for the purposes of ascertaining the modern legal culture of Korea. It is also instructive to examine the results of several surveys of Korean legal culture. Survey results may not always be meaningful in interpreting legal


\textsuperscript{516} In this regard, Buzo argues that ‘claricatures of dynastic despotism proliferate in the non-specialist literature and are often adduced to suggest historical roots for Korean political authoritarianism in its various guises’. See Adrian Buzo, \textit{The Making of Modern Korea} (Routledge, 2002) at 6.

\textsuperscript{517} Id at 142.


\textsuperscript{520} Ibid.

190
The emphasis in this thesis is on the qualitative aspects of legal culture, rather than on its quantitative aspects.\(^{522}\) Hence, legal and practical analysis, rather than statistical analysis, has been the primary method of study used in this thesis. Nevertheless, some helpful references may be added by considering survey results.

It has been suggested that Confucian culture that once may have opposed formal regulation has now either disappeared or been rendered irrelevant to modern-day Korea (see Part II.5 of Chapter 1).\(^{523}\) Such an observation is probably reasonable given the institutional and societal changes that have taken place in Korea in the last fifty years or so. As may be seen from the discussion in this chapter of various recent events and changes in law, there is clear evidence that Confucianism is not a key feature of Korean legal culture today.

\section*{Survey by Yonsei University}

This conclusion is also evident from the results of surveys that have been conducted in relation to the Korean public’s legal culture.\(^{524}\) One such survey was carried out during the 1960s by the Social Science Research Institute of Yonsei University with a research grant provided by the Asia Foundation.\(^{525}\) Throughout Korea, 1,310 Koreans twenty years or older were interviewed in person. Great efforts were made to ensure that the interviewees correctly

\footnotesize


\(^{522}\) This kind of approach was also adopted by Atiyah and Summers in showing the difference in the legal reasoning between England and the United States. See P.S. Atiyah \\& Robert S. Summers, \textit{Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions} (Oxford University Press, 1987) at vii. The similarity between their work and this thesis is that both study (and compare) many aspects of the legal cultures of different countries (id at 4-5).

\(^{523}\) Dai-Kwon Choi, ‘The Emergence of Formalised Intermediate Norms in Korea: The Case of Sexual Harassment’ in Tom Ginsburg (ed), \textit{Legal Reform in Korea} (RoutledgeCurzon, 2004) at 89. See also Benjamin A. Elman, John B. Duncan \\& Herman Ooms, ‘Introduction’ in Benjamin A. Elman, John B. Duncan \\& Herman Ooms (eds), \textit{Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam} (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 13 (stating that, what Confucianism ‘might mean in the daily life of most South Koreans today remains unclear’). As well, see Adrian Buzo, \textit{The Making of Modern Korea} (Routledge, 2002) at 7 (arguing that ‘[p]owerful forces of egalitarianism and secularism have reshaped this ethos in the modern era’). However, Duncan notes an article written by President Kim Dae Jung in the monthly \textit{Sin Donga} (May 1999 edition), which urged a reinterpretation of Confucianism for application in society. See John B. Duncan ‘Uses of Confucianism in Modern Korea’ in Benjamin A. Elman, John B. Duncan \\& Herman Ooms (eds), \textit{Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam} (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002) at 458-459. He argues (at 459) that this ‘reflects an awareness of the centrality of Confucianism in the contemporary South Korean intellectual discourse on politics, society, and culture’. However, Kim Dae Jung’s statements could be interpreted as indicating the fact the contemporary Korean society lacks Confucianism, which is precisely why he urges a reinterpretation of Confucianism in Korean society.

\(^{524}\) As will be evident from the discussion here of the survey results, it is not easy to ascertain legal culture through surveys. Political, social and economic factors, as well as news of topical events, may have significant impact on survey results. The results may therefore be hard to interpret. Also, ‘public opinion’ may, for present purposes, be more complex than a mere head count. It may represent the ‘operating attitudes among those with power and influence – what opinion leaders thought and what the ordinary person accepted from them’. See Lawrence M. Friedman, \textit{The Legal System} (Russell Sage Foundation, 1977) at 206.

understood the questions and felt free to express their own views. Hahn Pyong Choon, one of the co-ordinators of the survey, initially drew some hypotheses regarding the results. His hypotheses were mainly that Korean legal culture was largely based on Confucian values. The results resemble the list of conventional views about Korean legal culture set out in Part II.1 of Chapter 1.

After reviewing the survey results, Hahn, while arguing that his original hypothesis was generally confirmed, admitted that it should be modified. He then went on to say that “we have discovered most people definitely believe that the world without any law may well be a miserable place to live”. Upon a close review of the outcome of the survey, the better view seems to be that Hahn’s original hypothesis was generally inaccurate. For example, when asked whether they would go to court to settle a family quarrel if it could not be settled within the family, 32.4% of the interviewees said ‘yes’. Hahn stated that “[t]his fact seems to show that the people are not so averse to legal process as we assumed in hypotheses”. Yang Kun, commenting on Hahn’s survey, criticises Hahn for failing to take into account the ‘high legal fees caused by the monopoly of a small number of lawyers’ and the fact that Korea was at the ‘low stage of industrialisation’ at this time, making it even more difficult to afford lawyers.

Another question was: ‘In a lawsuit between someone rich and powerful and a poor farmer, would the former win regardless of the merits of the case?’ The answer by 46.1% of the interviewees was that whichever side was in the right would win the case. This shows considerable confidence in the fairness of the judicial system. This is quite remarkable given the fact that the courts were often intimidated by the authoritarian regimes at the time. When asked for whom the laws were made, 67.1% of the respondents said they were made for the people; 10.9% said they were made for the state; 0.1% thought that they were made because of bad people; and less than 0.01% said they were made for the powerful. The

---

526 This was the period immediately after the Korean War, and there were sensitive issues involving communist North Korea. Hence, the interviewees could easily be intimidated by questions asked by strangers.


528 I'd at 167

529 Ibid.

530 It is not clear which aspect of the survey result Hahn was relying on to support his conclusions. Other than the ones mentioned here, the questions were not the kind of questions that would reveal the legal culture of people in terms of whether the culture supported Confucian values or not. They included: ‘Have you been to court?’, ‘Would you inform the police if you witnessed a crime?’ and ‘Have you registered your title to your property?’. Yang, after reviewing Hahn’s survey, says that Hahn’s conclusions are ‘somewhat prejudiced and even deficient’. See Kun Yang, ‘Law and Society Studies in Korea: Beyond the Hahn Thesis’ (1989) 23 Law & Soc’y Rev 891 at 894.


533 Hahn, again, admitted that his earlier hypotheses were not entirely correct. See Pyong-Choon Hahn & Seung-Doo Yang, ‘The Attitudes of the Korean People Toward Law’ in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975) at 168-169.

conventional view has been that Koreans despise the law because it is seen as a tool of the government to control individuals. But this survey result does not support such a view. It suggests that people tend to believe in the normative value of the law, that the law exists for the people and that it cannot be meddled with by even the most powerful people in the country.

ii. **Surveys by the Korea Legislation Research Institute**

Another significant survey of Korean legal culture was carried out by the Korea Legislation Research Institute in 1991. In addition to its own survey, this research compares the results of three other similar studies carried out by Professor Yang Seung Doo in 1965, Professor Lim Hy-Sup in 1972 and Professor Lee Keun Shik in 1981. Therefore, this research is probably one of the most comprehensive projects of its kind undertaken in Korea. It concludes that:

‘Historically, there has been a lack of both law-abiding spirit and consciousness of rights among the Korean people ... This evaluation of the values and legal consciousness, however, can no longer be valid.’

To be sure, it was apparent in this research that there was a considerably high level of negative feelings towards the way in which law was followed in society. When asked ‘Do you think law is well observed in our society?’, 82.4% of the respondents answered ‘no’. This was probably due to the contemporary history of successive authoritarian regimes suppressing the rule of law. This is evident from the fact that 61.8% of the respondents chose ‘politicians’ when asked who were the worst violators of law. Such a negative attitude about the law-abidingness of politicians seems to have affected the respondents’ views generally. For example, when asked ‘Do you consider a statute legislated by the National Assembly as law made by the people?’, 54% of the respondents answered ‘no’. This is a significant change from Hahn’s survey conducted some 30 years earlier. In Professor Lim’s survey (conducted in 1972), only 14.4% of the respondents answered ‘no’ to the same question. Also, the 1991 survey reveals that when asked ‘Do you think power and wealth would affect the outcome of judgments?’, 94% of the respondents said ‘yes’. This is a dramatic increase from Hahn’s earlier survey where only about 30% of the respondents said ‘yes’. Similar findings were made in Professor Yang’s survey of 1965. Again, this probably reflects the experience of the authoritarian regimes in Korea’s recent history.

---


536 The Korea Legislation Research Institute is a government body responsible for conducting specialised research projects to facilitate the establishment and implementation of the government’s legislation policies. It was established on 21 December 1989 under the Korea Legislation Research Institute Act (Act No. 4141).


538 Id at 135-137.

539 Id at 129.

540 The other respondents said 'enterprisers' (15.6%) and 'public servants' (11%). See id at 136.

541 When asked 'If a rich governor of a province and a poor farmer are in a litigation, who do you think would win?' about a third of the respondents said 'the governor'. See id at 129 and 136.
Another survey was carried out by the Korea Legislation Research Institute in 1994, asking very similar questions to a similar number and group of interviewees. The survey results were broadly similar to those of 1991, but this time it could be seen that the interviewees had more confidence in the legal system. For example, 3.5% more people thought law was well observed in the society, 19% fewer people thought that politicians were the worst violators of the law, and 4% fewer people thought that money and power influence court judgments. These results probably reflect the improved political environment of Korea by the time of the survey.

A more recent survey on Korean legal culture was conducted by the Korea Legislation Research Institute in 2001. This time, the interviewees were asked different types of questions, and therefore a direct comparison against the previous survey results is not possible. Nevertheless, the survey results demonstrate that a much higher level of ‘legal consciousness’ is present among Koreans. For example, 90.6% of the interviewees thought that they needed legal information. Also, 74.6% of the interviewees actually read news or materials relating to law, and 100% of the interviewees were aware of the existence of the Constitution, with 44.4% were actually aware of some provisions of the Constitution. The survey shows that far from lacking interest in the law, Koreans have a high level of awareness of and respect for the law.

Writers tend to attribute the current high level of ‘legal consciousness’ of Koreans to the modernisation of Korea. But this is not entirely convincing. The surveys conducted in the 1960s discussed above also indicate that there was a considerable level of legal consciousness among Koreans, and that many had confidence in the justice system. It must be remembered that this was immediately after the harsh Japanese occupation period and the destructive Korean War. The law and legal system were hardly the concern of many Koreans during this time.

In more recent times, as already discussed, Korea had a succession of authoritarian governments. This unfortunate sequence of events makes it difficult to conduct accurate surveys of Koreans’ attitudes towards law. Not surprisingly, the results of surveys conducted during this period reveal that people did not fully trust either the government or the legal system. It was only when governments started focusing on achieving the rule of law that people began to trust in the legal system again. This time, the survey results show a

---

543 Id at sections II (3) and (4).
545 Id at chapter 4 (1)(1).
546 Id at chapter 4 (1)(2).
547 Id at chapter 4 (1)(3).
548 See for example, Dai-Kwon Choi, ‘The Emergence of Formalised Intermediate Norms in Korea: The Case of Sexual Harassment’ in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 89.
550 Ibid.

194
remarkably positive attitude on the part of Koreans towards the law, particularly the Constitution, which guards people's most fundamental rights.

A word of caution about survey results must be made, however, before they are relied upon too much to interpret legal culture. The problem with survey results include, as Miyazawa argues, the fact that (a) the questions may be so abstract that respondents are asked about matters that they had never considered; (b) scales of questions/answers are not constructed to the extent desirable; and (c) one cannot distinguish whether responses are based on respondents' cultural framework or on rational calculation. Miyazawa argues that more ambitious cross-national, comparative analyses of survey results will indicate truly meaningful data on a particular legal culture. Also, Sally Merry argues that this sort of survey 'flattens the way people understand and use law' - because it 'assumes that each individual has, rather than a series of interpretations of different facets of law, an overall stance toward law as a thing'. Nevertheless, the surveys discussed above provide useful further material for ascertaining some of the attitudes of people towards law in modern Korean society.

V. CONCLUSIONS

Korea's indigenous legal culture prior to the Chosun Dynasty period was not inconsistent with the rule of law. The Hwabaek institution, the matrilocal marriage system, equal inheritance laws, the Principle of Respect for the Royal Ancestor's Constitution and the litigation system are among the evidence that supports this conclusion. Concepts such as stability, clarity and supreme authority of the law, gender equality and rights-consciousness were among the values supported by the early normative legal culture.

The normative legal culture experienced a series of legal transplants and social changes effected by Confucianism, colonisation and modernisation. These processes were relatively short-lived, and they cannot be explained by simple, monolithic paradigms but by involved complex cultural negotiations. The length of their duration is relevant as it forms part of the 'test' for ascertaining normative legal culture (see Part III.4.A of Chapter 2). More significantly, the 'cultural spaces' created by such processes point to a dynamic interplay between indigenous legal culture and imposed norms. Thus, the emerging picture is one in which indigenous legal culture sometimes 'passively resisted' imposed norms but then actively reasserted itself when the opportunity arose. The peasant movements and the increasing public profile of women are among the best examples.

As shown by the study of the modern Korean legal system and the surveys on legal culture, significant aspects of the modern legal culture of Korea support the rule of law. This in turn reinforces the conclusions made above about Korea's normative legal culture. Modern legal culture and normative legal culture are closely related; they support each other. This is further underpinned by the observation that it was neither modernity nor colonialism

552 Id at 229.
553 Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (The University of Chicago Press, 1990) at 5.
that had a determinative influence on modern legal culture; arguably, it was Korea’s deeply rooted legal culture that had a significant and direct bearing on modern legal culture.\footnote{554}

In the next chapter, these findings are further supported by an examination of the activities and decisions of the Constitutional Court of Korea. It will be seen that the Court sometimes bases its decisions upon its views of certain aspects of Korea’s deeply rooted legal culture. These views are mostly consistent with the rule of law. These views are critical, then, to the Court’s cases and to the impact that they have on the fundamental rights of Koreans.

\footnote{554}{In this regard, one notes Buzo’s comment regarding Korea’s reversion to democratisation in 1987 that ‘[f]oreign influence has hovered in the background, shaping the broader international environment but only indirectly influencing how Korean leaders interpreted that environment and acted’. See Adrian Buzo, \textit{The Making of Modern Korea} (Routledge, 2002) at 10. See also Part IV.3.B above.}
Chapter 4 Constitutional Review

I. INTRODUCTION

1. Globalisation and the Rule of Law

A. Colonialism, Globalisation and Conventional Views on Indigenous Legal Cultures

While Chapter 3 was mainly concerned with the first of the two main arguments of this thesis, this chapter deals with both arguments (see Part I.2 of Chapter 1). To recap, the two arguments are:

(a) Significant aspects of the deeply rooted legal culture of Korea are not inconsistent with the rule of law; rather, in many cases, they strongly support the notion of the rule of law. (b) Findings made in respect of the deeply rooted legal culture of Korea may have significant practical applications in certain areas of legal practice, particularly given that one’s view of the findings is likely to influence the way in which one carries out his or her legal practice.

This chapter, firstly, supplements the findings made in respect of the normative legal culture of Korea in Chapter 3, and, secondly, shows that such findings have significant practical consequences in legal practice. The relevant legal practice to be discussed in this chapter will be constitutional review.

It was argued in Part IV.1.D of Chapter 3 that colonialism and imperialism had encouraged the view that Korean indigenous laws lack the rule of law elements; the alleged need to transplant the rule of law was the major legitimating factor at the time. It was also argued that like colonialism/imperialism, the current globalisation process also involves the use of the rule of law concept as the implicit measure of civilisation. Thus, contemporary globalisation also subtly encourages the view that Asia’s ‘traditional culture’ is inferior.1

To be sure, globalisation is an ambiguous and complex concept (see Part III.4 of Chapter 1).2 As such, it may be too simplistic to say that indigenous laws are incompatible with globalisation. But it is also difficult to deny that, within the globalisation process, there is a tension between the modernist imperative and traditional allegiances.3 The tension has been created by the fact that globalisation and the rule of law are closely related,4 and by widespread conventional views about indigenous cultures. As already discussed, the rule of law is seen as an element of the ‘globalisation creed’.5 Thus, globalisation shares significant

---

5 Id at 83.
similarities with colonialism/imperialism: they both claim to incorporate social reform movements to promote the rule of law,⁶ even with the danger of being seen as 'a prevalent and universalist justification for what might otherwise appear to be self-interested prescriptions of policy'.⁷ Indeed, one notes that certain contemporary resistance to globalisation uses anti-colonial arguments.⁸

The assumptions about indigenous legal cultures made in colonialism and globalisation contexts are connected to the conventional views about Korean legal culture in that the former support the latter. The opposite is also true: conventional views about indigenous legal cultures tend to provide additional legitimacy to colonialism and globalisation reform efforts. Hence, it becomes particularly relevant to examine Korean legal culture in the contexts of colonialism and globalisation; the aim is to show how it may be compatible with the proposed reform of the rule of law. Part IV.1 of Chapter 3 discussed how Korea's deeply rooted legal culture dynamically interacted with imposed norms within the cultural space created by colonialism. In this chapter, the focus will be on the interaction between Korean legal culture and the globalisation process as manifested in constitutionalism, which purports to promote the rule of law.

B. Globalisation and Constitutional Review

It has been said that the two most significant trends in the globalisation process has been in the areas of 'corporate/commercial enterprise and human rights/humanitarian standard-setting'.⁹ While the first area will be dealt with in Chapter 5, this chapter mainly focuses on the second. There is a global trend towards judicial empowerment and constitutionalism, which is arguably one of the most significant developments in late twentieth and early twenty-first century government.¹⁰ Bodies such as the World Bank, the World Trade Organisation and the International Monetary Fund demand greater constitutionalism (as part of rule of law reform) from countries with whom these bodies deal.¹¹

It is said that '[c]onstitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication'.¹² Thus, 'courts in many countries would often be influenced, in the remedy as well as the substance, by parallel developments elsewhere'.¹³

---

Ran Hirschl calls this phenomenon 'juristocracy'. There is 'constitutional cross-fertilisation' as national courts around the world look to foreign and international law in adjudicating constitutional issues, particularly in the area of human rights. In the case of the Korean Constitutional Court (referred to in this chapter as 'the Court'), the influence of United States' constitutionalism has been conspicuous in major areas of civil rights law.

What explains such a global trend? Hirschl argues that the global trend towards 'juristocracy' is due to the efforts of political and economic elites, who, while professing to support democracy, attempt to insulate policymaking from the vicissitudes of democratic politics. In addition to Hirschl's reasoning, one should also not ignore the cultural and public support and demand for constitutionalism that political and economic elites are often pressured to deal with. Indeed, the crux of the global constitutionalisation process may be to do with 'cultural standards or values emerging in several countries and influencing each other'. Thus, David Williams argues that '[o]nce there is reference to "culture" or "legal culture", it is surely difficult to avoid injections from other countries or jurisdictions in circumstances where the evidence is timely and appropriate'. This is also evidenced by the fact that 'universalist' treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights explicitly provide for cultural differences. Globalisation does not mean uniformity as each country has its own local customs and expectations with regards to its judiciary.

---

14 Ran Hirschl, 'Globalization, Courts, and Judicial Power: The Political Origin of the New Constitutionalism' (2004) 11 Ind J Global Leg Stud 71 at 71. Regarding this concept, Hirschl (at 71) says that '[a]round the globe, in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries'.


18 To be sure, he does recognise the fact that 'demands for constitutional change often emanate from various groups within the body politic'. See Ran Hirschl, 'Globalization, Courts, and Judicial Power: The Political Origin of the New Constitutionalism' (2004) 11 Ind J Global Leg Stud 71 at 90. But Hirschl says (at 90) that 'unless hegemonic political and economic elites, their parliamentary representatives, and the judicial elites envisage absolute or relative gain from a proposed change, the demand for that change is likely to be blocked or quashed'. The problem with Hirschl's theory seems to be that it does not attempt to identify the real causes for the way in which the hegemonic elites pursue constitutionalisation, and the fact that in a democratic society, public demand is a significant factor that drives politics.


20 Id at 59.


Globalisation has also meant that the influence of colonial institutions is fading and judicial globalisation is increasingly taking place.\textsuperscript{23} It has been said that ‘the system of international law supporting conquest and colonisation has been replaced by a cosmopolitan, egalitarian system of international law’.\textsuperscript{24} Nevertheless, the judicial globalisation process is not a ‘full dialogue between equal partners either’.\textsuperscript{25} Thus, there may be a ‘judicial imperialism’ by which ‘human rights law of Western origin is spread in other countries’, and ‘local resistance [is] created in part by the use of colonial institutions for that purpose’.\textsuperscript{26}

The cultural differences between the West and Korea do not necessarily mean that constitutionalism is inconsistent with the deeply rooted legal culture of Korea. Rather, as this chapter shows, significant aspects of Korean legal culture are in fact consistent with the global trend of constitutionalism. In support of this argument, several aspects of constitutional review will be examined.

2. Korean Legal Culture and Constitutional Review

A. Korean Official Law and Modern Legal Culture Supporting the Rule of Law

As discussed in Part II.5 of Chapter 1, several fundamental elements of the rule of law are embodied in the Constitution of Korea (for example, guarantee of equality before the law in Article 11, and personal liberty in Article 12). The Constitution is ‘the fundamental law that regulates the structure, organisation and function of a state to protect Korean people’s liberties and rights and to check and control its power with reason’.\textsuperscript{27} Hence, the Constitution is a prime example of the official law that supports the rule of law. As discussed in Part IV.3.C.ii of Chapter 2, the prima facie presumption is that such official law is supported by the normative legal culture, unless proven otherwise.

This presumption may be rebutted if it is shown that the provisions of the Constitution are not effectively enforced. The mere existence of the constitutional provisions that purport to guarantee the rule of law will not be effective unless those provisions are strictly enforced by a system of judicial review.\textsuperscript{28} Without strict enforcement of the Constitution by the Court, the Constitution may become a ‘dormant document’, as was shown by earlier modern Korean history (see Part IV.3.B of Chapter 3).\textsuperscript{29} Thus, strict enforcement of the Constitution by the Court will show both ‘law in books’ and ‘law in action’ supporting constitutionalism. Further, when constitutional law cases attempt to uphold the rule of law principles contained in the Constitution, such cases themselves become part of the official law (in the form of case

\textsuperscript{23} Hannah L. Buxbaum, ‘Globalization, Courts, and Judicial Power: From Empire to Globalization ... and Back? A Post-Colonial View of Transjudicialism’ (2004) 11 Ind J Global Leg Stud 183 at 183 (discussing the process of judicial globalisation in New Zealand).

\textsuperscript{24} Id at 184.

\textsuperscript{25} Id at 187.

\textsuperscript{26} Id at 188.

\textsuperscript{27} The First Ten Years of the Korean Constitutional Court (The Constitutional Court of Korea, 2001) at section I of chapter 1.


law) that supports the rule of law. Thus, it has been said that, ‘judicial review is the ultimate expression of a tradition of autonomous law associated with the modern West’. \(^{30}\)

The discussion below reveals Korea’s modern legal culture relating to constitutional review. As discussed in Part IV of Chapter 3, this culture will be significant evidence of normative legal culture relating to constitutional review. This, in turn, will show whether Korea’s normative legal culture supports the rule of law, since constitutional review is one of the most prominent structural mechanisms in a democracy for ensuring a government of law, rather than a government of individuals. \(^{31}\)

B. Cultural Debates in Constitutional Law Cases

Constitutional issues force judges to ‘reflect upon the legal culture in which the dispute is embedded’. \(^{32}\) This may be because a constitution (probably more so than other law) is ‘expressive of [a] country’s legal and political culture’. \(^{33}\) In the case of Korea, it has been argued that the constitutional adjudication system is one of the very few venues through which one can engage in a cultural debate about the relevance of Korean tradition to modern Korean identity. \(^{34}\) In interpreting provisions of the Constitution, the Court often debates the content of Korean culture, norms and values and their applicability to the issues to be decided.

For example, in the *Same Surname – Same Origin Marriage Ban Case*\(^ {35}\) discussed below, the Court discussed Korean legal culture relating to marriage traditions. Interestingly, in that case, the Court examined, among other things, indigenous Korean legal culture relating to marriage customs of the Old Chosun period, dating to about 400 B.C. \(^ {36}\) The Court’s findings in respect of such indigenous Korean legal culture had a major impact on its determination of the case. In this regard, the following points are noted:

(a) Even though the global trend regarding constitutionalism assumes ‘judicial imperialism’ of the West, \(^ {37}\) the Court relies on indigenous norms to carry out constitutional review. Thus, the Court directly links Korean indigenous legal culture to constitutionalism, treating them to be entirely compatible with each other. In the *Special Law on the Establishment of a New Capital City Case* discussed below, the Court went extremely far


\(^{35}\) 95Hun-Ka6, 16 July 1997 (9-2 KCCR 1).

\(^{36}\) See Part III.2.B below.

with this idea determining that unwritten customary constitutional rules (backed by indigenous legal culture) exist in addition to the written Constitution.

(b) The Court’s discussion (and ‘determination’) on Korean legal culture forms significant evidence of normative legal culture. Like the methodology for studying legal culture adopted in this thesis (see Part IV.3 of Chapter 2), the Court also examines legal history in determining legal culture (see Part III.4.B.iii below). Further, the Court’s methodology for identifying ‘customary constitutional rules’ is strikingly similar to the author’s methodology for identifying normative legal culture (see Part III.4.B.ii below). The Court’s ‘determination’ of Korean legal culture represents unique evidence of Korea’s normative legal culture because it is legally authoritative. Hence, such legal culture is more likely to have a ‘determinative influence’ on particular laws (see Part III.2.D.v of Chapter 2).

(c) The views taken by the judges themselves evidence significant aspects of ‘internal legal culture’ (see Part III.2.B.ii of Chapter 2) of Korea. This way of looking at legal culture may be seen as adopting an aspect of the ‘constitutional ethnographical approach’, whereby the Court’s culture may be studied by, among other things, examining cases decided by it.\(^ {38}\) As will be seen, such culture of the judges is not isolated from the public’s legal culture. There is wide public support for the Court (see Part II.3 below), and process of selection of the Court’s judges\(^ {39}\) indicates that the Court, in a sense, speaks for the public. Hence, the Court’s internal legal culture as evidenced in its decisions is an important source from which to determine the legal culture of Korea.

(d) Not only are the views taken by the judges significant evidence of the legal culture of Korea, but also they often have the effect of shaping Korea’s legal culture.\(^ {40}\) This is, again, evidenced by the level of the public support given to the Court, and the remarkable success and the influence of the Court since its establishment. The Court is a forum for groups seeking to advance social change\(^ {41}\) and to express cultural preferences.

For these reasons, when discussing Korean legal culture and its relationship to the rule of law, a discussion of the Court’s decisions and activities becomes crucial.

C. Practical Implications of Deeply Rooted Legal Culture in Legal Practice

The above discussion shows that deeply rooted legal culture, or one’s view of it, has significant implications in the practice of constitutional review, thus supporting the second of

\(^{38}\) See generally Kim Lane Schepple, ‘Constitutional Ethnography: An Introduction’ (2004) 38 Law & Soc’y Rev 389. Scheppele (at 395) defines constitutional ethnography as ‘the study of the central legal elements of politics using methods that are capable of recovering the lived detail of the politico-legal landscape’. Scheppele argues (at 386) that constitutional ethnography does not necessarily require fieldwork, but examination of written records may be just as reliable and effective. Hence, examining the Court’s judgments is a suitable way of engaging in constitutional ethnography. For a discussion on the significance of court case records for examining legal culture, see Sally E. Merry, Colonizing Hawai’i: The Cultural Power of Law (Princeton University Press, 2000) at 8-9.

\(^{39}\) The President of Korea, the Supreme Court and the National Assembly each appoints three judges of the nine-judge Constitutional Court. See Articles 83(3) and (4) of the Constitution.

\(^{40}\) It has been said ‘judicial opinions not only comment upon but influence cultural attitudes and social action’ (original emphasis). See Timothy Zick, ‘Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography’ (2004) 45 WM and Mary L Rev 2261 at 2301.

the two main arguments of this thesis. In fact, constitutional review is one of the most obvious and significant areas in which one’s view about deeply rooted legal culture has real influence. As discussed, the judges actually base their decisions on their findings on particular aspects of Korea’s deeply rooted legal culture. In the case of ‘customary constitutional rules’ (see Part III.4.B.ii below), rules found to be supported by deeply rooted legal culture may even become constitutional rules. Thus, the judges’ views on deeply rooted legal culture, or normative legal culture, may have a tremendous impact on the judicial review of the Court, and on the fundamental rights of Koreans.

3. Outline of this Chapter

Part II.1 of this chapter discusses the concept of constitutional review. As mentioned, it is an idea closely related to democracy and the rule of law, as well as a significant part of the contemporary globalisation process. Part II.2 discusses the Court’s structure and jurisdiction, and Part II.3 discusses the Court’s recent activities.

In Part III, three Constitutional Court cases are reviewed in detail. These are the Same Surname – Same Origin Marriage Ban Case; the Family Ritual Standards Act Case; and the Special Law on the Establishment of a New Capital City Case. The judges in these cases often base their decisions on their views on what the relevant deeply rooted legal culture is. These cases reveal how the judges’ views on legal culture affect judicial decision-making processes. They also indicate that the Court’s interpretation of the deeply rooted legal culture is largely consistent with the rule of law concept.

II. CONSTITUTIONAL REVIEW IN KOREA

1. The Concept of Constitutional Review

Constitutional review is seen as protecting democracy from its own excesses. Also, it is regarded as protecting the substantive values of democracy from procedurally elected bodies because it can be counter-majoritarian, acting as a check on majority power.45 Thus, the idea of constitutional review may be seen as a challenge to the notion of parliamentary sovereignty.46 The current global trend may be that parliamentary sovereignty is a waning

42 95Hun-Ka6-13 (Byung-hap), 16 July 1997 (9-2 KCCR 1).
46 But Dworkin has suggested that democracy cannot be equated to mere majoritarianism. Thus, the notions of democracy and constitutionalism are not in fundamental conflict. See Ronald Dworkin, ‘Introduction’ in Ronald Dworkin (ed), Freedom’s Law (Harvard University Press, 1996) at 15-19. Also, Frank Michelman has suggested that democracy and constitutionalism may be mediated through a republican ‘jurisgenerative’ politics, in which the people can see themselves as the author of laws that they agree to live by. See Frank Michelman, ‘Law’s Republic’ (1988) 97 Yale L J 1493 at 1499-1503.
idea, and that there may a ‘global expansion of judicial power’, notably in the form of constitutionally review. This may be referred to as the ‘third wave’ of democracy. This phenomenon is visible, not only in national courts, but also at the international level: thus, actions taken by international bodies are being scrutinised by way of judicial review. What is clear is that constitutional review is almost exclusively associated with democratic governance.

The rule of law and constitutional review are closely related to each other, particularly in new democracies like Korea where democratic means of electing the President had previously been insufficient to achieve democracy and the rule of law. The rise of active constitutional review may signify an increase in rights consciousness. It has been argued that, functionally, judicial review may be seen as a form of political insurance for prospective electoral losers during the constitutional bargain. It may also reflect the insurance needs of the founders of the constitution by allowing the drafters to conclude constitutional bargains that would otherwise be unobtainable. In the case of Korea, this may have been the effect of the Principle of Respect for the Royal Ancestor’s Constitution in the Chosun Dynasty (see Part III.2.E of Chapter 3), meeting the ‘insurance needs’ relating to the old laws. Other commentators, finding the ‘insurance thesis’ rationale to be insufficient, try to explain constitutionalisation as the ‘product of a strategic interplay among hegemonic yet threatened political elites, influential economic stakeholders, and judicial leaders’.

---

51 Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 10. See also Thomas M. Frank, ‘Democracy, Legitimacy and the Rule of Law: Linkages’ NYU Law School, Public Law and Legal Theory Working Paper No. 2 (1999) at 4 and 9. (Frank argues that free and fair elections themselves are not even sufficient conditions of electoral democracy. This is because in addition to free and fair elections, there must be free and fair procedures of nomination, unfettered debate, and equal access to media and to public spaces. He also argues that, particularly in the case of the United States, electoral democracy is threatened by the fact that money plays a key role in politics).
53 Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 25. Ginsburg argues (at 245) that this rationale for having active judicial review suits Korea because of (a) its strong presidentialism and (b) the tendency of Korean parties to coalesce into two groups of roughly equal strength with the possibility of alternating power.
54 Id at 33.
55 Ran Hirsch, ‘Globalization, Courts, and Judicial Power: The Political Origin of the New Constitutionalism’ (2004) 11 Ind J Global Leg Stud 71 at 72 and 88-89. Hirsch argues that the ‘insurance thesis’ takes a rather ‘thin view’ of politics. But Hirsch’s view on politics also does not seem broad enough because he tends to underestimate the possibility of cultural support for constitutionalisation, which may significantly shape politics.
Irrespective of the real rationale of constitutional review, the emphasis may be on the fact that it involves a kind of dialogue with political branches in government, and it can potentially expand the range of voices to include political losers. Constituional review contributes to the development of the democratic constitution itself. In the case of Korea, the Court is seen to have contributed to the consolidation of Korean democracy such that the process has become fundamentally irreversible.

Constitutional review also provides external legitimacy and internal political logic to government actions. For example, compared to constitutional review, the institutional details of standing law may be off the screen of foreign observers and hence susceptible to manipulation by local political actors, whereas constitutional review may satisfy foreign interests concerned with rights protection and controlling legislative power. To sum up, contemporary constitutional review may be seen as a fundamental mechanism for ensuring the rule of law and a check on majority power.

2. The Constitutional Court of Korea

The Constitutional Court of Korea was established in 1988 under the Constitutional Court Act. The Court was modelled on the Federal Constitutional Court of Germany, the choice of which was largely due to Korea's civil law tradition. Initially, the relevant constitutional amendments reflected a compromise between the main political parties without apparent rationale. Hence, the Court may face significant difficulties in seeking the drafters' original intent in interpreting the Constitution. Nevertheless, the Court has been developing its own rigorous jurisprudence along the lines of conforming with the rule of law. Thus, the Court is seen as a 'suprapolitical organ of the rule of law'.

---


58 According to Ginsburg's research, among Korea, Mongolia and Taiwan, the Constitutional Court of Korea has had the most success, is the most active, and has the greatest judicial power. See id at 243 and 253.


61 Act No. 4017 (5 August 1988).

62 On the other hand, countries that allow ordinary courts (as opposed to constitutional courts) to conduct constitutional review are almost exclusively those that have an Anglo-American-type of legal system. See Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 35.

63 Id at 214. Ginsburg suggests (at 249) that the disagreement and distrust between Kim Young Sam and Kim Dae Jung provided a crucial motivation for setting up a strong and accessible constitutional court.

The Court hears matters relating to the constitutionality of a law, impeachment of the President, dissolution of a political party, competence disputes between state agencies, and certain constitutional complaints. At least six out of the nine judges must concur in order to decide any of these matters. But such cases may not involve an abstract review (unlike the German Abstrakte Normenkontrolle) at the request of government agencies, and the requirement is that there must be some possibility of infringement of constitutional law. Nevertheless, in the case of a constitutional complaint, the standing to bring a claim is given to 'any person who claims that his [or her] basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power', provided that any other available relief process has been exhausted. Another provision that grants standing to an ordinary citizen is Article 68(2), pursuant to which a party may challenge the failure of an ordinary court to refer a case to the Court. Amicus briefs and third-party interventions with a legal interest are allowed, and interest groups in Korea are increasingly involved in the Court's cases through these routes. Hence, overall, access to the Court is reasonably easy and unrestricted, which is an important component of the rule of law.

The Court is composed of nine judges. Three are appointed from persons selected by the National Assembly, and three are selected by the Chief Justice of the Supreme Court.

---

65 For example, the impeachment proceedings against President Roh Moo Hyun. See 2004 Hun-Na1, 14 May 2004.
66 The Constitution, Article 111(1). The power to decide on constitutional law matters seem to overlap between the Constitutional Court and the Supreme Court (see Articles 107(1) and 107(2) of the Constitution). Such overlap of jurisdiction seems to create an ambiguity which may have to be resolved pursuant to a constitutional amendment (see Chongko Choi, Hankuk popinmun [Introduction to Korean Law] (Bak Young Sa, 1994) at 33).
67 The Constitution, Article 113(1).
68 See generally The Constitutional Court Act, Chapter IV. See also James M. West & Dae Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex?' in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 220.
69 The Constitutional Court Act, Article 68(1).
72 The Constitution, Article 111(2).
73 The Constitution, Article 111(3). The Chief Justice of the Supreme Court is selected by the President; thus the President effectively has the most influence in selecting the Constitutional Court judges — although, of course, it may not always be the case that the same President would choose the Supreme Court Chief Justice who selects the relevant Court judges given the tenure of the President (which is five years (Article 70) — whereas the tenure of the Chief Justice is six years (Article 105(1)). Further, assuming that the President has the support of the majority of the National Assembly, the President would in fact have the dominant position in selecting the Court judges. Hence, there is a risk that the President would simply appoint his or her pure agents as the judges of the Court, which may lead to the lowering of the quality of the opinions of the Court. See Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 45.
74 However, Ginsburg (at 65) suggests that, once established, courts generally behave strategically both with respect to individual cases and with respect to their own constitutional position in the constitutional system — quite independently from what the persons who set up the court had in mind. Ginsburg also (at 69) argues that most judges follow the law most of the time rather than following their personal motivations. This seems to be the case for the Korean Constitutional Court as the past opinions of the Court appear to be generally of high quality, with rigorous reasoning based on law. Also, compare Upham's argument that political interference in the workings of the judiciary is not inconsistent with the rule of law, and that the focus should rather be on the judiciary's legitimacy and
The judges must be at least forty years of age, and they must have at least fifteen years of experience as a judge, attorney, or a prosecutor. They may not conduct any business for profit, or concurrently be members of the National Assembly, local council or a corporation. They may not join a political party or participate in politics. In addition, there are provisions to exclude the judges from hearing cases where potential conflicts of interest could arise. The term of the judges is six years and may be renewed. The possibility of reappointment may potentially reduce judicial independence. However, such possibility may be mitigated by virtue of the restriction to be involved in politics. The retirement age of a judge is sixty-five, except for the President of the Court, whose retirement age is seventy. The judges cannot be removed from office against his or her will unless either an impeachment decision is rendered against him or her, or he or she is criminally sanctioned with a sentence of imprisonment. These mechanisms contribute to the enhancement of judicial independence.

Article 45 allows the Court to decide whether or not a statute (or a provision of it) is unconstitutional. In practice, the Court may decide that legislation (or a provision of it) is (a) 'unconstitutional', in which case the relevant legislation will lose its effect immediately; (b) 'non-conforming to the Constitution', in which case the National Assembly is urged to revise it within a certain time period; (c) 'unconstitutional in certain contexts', in which case certain ways of interpreting the legislation is regarded as unconstitutional while other ways of interpreting the legislation may be constitutional; and (d) 'constitutional in certain contexts', in which case the legislation is constitutional if interpreted in certain ways. Some writers note that these various gradations of declaration allow the Court to dialogue with the legislative branches and executive agencies (while others point out problems associated with the gradations system). Such dialogue may be particularly significant in the Korean context where the judiciary has weak enforcement powers at its disposal, which is a characteristic of the civil law tradition. Table 4-1 shows a breakdown of the types of cases filed in the Court and the different categories of case outcomes as at 30 April 2005.

---


74 The Constitutional Court Act, Article 5(1).
75 The Constitutional Court Act, Article 14.
76 The Constitutional Court Act, Article 9.
77 The Constitutional Court Act, Article 24.
78 The Constitutional Court Act, Article 7(1).
80 The Constitutional Court Act, Article 7(2).
81 The Constitutional Court Act, Article 8.
82 See, for example, Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 219.
83 See, for example, Jin-Su Yune, 'Recent Decisions of the Korean Constitutional Court on Family Law' (2001) 1 Journal of Korean Law 133 at 135 and 140 (arguing that the gradations system can result in situations where remedies are practically denied to the wronged parties even though the Constitution has been violated).
<table>
<thead>
<tr>
<th>Type</th>
<th>Total</th>
<th>Constitutionality of Law</th>
<th>Impeachment</th>
<th>Competence Dispute</th>
<th>Sub-total</th>
<th>§68(1)</th>
<th>§68(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filed</td>
<td>11283</td>
<td>508</td>
<td>1</td>
<td>24</td>
<td>10750</td>
<td>9444</td>
<td>1306</td>
</tr>
<tr>
<td>Settled</td>
<td>10599</td>
<td>469</td>
<td>1</td>
<td>18</td>
<td>10111</td>
<td>8943</td>
<td>1168</td>
</tr>
<tr>
<td>Dismissed by Small Benches</td>
<td>4047</td>
<td>4047</td>
<td>3916</td>
<td>131</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unconstitutional</td>
<td>267</td>
<td>94</td>
<td>173</td>
<td>39</td>
<td>134</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unformable to Constitution</td>
<td>88</td>
<td>34</td>
<td>54</td>
<td>10</td>
<td>44</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decided by Full Bench</td>
<td>48</td>
<td>15</td>
<td>33</td>
<td>10</td>
<td>23</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitutional in certain contexts</td>
<td>28</td>
<td>7</td>
<td>21</td>
<td>21</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitutional</td>
<td>857</td>
<td>198</td>
<td>659</td>
<td>3</td>
<td>656</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amnullled</td>
<td>223</td>
<td>3</td>
<td>220</td>
<td>220</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rejected</td>
<td>3548</td>
<td>7</td>
<td>3540</td>
<td>3540</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dismissed</td>
<td>1072</td>
<td>6</td>
<td>1046</td>
<td>922</td>
<td>124</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>4</td>
<td></td>
<td>4</td>
<td>3</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Withdrawn</td>
<td>417</td>
<td>2</td>
<td>314</td>
<td>280</td>
<td>34</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pending</td>
<td>684</td>
<td>6</td>
<td>639</td>
<td>501</td>
<td>138</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table 4-1  Cases handled by the Court as at 30 April 2005**

Due to Korea’s civil law tradition, the concept of stare decisis does not exist in Korea, and so courts’ decisions do not bind the lower courts. Courts must rely on existing institutions to implement their judgments. Nevertheless, this situation has been modified by Article 47 of the Constitutional Court Act, which reads, ‘[a]ny decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments ... Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the

---

84 Statistics from the Constitutional Court of Korea. See www.ccourt.go.kr (visited in September 2005).
86 Id at 229. But the system of promoting judges by higher courts, to some extent, ensures that the decisions of the higher courts are respected.
decision is made.\textsuperscript{87} So far, the implementation of the Court's judgments has been highly successful, and non-compliance has become extremely difficult as the status of the Court is increasingly being recognised among Korean institutions and the public. The Court's decisions have been nearly universally complied with, and politicians' attempts at restricting the role of the Court have been deflected by supportive public opinion.\textsuperscript{88}

The Court must pronounce its final decision within 180 days of the filing of a case.\textsuperscript{89} This requirement facilitates the speed of the judicial process, which may be one of the key concerns for any type of judicial review,\textsuperscript{90} particularly where a relatively large majority must concur in respect of a decision.\textsuperscript{91} In this way, the Court attempts to achieve both quality and speed in its decision-making.

3. Constitutional Review in Korea

The extent to which constitutional review may help to achieve democracy and the rule of law will depend on whether independent judicial review is possible – in the sense that the court must have both power over and insulation from political interference and control.\textsuperscript{92} However, the history of constitutional review in Korea indicates that this had been precisely the problem. Prior to 1988, Korea experienced authoritarian regimes, and the Constitution was violated several times by the highest authorities in Korea (see Part IV.3.B of Chapter 3). There were attempts to amend the Constitution illegally in order for the Presidents to prolong their tenures. The Supreme Court, which was responsible for constitutional review in this period, faced real political pressures. The Supreme Court's constitutional review was inactive and its impact minimum.\textsuperscript{93} The situation did not improve after military government was established by President Chun Doo Hwan in 1980.

The Constitutional Court was formally established during the Second Republic, but became irrelevant due to the military coup in 1961 and the subsequent authoritarian regimes. It was only after the re-establishment of the Court in 1988 that judicial activism in constitutional review really took place in Korea. Since then, the Court has been extremely active and demonstrated independence from other government bodies,\textsuperscript{94} and has become the major locus of decision-making.\textsuperscript{95} Korean judges no longer adhere to rigid hierarchy, and do not hesitate to express dissenting views against senior judges, which indicates a significant

\textsuperscript{87} In addition, one notes that, for judicial administration, the distinction between civil law and common law jurisdictions are disappearing as countries adopt similar principles of judicial education. See Clifford Wallace, 'Globalisation of Judicial Education' (2003) 28 Yale J Int'l L 355 at 358.


\textsuperscript{89} The Constitutional Court Act, Article 38.

\textsuperscript{90} L. S. Janofsky, 'The "Big Case" – A "Big Burden" on Our Courts' (1980) 4 Utah L Rev 719.

\textsuperscript{91} Hence, the major trade-off in judicial review may be between speed and accuracy. See Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 47.

\textsuperscript{92} Id at 28.

\textsuperscript{93} James M. West & Dae Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex?' in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 242.


change in ‘internal legal culture’ from the early times (see Part IV.1.B of Chapter 3).96 The implementation of constitutional review by the Court has been judged a clear success.97 Given the conventional view that Confucianism presents a difficult environment in which constitutional review and the rule of law can develop,98 such a success presents a challenge to the conventional view. Korean legal culture seems to support the judicial activism of the Court rather than Confucian li to regulate the implementation of the Constitution.99

Notable recent decisions of the Court include the impeachment proceedings of President Noh Moo Hyun,100 and the Special Law on the Establishment of a New Capital City Case (where the Court restricted the government from implementing its policy of moving the capital city from Seoul to a place in Chungchung Province – see Part III.4.A below).101 Other than these cases, there have been numerous cases, including those involving human rights, social, criminal justice, labour and economic issues. Hahn Chaihark and Kim Sung Ho observe that ‘the Court has stood by what the general public has considered to be democratic and progressive causes’, evidenced in its rulings in the areas of, for example, freedom of speech, freedom of expression, the right to privacy, the right to personal integrity, and electoral process.102 The Court, unlike in the past, does not refrain from deciding issues that fall under the Civil Code as well as issues falling under ‘purely constitutional law’,103 as in the Same Surname – Same Origin Marriage Ban Case discussed below. Thus, the Court has significantly advanced civil rights and the rule of law in Korea.104 The number of the cases filed since the Court’s establishment in September 1988 until 30 April 2005 total 11,283 (see Table 4-1 above). Table 4.2 shows changes in the number of cases filed with the Court since 1988.

98 Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 12, and H. Patrick Glenn, Legal Traditions of the World (Oxford University Press, 2000) at 297. Ginsburg, however, admits (at 14) that the notion of Confucianism is so broad that it might either support or hinder the development of judicial review.
99 For a discussion of how Confucian li could (and should) regulate the implementation of the Korean Constitution, see Chaihark Hahn, ‘Constitutionalism, Confucian Civic Virtue, and Ritual Propriety’ in Daniel A. Bell & Chaibong Hahn (eds), Confucianism for the Modern World (Cambridge University Press, 2003) at 31-53. For a similar discussion in the Chinese context, see, for example, Howard J. Wechsler, Offerings of Jade and Silk: Ritual and Symbol in the Legitimation of the T’ang Dynasty (Yale University Press, 1985).
Table 4-2  Number of cases filed with the Court since 1988

Given the independent input of the Court in producing politically significant outcomes that have been complied with by other actors in so many cases, constitutional review in Korea may be viewed as a clear success. This success may be explained in several ways, including by examining institutional and political changes in Korea. But these changes alone may not explain the success that the Court has had since its establishment. People must want the Court for it to be successful (see Part III.4.C.iii of Chapter 2) – even during the period in which proper constitutional review was suppressed (see Part IV.3.B of Chapter 3).

---


108 See, for example, Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003) at 206-246. Ginsburg states (at 15) that he also challenges the culturally deterministic accounts of the rule of law and judicial power in Korea.

109 Ginsburg seems to say that Korea’s Confucian culture and authoritarian history do not help in explaining the success of constitutional review in Korea. See id at 256. But obviously different conclusions may be reached by understanding that the Korean tradition may support the rule of law, and that the past authoritarian regimes were strongly resisted by the public.
Persistent and sometimes violent resistance to such suppression must be evidence of such a desire for a proper system of constitutional review.\textsuperscript{110}

Thus, an important factor that explains the success of constitutional review in Korea may be supportive public opinion.\textsuperscript{111} The legitimacy of judicial activism and judicial review must be supported by public opinion.\textsuperscript{112} There is high public awareness and interest in Court’s decisions in Korea (see Part IV.3.C.ii of Chapter 3), which is partly due to extensive media coverage.\textsuperscript{113}

Whether due to public pressure or not, the Court’s decisions have been well complied with by government bodies. This evidences a government culture that accepts the binding authority of the Court’s decisions. The dramatic increase in the number of cases filed with the Court indicates that plaintiffs now have a reasonable expectation that the Court will decide cases fairly and efficiently. Both the Court and the public accept the practical relevance of constitutional review. Some commentators have noted that “[t]he Constitutional Court now finds on its docket a range of volatile and hotly contested political questions which it is expected to adjudicate as if there were some well-established consensus on the content of the constitutional rights invoked”.\textsuperscript{114}

Such ‘consensus’, such culture of the public, the Court and the government, reflect the modern legal culture of Korea as it relates to constitutional review. Indeed, it has been recognised that unless there has been an acceptance of the judicial review system by the legal culture, one cannot guarantee success in the system of judicial review by simply operating the judicial review system under the official law.\textsuperscript{115} Given the extent to which such legal culture was evident in the past,\textsuperscript{116} such legal culture, it is submitted, forms part of the normative legal culture of Korea. This supports the earlier argument that constitutional petition may be part of Korea’s deeply rooted legal culture as evidenced by the Principle of Respect for the Royal Ancestor’s Constitution (see Part III.2.E.ii of Chapter 3). Constitutional petition is sometimes likened to the Chosun tradition of petitioning to the king by sounding the petition

\textsuperscript{110} A famous example is an incident in 1992 when the attempt by the ruling party to restrict the Court’s jurisdiction was withdrawn due to public protest. See Kun Yang, ‘Judicial Review and Social Change in the Korean Democratizing Process’ (1993) 41 Am J Comp L 1 at 8.

\textsuperscript{111} James M. West & Dae Kyu Yoon, ‘The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex” in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 240. See also Chaikhark Hahn & Sung Ho Kim, ‘Constitutionalism on Trial in South Korea’ (2005) 16 Journal of Democracy 28 at 40 (referring to how, for example, the public supported and accepted the Court’s rulings in the Special Law on the Establishment of a New Capital City Case even though the relevant issues decided were highly controversial).


\textsuperscript{113} James M. West & Dae Kyu Yoon, ‘The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex” in Sang-Hyun Song (ed), Korean Law in the Global Economy (Bak Young Sa, 1996) at 227. The media frequently circulates the written opinions of the Court. See, for example, ‘Court Opinion on Unconstitutionality of the Special Act on the Capital City’ Donga-Ilbo (21 October 2004).


\textsuperscript{116} See Part III.2.E of Chapter 3.
drum (see Part III.8.A of Chapter 3). To sum up, the normative legal culture of Korea supports the official law relating to constitutional review, which in turn supports the rule of law.

III. REVIEW OF CONSTITUTIONAL LAW CASES

1. Introduction

While the lower courts or the courts deciding more technical or commercial legal issues may not often face the need to engage in cultural debates in their adjudication process, the Constitutional Court often does. Particularly when it comes to the legal issues that are so fundamental and inherent to the Koreans themselves, the experience of the Court shows that it often finds itself searching for the relevant principles of the legal culture that have a specific application to the case in hand. Set out below are some of the Court’s decisions that discuss such cultural issues. They reveal the judges’ views on some of the aspects of Korea’s normative legal culture, which in turn were crucial for deciding the cases.

2. Same Surname – Same Origin Marriage Ban Case

A. Outline of the Facts and the Decision of the Case

Article 809(1) of the Civil Act prohibited ‘same-surname-same-origin’ marriages between Koreans. Thus, those with the same surname, and from the same ancestral line (donsungdongbon), could not marry each other. The ban on same-surname-same-origin marriage has been the subject of a long dispute between Confucian adherents who emphasise the unity of such marriages with national tradition, and women’s groups who demand its revision or abolition. The latter have argued that the relevant law is not only too broad a prohibition on marriage without any genetic evidence, but also a relic of patriarchy and male supremacy. It has been said that this debate involved the ‘entire country’, and as such, the Court’s decision was particularly important for identifying a significant aspect of Korea’s legal culture.

The Court found that Article 809(1) of the Civil Code did not conform with the Constitution on the basis of, among other things, the following reasons:

(a) Modern Korean society has changed drastically in the period in which the ban on same-surname-same-origin marriage could take roots, and the institutional foundation of the ban is being greatly questioned.

---

118 Court records are an excellent source from which to ascertain certain legal culture. See Sally E. Merry, Colonizing Hawai’i: The Cultural Power of Law (Princeton University Press, 2000) at 8 and 9 (arguing that case records provide a ‘special lens on everyday life’).
119 95Hun-Ka6-13 (Byung-hap), 16 July 1997 (9-2 KCCR 1).
120 92KCCR 1–2.
122 The First Ten Years of the Korean Constitutional Court (The Constitutional Court of Korea, 2001) at section V.A.A of chapter 3.
(b) Accordingly, Article 809(1) of the Civil Code now loses its social acceptability or rationality as a marriage ban and is in direct conflict with the principle of sexual self-determination. Also, it is especially in conflict with the constitutional ideas and provision in Article 10 on human dignity and worth and the right to pursue happiness, which is the basis of the right to choose one’s destiny including freedom of marriage and freedom to choose one’s partner in marriage.

(c) It also directly conflicts with the constitutional provision calling for establishment and maintenance of marriage and family life as the basis of individual dignity and gender equality.

(d) In addition, since the scope of prohibition is limited to same surnames, that is, the same patrilineal blood lines, it is another type of gender discrimination.

(e) Since there is no rational ground to justify such discrimination, it violates the constitutional principle of equality (Article 11). And since its legislative purpose no longer qualifies as public welfare or social order justifying a limitation on people’s rights and freedom, it also violates Article 37(2).123

B. Analysis of the Case

The majority argued that, according to Korean history, the rule that prohibits same-surname-same-origin was originally imported from China along with Confucian teachings, becoming firmly established in Korea only in the late seventeenth century.124 Accordingly, it was not part of the indigenous marriage custom of Korea, and therefore should not be followed. The dissenting judges, on the other hand, argued that the rule was not imported from China, and it was part of the national heritage of Korea from the beginning of the Korean history.125 They said that, alternatively, even if the rule had been imported from China, it had nevertheless been formed part of Korean legal culture for almost six hundred years, and therefore should be respected as law.126

It is interesting to note that both the majority and dissenting judges saw it appropriate to refer to the legal history of Korea and to ascertain the relevant indigenous legal culture of Korea to decide the case (see Part III.5.B of Chapter 2). Clearly, the case could be decided without such cultural debates by simply analysing whether the rule prohibiting same-surname-same-origin marriage unduly restricts the freedom of citizens as guaranteed in the Constitution. This implies recognition by the Court that certain indigenous laws/legal culture of Korea may still be normatively valid and may be referred to where appropriate.

In order to identify the relevant indigenous law on the point, a matter of critical importance was the judges’ arguments based on historical facts. Their discussion of Korean

123 Article 37(2) of the Constitution states that ‘[t]he freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated’.
125 9-2 KCCR 23.
126 9-2 KCCR 24.
legal history extended as far back as some 2,332 B.C. In this regard, for both the majority and the minority judges, the fact that such law was indigenous rather than received law seems to have been important. Why was this important for them to consider? This question implies several matters. Firstly, it implies that 'inner acceptance' of the law by the people was important for the Court (see Part III.4.C.ii of Chapter 2). In this regard, the length of the time in which the law existed was crucial. The majority held that the law in question was imported from China or it was part of Confucian legislation (see Part II.3.G.iii of Chapter 3), and it only existed since the seventeenth century. The implication is that this is not long enough for the law to have been deeply rooted in Korea. They also said that, historically, such law had been resisted (see Part III.5.B of Chapter 3). The minority, on the other hand, held that the law was indigenous (and not imported), and existed since 2,332 B.C. Therefore, in their view, the law was firmly rooted in Korea.

The approach taken by both the majority and the minority shows a significant similarity to the relevant approach taken in this thesis. That is, the mere existence of a rule is not sufficient to give rise to the assumption that people would regard the rule as what the law should be. Particularly in the case of received law or law that was created for certain political or religious reasons, such an assumption may be doubted (see Part IV.3.C.ii of Chapter 2). The law must have passed the test of time to prove that it is being viewed as what the law should be. Part of this test will be asking the question of whether the law had been persistently resisted by people (see Part IV.3.C.ii of Chapter 2).

Another implication of the Court emphasising whether the law was indigenous was this: the Court attempted to distinguish elements of Confucian legislation from other laws. The majority, in particular, explicitly distinguished Confucian customs from Korean legal culture. Even the minority assumed that only indigenous laws (rather than Confucian legislation) would have normative force. Hence, the Court does not appear to take conventional view about the deeply rooted legal culture of Korea (compare Part II.1 of Chapter 1). The Court's view is that Confucianism does not form part of the deeply rooted legal culture of Korea. This clearly supports the first of the two main arguments of this thesis (see Part 1.2 of Chapter 1).

The Court also examined the modern legal culture of Korea on this point. The majority said that the rule prohibiting same-surname-same-origin marriages was a tool for maintaining social order during the Confucian era, and therefore it is no longer relevant as law today. The dissenting judges, on the other hand, regarded the rule as a valuable norm in itself, which reflected the ethical value judgments underlying the customs and attitudes of even contemporary Koreans. They were of the view that the majority of Koreans would still hold that the rule would be valid. They said this is reflected by the fact that although the rule was purported to be abolished several times in the past, the National Assembly was not able to pass a bill that would abolish the rule.
The above discussion shows the Court’s view of the relationship between deeply rooted legal culture and modern legal culture. Upon a close reading, it appears that both the majority and the minority suggest that there is a close relationship between deeply rooted legal culture and modern legal culture (and this supports the author’s argument in Part IV.3.D of Chapter 2). For the majority, Confucianism was not part of deeply rooted legal culture, which was relevant for concluding that modern legal culture did not support the relevant law in question. For the minority, they argued that even if the same-surname-same-origin marriage law was not originally Korea’s indigenous law, it had become indigenous law by virtue of long usage. Thus, they argued that modern legal culture supports such law.

There appears to be several reasons why the Court saw a close connection between deeply rooted legal culture and modern legal culture. Firstly, the Court seems to recognise that there is a normative value in deeply rooted legal culture itself, which is still applicable today. As will be seen from the *Special Law on the Establishment of a New Capital City Case* discussed below, sometimes the Court would regard non-legal rules supported by deeply rooted legal culture as having a force equal to the official law itself.

Secondly, other than the deeply rooted legal culture, the Court examined such evidence as, statistics, views of the National Assembly, and legislative changes, in order to ascertain modern legal culture on the point. Nevertheless, the minority points out that there is a lack of reliable information of modern legal culture on the point. Also, such information may be subject to political manipulation – much more so than the Court’s decision. Thus, while these materials may be helpful, they may not be reliable or conclusive (see Part IV.3.C of Chapter 3). It appears that it is because of this reason that the Court mainly focuses its discussion on the historical evidence on the deeply rooted legal culture of Korea.

Thus, in order to come to a conclusion on an aspect of the modern legal culture of Korea, the Court seems to heavily rely on its findings on the relevant aspect of the deeply rooted legal culture of Korea. The Court seems to believe that the deeply rooted legal culture of Korea may form the best evidence of the modern legal culture of Korea.

### C. Confucianism and the Rule of Law

It has been said that the judgment in the *Same Surname – Same Origin Marriage Ban Case* involved ‘politics of Confucianism’, meaning that the Court was being drawn into a cultural debate concerning the relevance of Confucianism in modern Korea. Not too often does the Court (or any other court in Korea) discuss issues relating to Confucianism in its judicial decision-making. Therefore, this case is highly significant for this thesis.

---

135 9-2 KCCR 24.
136 9-2 KCCR 15.
137 9-2 KCCR 20-21.
139 9-2 KCCR 24-25.
The decision has been criticised on the basis that one should not assume that there is some core of national culture that remains constant over time, or that it is possible to delineate a hard and fast boundary between indigenous culture and foreign cultures.\textsuperscript{142} It has been argued that part of the problem with the latter assumption is that it is dangerously nationalistic in its approach, and it singles out Confucianism as being an essentially foreign import and therefore not forming part of Korean national culture.\textsuperscript{143} The following points may be made in respect of such criticism.

Firstly, such an argument assumes that Confucianism is part of the national culture of Korea. While this may be true, this does not necessarily mean that it is part of the deeply rooted legal culture of Korea (see Part III.4.A of Chapter 2). Secondly, it assumes that there is no such a thing as the deeply rooted legal culture of a country. But as discussed in Part III.5.B of Chapter 2, this may be a moot point, and one notices from the discussion of Korean legal history in Chapter 3 that certain patterns of culture continue to exist throughout different periods of time in a dynamic manner. Further, if there is no such a thing as deeply rooted legal culture, can there be such a thing as national legal culture or modern legal culture (see Part III.5.B of Chapter 2)? If so, why?

As to the substance of the decision itself, the Court held, in effect, that the official law relating to same-surname-same-origin marriage was not supported by the deeply rooted legal culture of Korea. This supports the argument that Korea’s normative legal culture supports the freedom of individuals to choose their marriage partners. It also implies that the normative legal culture does not support the law that prohibits marriage between persons with the same surnames – that is, a prohibition based on only the same patrilineal blood lines. That is, the normative legal culture does not support laws that discriminate women, which supports the argument made in Part III.6 of Chapter 3 and the hypothesis set out in Part III.5 of Chapter 1.\textsuperscript{144}

Also, the judgment favours individualistic, rather than collectivistic, traits of legal culture. This is because collectivistic traits of legal culture would support a prohibition on same-surname-same-origin marriages that conflicts with the collectivistic nature of human relationship, particularly for people with the same ancestral line. This is consistent with the argument in Parts III.7 and III.8 of Chapter 3 about the individualistic aspects of Korean legal culture.

To sum up, the Court’s decision suggests that the normative legal culture of Korea does not support rules that are gender biased or collectivistic (as opposed to individualistic) in nature. In other words, the substance of the judgment is to uphold the rule of law, and the Court bases its judgment on the deeply rooted legal culture of Korea. This also shows that the Court’s ‘internal legal culture’ (see Part I.2.B above) is consistent with such aspects of the rule of law. Further, not only is there public support for the decision (see Part II.3 above) but it is noted that the majority of commentators in Korea support this decision.\textsuperscript{145} This suggests

\textsuperscript{142} Id at 293.
\textsuperscript{143} Id at 298.
\textsuperscript{144} The relevant hypothesis states that ‘significant aspects of Korea’s normative legal culture support the notion of gender equality, although many aspects of Confucian culture create gender inequality’.
that both the Court’s view on Korean legal culture and the actual Korean legal culture (see Part III.5.C of Chapter 2) tend to support the aspects of the rule of law in question.

3. **Family Ritual Standards Act Case**

A. Outline of the Facts and the Decision of the Case

The Family Ritual Standards Act of Korea banned the serving of alcoholic beverage and meals during festivities and funerals, except ‘modest servings of alcoholic beverage and meals at home or ordinary restaurants’ (other than hotels). Violation of the Act resulted in criminal punishment. The purpose of the Act was to reduce excessive waste and vanities in family rituals.\(^{147}\) The Act, however, had been criticised for subjecting to criminal punishment an area otherwise reserved for ethics and custom, and also for being ineffective.\(^{148}\)

The complainant in this case was a groom about to wed, who filed a constitutional complaint on the ground that the ban on serving of meals to the guests at wedding ceremonies under the above Act violated his right to pursuit of happiness under Article 10 of the Constitution.\(^{149}\) Another issue in this case was the constitutionality of the relevant law in view of the principle of clarity of the law. The constitutional law principle of *nulla poena sine lege* requires the elements of a crime and its punishment be determined in the form of a legislative act.\(^{150}\) The rule of clarity derived from the principle of *nulla poena sine lege* requires that elements constituting a crime be clearly defined. This rule enables ordinary citizens to recognise what action is prohibited by law and what are the penalties for such violation so that they can determine the course of their action accordingly.\(^{151}\) Therefore, if the elements of a crime are unclear because of ambiguity or abstractness in description, this would violate the rule of clarity. That would in turn be against the rule of law which aims to protect the freedom and the rights of citizens through the application of the principle of *nulla poena sine lege*.\(^{152}\)

The Court unanimously held that the provision restricted the complainant’s general freedom of action and violated the requirement of clarity under the principle of *nulla poena sine lege*. The Court stated as follows.\(^ {153}\)

(a) The practice of serving alcoholic beverages and meals to one’s guests at his or her wedding ceremony has long been part of human social life. It belongs to the domain of an individual’s general freedom of action and should be protected by the right to pursue of happiness under Article 10 of the Constitution.

---

147 Ibid.
148 Ibid.
149 Ibid.
150 99Hun-Ka8, 28 February 2002 (14-1 KCCR 87).
151 Ibid.
152 Ibid.
(b) The statute, while generally banning the serving of alcoholic beverages and meals, enables presidential decrees to provide for exceptions. The Act must be sufficiently clear so that ordinary people can easily predict what the prohibited conduct is.

(c) The elements of crime under the Act are determined inversely by the presidential decrees that specify the permitted conduct, the scope of which must be 'reasonable in light of the true meaning of family etiquette and rituals' according to the Act. Therefore, the rule of clarity is satisfied if the statutory phrase allows sufficient inference in respect of the overall extent of the presidential decree. But the concept of 'the true meaning of family etiquette and rituals' does not allow people to predict how one may treat the guests at wedding ceremonies and sixtieth birthday parties\(^{154}\) in accordance with 'true meaning'. Under Korean tradition, a wedding is a very generous festivity. It is such an important event that one is expected to make it extravagant even if it requires spending of money that exceeds one's budget. The records show that people have a diverse understanding of the provision. 'The true meaning of family etiquette and ritual' is not easily discernible to people.

(d) Also, the overall meaning of 'reasonable scope', when applied to family etiquette and rituals, is not easy to predict. The subject matter also belongs to the realm of custom and localities and cannot be easily reconcilable with the Western concept of 'reasonableness'. Alcoholic beverages and food items vary widely in quantity, quality and price and are therefore not conducive to setting any scope. The regulatory history underlying past presidential decrees does not make the prediction any easier either.

(e) In the end, the concept of 'reasonable concept in light of the true meaning of family etiquette and rituals' is not sufficiently predictable in overall content to be used as a guide for one's action. It is dangerously conductive to the arbitrary action of those administrating the law. The provision violates the requirement of clarity under the principle of *nulla poena sine lege*, and violates people's general freedom of action.

B. Analysis of the Case

Some argue that the Family Ritual Standards Act was Confucian-style legislation in the sense that it encouraged thrift and modesty, both Confucian virtues.\(^{155}\) The Act was viewed as striving to diminish the possibility of feelings of resentment between the rich and the poor. It has been argued that the Act was, therefore, an egalitarian piece of legislation in its inspiration.\(^{156}\) Accordingly, the Act could be seen as 'Confucian legislation' (see Part II.3.G.iii of Chapter 3), but egalitarian in nature. Also, the Act could be seen as Confucian legislation in another sense: it purported to regulate by law matters that could well be left to social customs, and therefore paternalistic in its nature.\(^{157}\) The Court seems to have taken into account this latter factor in coming to its decision: that is, the Act is Confucian legislation that purports to regulate matters that are best left to social customs.

---

\(^{154}\) The Koreans traditionally regard one's sixtieth birthday, called *hwangap*, as a very special occasion and often hold a large celebration.


\(^{156}\) Ibid.

\(^{157}\) Id at 285.
The Court said that the subject matter ‘cannot be easily reconcilable with the Western concept of “reasonableness”’. Hence, the Court is implicitly emphasising a dichotomy between Confucianism and Western culture. This has been criticised on the basis that the Court is, in a way, characterising Confucian culture (at least the particular culture in question) as essentially ‘unreasonable’. But this seems to be a narrow interpretation of the statement. All that the Court seems to be saying is that the concept of ‘the true meaning of family etiquette and rituals’ is not sufficiently clear because it does not allow people to predict how one can treat the guests at the wedding ceremonies. Thus, it is difficult to know whether certain family etiquette and rituals are ‘reasonable’. The focus, therefore, is upon the unclear aspects of the law, rather than the substance of the law being unreasonable.

Interestingly, the Court is, unlike in the Same Surname – Same Origin Marriage Ban Case, refraining itself from discussing the cultural aspects of the case, and basing its decision on narrow legal grounds. The Court does not try to look for any indigenous laws or customs on the point by reviewing history. It simply bases its decision on the reasoning that the relevant provision of the Act violates the requirement of clarity under the principle of nulla poena sine lege and the general freedom of action. The Court says that this is because the provisions of the Act are unclear about how to determine what is reasonable in light of the true meaning of family etiquette and rituals.

But how would the Court have decided the case if, for example, the Act in fact clearly set out the criteria for predicting how one should treat guests at wedding and other ceremonies? For example, what if the Act specified the maximum amount of money one can spend in relation to a wedding ceremony? If that was the case, clearly, the provisions of the Act would not violate the requirement of clarity under the principle of nulla poena sine lege because there could be no ambiguity about what the law was. In that case, would the Court have upheld the provision of the Act? Although the answer to this question is uncertain, it is instructive to refer to the legislature’s response to the decision. After the decision, although the decision concerned only one particular provision of the Act, the entire Act was repealed. Thus, the legislature’s interpretation of the judgment seems to be that, not only does the Act violate the principle of nulla poena sine lege, but it is also viewed as unrealistic and purports to regulate matters that are in the realm of individual freedom.

Why did the Court, unlike in the Same Surname – Same Origin Marriage Ban Case, refrain from discussing aspects of the relevant indigenous laws that the Act was purporting to embody? The Court could have, as it did in the Same Surname – Same Origin Marriage Ban Case, examined the historical position of the law and culture relating to relevant family rituals and determined the validity of the Act in light of the Constitution. Perhaps one reason why the Court did not engage in such a cultural debate was because the Act was quite different from other kinds of ‘Confucian legislation.’ This is because the Act, in one sense, was law that purported to abolish certain aspects of Confucian legislation. Part of the old Confucian legislation evidenced in Kyungkuk Taejon and Kukchjo Oryeu was that there were elaborate rules for performing Confucian rituals – for different social classes of people. In this respect, the Act was in effect trying to simplify the rituals and abolish the status distinctions embodied in the old laws – in which case the Act could be seen as a kind of ‘modern’ law.

158 Id at 286.
159 ‘Standards of Five Ritual of Our Dynasty’, which was a ritual code compiled in 1474.
The Court did, however, mention an aspect of traditional legal culture. The Court mentioned that ‘the practice of serving alcoholic beverages and meals to one’s guests at his or her wedding ceremony has long been common part of the social life of mankind, and belongs to the domain of an individual’s general freedom of action and it should be protected by the right to pursue of happiness under Article 10’. In other words, people regarded it as their right to be able to serve alcoholic beverages and meals as they wanted at wedding ceremonies, and such a right was supported by deeply rooted legal culture.

In the end, the Court, however, did not base its decision on its view of Korea’s deeply rooted legal culture. Instead, the Court made a decision based on the finding that the Act restricted the freedom of individuals and violated the rule of clarity. This in turn supports the argument in Part III.2.D of Chapter 3 that Korea’s normative legal culture demands clarity of law. Thus, even if the Act was not ‘Confucian legislation’, it nevertheless did not pass the rule of law test of the Court. Again, the substance of this decision was to uphold the rule of law.

4. **Special Law on the Establishment of a New Capital City Case**

A. **Outline of the Facts and the Decision of the Case**

The last case to be examined in this chapter is the *Special Law on the Establishment of a New Capital City Case*. This case dealt with a highly political issue, drawing significant public attention. Besides being a controversial and politically important case, this is a major case with significant implications for the place of legal culture in Korean law, as well for the question of the interpretation of the meaning of legal culture.

Before President Roh Moo Hyun was elected as the President of Korea in 2002, as part of his election campaign he promised that the current capital city of Seoul would be relocated to the Choongchung province if he got elected. This was part of an effort to win the votes from the Choongchung province, and to show that he was committed to developing regional governments. After he was elected as the President, the government of Korea passed the Special Act on the Establishment of a New Capital City (referred to in this Part III.4 as the ‘Act’) on 29 December 2003 for the purpose of relocating the capital city of Korea to the Choongchung province. The petitioners in this case consisted of several residents of Seoul requesting the Court to determine the constitutionality of the Act. They argued that the Act violated, among other things, citizens’ right to participate in a national referendum to decide a matter that is of such a fundamental importance as the question of the relocation of the nation’s capital.

The majority of the Court held that the Act violated the Constitution. The Court stated as follows.

(a) **The capital city of a country should at least be a place where the country carries out fundamental aspects of its political and administrative functions.** The capital city of Korea is currently Seoul. Although the fact that the capital city of Korea is Seoul is not specified in the Constitution itself, if it can be established that such a fact is part of

---

162 2004Hun-Ma554, 566, 21 October 2004, 4Ka(1).
Korea’s ‘customary constitution’, then such a fact becomes part of Korea’s Constitution. Relocation of the capital city requires a constitutional amendment, which can only take place according to the relevant procedures set out in the Constitution.\(^{163}\)

(b) Article 130 of the Constitution states that any amendment to the Constitution shall be submitted to a national referendum, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections.\(^{164}\) Accordingly, if it is found that the fact that the capital city of Korea is Seoul is part of the customary constitution of Korea, then the Act violates Article 130 because it purports to amend the Constitution without having a national referendum on the issue.\(^{165}\)

(c) Therefore, the key issue in the case is the question of whether the fact that the capital city of Korea is Seoul is part of Korea’s customary constitution. The Court found that the fact that the capital city of Korea is Seoul is part of Korea’s customary constitution,\(^{166}\) and therefore the Act violated Article 130 of the Constitution.\(^{167}\)

Judge Kim Young II, who also held that the Act violated the Constitution, arrived at the conclusion on a different ground. He said that it was Article 72 of the Constitution, which states that ‘[t]he President may submit important policies relating to diplomacy, national defence, unification and other matters relating to the national destiny to a national referendum if he deems necessary’ that was violated by the Act, rather than Article 130. Judge Chun Hyo Sook dissented and held that the Act did not violate the Constitution.

B. Analysis of the Case

i. Majority and Dissenting Views

The Court stated that Korea has a written constitution, but it is impossible for the written constitution to contain every element of Korea’s constitutional provisions, and therefore, the concept of unwritten or customary constitutional rules should be recognised.\(^{168}\) As justification for recognising such ‘customary constitutional rules’, the Court referred to Article 1(2) of the Constitution, which states that ‘[t]he sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people’. The Court said Article 1(2) implies that customary constitutional rules may be formed, which is an expression of the will of the people.\(^{169}\)

The Court went on to say that this is an aspect of an exercise of the sovereignty of the people. As such, the sovereignty of the people or the notion of democracy requires the people’s participation in creation of the constitution, whether written or unwritten, and once created by the people, the customary constitutional rules will be regarded as part of the Constitution.\(^{170}\) This seems to be a rather broad interpretation of Article 1(2) and the notion

\(^{166}\) 2004Hun-Ma554, 566, 21 October 2004, 4Da(3)Da.
\(^{168}\) 2004Hun-Ma554, 566, 21 October 2004, 4Da(1)Ka.
of democracy. Nevertheless, it shows that the Court is attempting to give citizens an important place in major decision-making processes. This is consistent with the Court’s objective of guarding and actively implementing the rule of law and democracy.

Judge Kim Young II who delivered a separate judgment also clearly endorsed the possibility of the existence of the concept of customary constitutional rules. But Judge Chun Hyo Sook in her dissenting judgment said that customary constitutional rules cannot have the equal status as that of the written Constitution. She went on to say that in a system where there is a written constitution, customary constitutional rules can only have a complementary role in relation to the written constitution, and they cannot exist separate from the written constitution itself. Thus, although Judge Chun dissented, she also recognised the possibility of the existence of customary constitutional rules. Like the majority, she also recognised that customary constitutional rules may be legitimised by virtue of the public’s conviction that such rules are part of the law (and this aspect of customary constitutional rules is discussed below in Part III.4.B.ii below). The following points may be noted in respect of Judge Chun’s decision:

(a) While recognising that customary constitutional rules may exist, Judge Chun indicates that they are subordinated to the provisions of the written Constitution. If so, firstly, what is the status of customary constitutional rules, and secondly, how can they be changed or invalidated? An obvious implication of Judge Chun’s decision is that customary constitutional rules may be modified by general laws such as the Special Act on the Establishment of a New Capital City. But if customary constitutional rules may be modified by general laws, then how are customary constitutional rules ‘constitutional’ rules? Even if customary constitutional rules only supplement or complement the provisions of the Constitution, should they not have a status that is higher than that of general laws?

(b) Judge Chun indicated that the relevant political bodies (namely, the National Assembly) may modify customary constitutional rules unless the relevant matter relates to a matter involving a national crisis. But the problem with this suggestion is that: it might be difficult to define what constitutes a national crisis for the purpose of recognising the customary constitutional rules that may be amended only through a national referendum. Even in the present case, it is arguable that a relocation of the capital city of Korea can potentially be a matter of national crisis for several reasons. Firstly, it may be due to the huge costs to be incurred in respect of the relocation work. Secondly, it may be due to the possibility of the escalation of issues relating to ‘regional politics’. Thirdly, it may be due to the fact that the motivation for relocating the capital city of Korea may be mostly based on political considerations, and not on practical or reasoned considerations. Hence, it is not unreasonable to suggest that the relevant matter in the case involves a matter of a national crisis for a significant portion of Koreans.

2004Hun-Ma554, 566, 21 October 2004, 7Ka(3).
2004Hun-Ma554, 566, 21 October 2004, 7Ka(3).
2004Hun-Ma554, 566, 21 October 2004, 7Ka(5).

In Korea, issues relating to ‘regional politics’ result in hostile attitudes between people from different regions of Korea. Hence, the question of where the capital city of Korea should be located is a particularly sensitive issue.
ii. Elements of Customary Constitutional Rules

How can a customary constitution rule be established? What are the elements of a customary constitution rule? The Court said that, firstly, customary constitutional rules are concerned with basic and fundamental aspects of Korea in respect of which it is not appropriate for written laws to regulate.\textsuperscript{177} Secondly, in order for customary constitutional rules to be established, the Court said that they must contain the required elements that constitute customary laws.\textsuperscript{178} These two basic requirements are elaborated by the Court in more detail, as follows:\textsuperscript{179}

(a) In order for customary constitutional rules to be established, firstly, there must exist certain customs that are relevant for the relevant constitutional matters in question.

(b) Secondly, such customs must have existed continuously and practised repeatedly, such that the public must recognise their continuous existence.

(c) Thirdly, there must not have been any other customs the substance of which conflicts with the customs in question.

(d) Fourthly, such customs must be capable of clear interpretation.

(e) Fifthly, there must be public approval, belief, or consensus about the fact that such customs are part of customary constitutional rules and obligatory in nature.

This formulation of customary constitutional rules appears to contain substantial similarities to the author’s concept of normative legal culture (see Part III.4.A of Chapter 2). For example, the Court tries to identify customs or elements of culture that are firmly rooted in Korean history, which is part of the methodology used in this thesis. Further, once such customs or cultures are identified, the Court examines whether the people would take a firm view as to whether such customs should form part of the law. This seems to be an endorsement of the idea that, people’s idea of what the constitutional rules should be is directly relevant to the legal legitimacy of a constitutional rule (see Part III.4.C.ii of Chapter 2).\textsuperscript{180} Again, this is very similar to the author’s formulation of normative legal culture.

Thus, this case, in effect, not only provides significant support for the methodology employed in the current thesis, but it also means that the findings of the current research may be a useful reference for studying Korea’s customary constitutional rules.

iii. History and (Old and Current) Official Law as Evidence of Legal Culture

Applying the above principles to the facts of the case, the Court said that the question of where the capital city of Korea should be is a constitutional law matter because it concerns

\textsuperscript{177} 2004Hun-Ma554, 566, 21 October 2004, 4Da(1)Da.
\textsuperscript{178} 2004Hun-Ma554, 566, 21 October 2004, 4Da(1)Ra.
\textsuperscript{179} 2004Hun-Ma554, 566, 21 October 2004, 4Da(1)Ra.
\textsuperscript{180} For a similar argument, see Lawrence M. Friedman, ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 Yale LJ 1579 at 1605-1606.
fundamental issues relating to the identity and structure of Korea.\textsuperscript{181} The Court said that, therefore, the people themselves should decide such an important issue.\textsuperscript{182}

The Court then went on to examine historical evidence relating to the place of the capital city of Korea. The Court noted that since 1392, Seoul had been the capital city of Korea, and that the word ‘Seoul’ itself means ‘capital city’.\textsuperscript{183} These facts are, the Court said, evidence that Koreans, whether consciously or not, had recognised Seoul as the capital city of Korea.\textsuperscript{184}

The Court not only looked to the historical evidence, but it also examined the laws of Korea during and after the Chosun Dynasty period. For example, the Court noted that the fact that Seoul was the capital city of Korea was recorded in the \textit{Kyongguk Taejon}.\textsuperscript{185} The Court said that the wording of certain laws of Korea since the Chosun Dynasty period suggests that they simply assumed the fact that Seoul was the capital city of Korea – although such laws did not ‘decide’ Seoul as the capital city of Korea.\textsuperscript{186} This, the Court said, simply confirms the Korean public’s traditional conviction that Seoul had been, as a matter of law, the capital city of Korea.\textsuperscript{187}

This aspect of the decision is not entirely clear. The laws did not state that Seoul ‘shall be’ the capital city of Korea, but simply mentioned that Seoul is the capital city of Korea. In other words, the relevant laws suggest that it is only a matter of fact – and not a matter of law – that Seoul is the capital city of Korea. Judge Chun (dissenting) made a similar point when she said, ‘the Court cannot avoid having a leap in argument by trying to establish the legal proposition that “Seoul should be the capital city of Korea” from the factual proposition that “Seoul is the capital city of Korea”’.\textsuperscript{188} Such a leap in argument was probably inevitable in the absence of any law that stated that Seoul shall be the capital city of Korea. Also, given the subject matter of the relevant issue in dispute – that is, an essentially factual question of where the capital city of Korea is – such a leap in argument may have resulted. Nevertheless, what the Court is attempting to do in this case is to use, as it did in the \textit{Same Surname – Same Origin Marriage Ban Case}, legal history as evidence of the existence of particular legal culture.

As Judge Chun pointed out, the way in which the Court used certain old laws as evidence relating to the existence of people’s belief that Seoul ought to be the capital city had its problems. Nevertheless, the Court’s approach is consistent with the author’s current methodology, which makes the prima facie assumption that official laws are supported by the relevant normative legal culture, unless proved otherwise (see Part IV.3.C.ii of Chapter 2). The existence of the relevant official law would be significant evidence of the existence of the normative legal culture that supports such official law. In fact, this aspect of the Court’s

\begin{enumerate}
\item[181] 2004Hun-Ma554, 566, 21 October 2004, 4Da(a(2).
\item[182] 2004Hun-Ma554, 566, 21 October 2004, 4Da(a(2).
\item[183] 2004Hun-Ma554, 566, 21 October 2004, 4Da(3) Ka.
\item[184] 2004Hun-Ma554, 566, 21 October 2004, 4Da(3) Ka.
\item[185] 2004Hun-Ma554, 566, 21 October 2004, 4Da(3) Na1Ba.
\item[186] 2004Hun-Ma554, 566, 21 October 2004, 4Da(3) Na3Na.
\item[187] 2004Hun-Ma554, 566, 21 October 2004, 4Da(3) Na3Na.
\item[188] 2004Hun-Ma554, 566, 21 October 2004, 7Ka(2). Indeed, one of the principal issues relating to the creation of customary laws is that ‘one cannot derive an \textit{ought} from is’. See Alan Watson, ‘An Approach to Customary Law’ (1984) \textit{U III L Rev} 561 at 561.
\end{enumerate}

225
assessment is significant. This is because after examining the records relating to the relevant official laws (both old and current), the Court then simply, without examining any other significant evidence, went on to conclude that the relevant culture that treats Seoul as the capital city of Korea is (a) capable of being clearly interpreted, and (b) backed by the Korean public. 189

The Court said that assuming that the fact that Seoul is the capital city of Korea is a customary constitutional rule of Korea, then such a rule may be invalidated only through a national referendum as required by Article 130 of the Constitution. 190 The Court further said that such a customary constitutional rule may also be invalidated if it is no longer found to be supported by the public consensus. 191 The Court indicated that while ‘customary rules’ may be modified by way of enacting laws that purport to modify them, ‘customary constitutional rules’, being higher laws, may only be modified by higher laws. That is, by going through the procedures set out in the Constitution itself. 192 The Court said that the customary constitution can also be modified if, and to the extent that, there are provisions in the Constitution itself that modify it. 193

Some of the above aspects of the majority decision will be further analysed in light of Judge Kim Young Il’s decision discussed below.

iv. Judge Kim Young Il’s Judgment

Judge Kim Young Il’s judgment contains several significant points relevant to the question of the legal culture of Korea and the rule of law. As such, it deserves closer attention in this section. Judge Kim held that the Act violates Article 72 of the Constitution rather than Article 130. He said that the matter of the location of the capital city of Korea is a ‘policy relating to matters of the national destiny’ and the fact that the President of Korea did not submit the matter to a national referendum violates Article 72 of the Constitution. 194

Judge Kim said that the language of Article 72 is worded in such a way that it is a matter of the President’s own discretion as to whether the matter should be submitted to a national referendum. Nevertheless, he said, the rule of law requires that any discretion entrusted to public authorities cannot be free from the law, and must be exercised according to the law. 195 Therefore, if it is found that the President has improperly exercised his discretion set out in Article 72, then his exercise of discretion will be unconstitutional. 196

This is clearly another instance of an attempt by the Court to uphold the rule of law. This time, the Court does so by limiting the President’s power guaranteed in the Constitution itself (compare Part IV.3.B of Chapter 3). However, this seems to be a rather liberal interpretation of the wording in Article 72 because the wording in Article 72 clearly seems to

195 2004Hun-Ma554, 566, 21 October 2004, 6Ra(1).
196 2004Hun-Ma554, 566, 21 October 2004, 6Ra(1).
give the President an unfettered discretion in exercising the relevant power (see Part III.4.A above).

Judge Kim said that the question is whether there are substantial reasons to regard that the public’s view on the relevant matter is different from the way in which the President would view the relevant matter. He said, if so, although the actual view of the public on the relevant matter has not been proven, the President will be found to have exercised his discretion improperly if he exercises his discretion without submitting the matter to a national referendum.197 Hence, Judge Kim was prepared to go a long way to ensure that the public’s views on what the law should be is given a normative value – which must be respected even by the President himself.198

Judge Kim then examined the public’s view on the matter of where the capital city of Korea should be, based on a public opinion poll of January 2004. He then concluded that the public’s view on the matter was divided, and therefore, the President should have submitted the matter to a national referendum.199 Judge Kim went on to say that even if it was found that the fact that Seoul is the capital city of Korea is a customary constitutional rule, it is also a matter relating to the national destiny, requiring the President to submit the matter to a national referendum.200

Judge Kim said that even if a matter requires an amendment to the Constitution, which requires compliance with Article 130, the President can nevertheless submit the matter to a national referendum to find out the public’s views on the matter pursuant to Article 72.201 Accordingly, the requirement to hold a national referendum pursuant to Article 130 does not preclude the application of the national referendum requirement under Article 72.202 Nevertheless, he said, once a national referendum is held under Article 130, then there will no longer be a requirement for another national referendum to be held under Article 72.203

Judge Kim then expressly endorsed the possibility of the existence of unwritten constitutional rules when he said that both Articles 72 and 130 can relate to a matter that requires an amendment to a constitutional provision, ‘whether such constitutional provision is a written or unwritten provision of the Constitution’.204 He went on to say that one of the requirements of the validity of a customary constitutional rule is the conviction of a majority of people that such a rule is part of the law. He said when such conviction no longer exists, a rule will lose its status as part of the customary constitution.205 He said that a decision of the Court is one of the ways of ascertaining the existence of such conviction of the people, and

197 2004Hun-Ma554, 566, 21 October 2004, 6Ra(2)Ka-degeut.
198 This is similar to the approach suggested by some commentators in respect of United States constitutional law. They argue that if the Constitution itself contemplates standardless official discretion, then the courts may prescribe the relevant standards for exercising such discretion. See Richard E. Levy & Sidney A. Shapiro, ‘A Standards-Based Theory of Judicial Review and the Rule of Law’ Wake Forest University Legal Studies Paper No. 05-16 (July 2005).
199 2004Hun-Ma554, 566, 21 October 2004, 6Ra(2)Ka-rieul.
200 2004Hun-Ma554, 566, 21 October 2004, 6Sa(1).
that a national referendum held pursuant to Article 72 or Article 130 is another way of ascertaining such conviction.\textsuperscript{206} This approach is similar to what normative legal culture is related to: a strong conviction about what a particular law should be (see Part III.4.A of Chapter 2). According to Judge Kim, this can be ascertained by way of a national referendum. But he seems to imply that, given the fact that this may often be impractical, the Court’s judgment would probably be the most practical means of identifying such legal culture.

However, Judge Kim then goes on to say that the problem with the majority’s decision is that the Court equates the unwritten provisions of the customary constitution to the written provisions of the Constitution itself.\textsuperscript{207} He says that only the relevant government bodies, and not the Court, have the authority to decide what provisions are to be included in the written Constitution of Korea. Therefore, the Court is acting outside its authority if it equates certain unwritten provisions of the customary constitution to the written provisions of the Constitution.\textsuperscript{208} He says that, in the circumstances, it is more appropriate to require a national referendum pursuant to Article 72 rather than Article 130 – particularly given the fact that the public’s view might turn out to be different from that of the Court’s on the matter in question.\textsuperscript{209}

It is clear that Judge Kim is taking a conservative view of the Court’s ability to make a decision about the existence and validity of customary constitutional rules. He is, in fact, suggesting that, on matters relating to the question of the existence of customary constitutional rules, the public’s view on the matter should be sought. However, this seems to contradict his earlier comment that the Court may decide the validity and the existence of customary constitutional rules.\textsuperscript{210} If, as he commented earlier, the Court can decide, and has in fact found, that certain customary constitutional rules validly exist (as in this case), then why should the matter be decided again by a national referendum under Article 72? If the Court’s decision on the valid existence of certain customary constitutional rules can be viewed as final, at least for the time being, then the presumption will be that those customary constitutional rules validly exist unless it is modified by the findings made by a national referendum under Article 130, which is what the majority of the Court has suggested.

It may be the case that what Judge Kim is implying is that while the Court can decide the existence and the validity of certain customary constitutional rules, its decision is not final at any point in time, and the public view on the matter will conclusively decide the matter. Although Judge Kim may be correct in suggesting that the public’s view on customary constitutional matters should prevail, the following points may be noted:

(a) This means that the existence and the validity of customary constitutional rules cannot be clearly ascertained unless and until a national referendum is held every time such matter arises. As a practical matter, this will be a burdensome exercise to undertake.

(b) As mentioned above, this directly contradicts Judge Kim’s earlier comment that the Court may decide on the existence and the validity of customary constitutional rules.

\textsuperscript{206} 2004Hun-Ma554, 566, 21 October 2004, 6Sa(2)Da.
\textsuperscript{207} 2004Hun-Ma554, 566, 21 October 2004, 6Sa(4)Na.
\textsuperscript{208} 2004Hun-Ma554, 566, 21 October 2004, 6Sa(4)Na.
\textsuperscript{209} 2004Hun-Ma554, 566, 21 October 2004, 6Sa(4)Ka.
\textsuperscript{210} See 2004Hun-Ma554, 566, 21 October 2004, 6Sa(2)Da.
(c) If the Court is unable to decide on the existence and the validity of customary constitutional rules, then can the Court decide on the existence and the validity of ‘customary rules’ that are not customary constitution rules? As in the case of customary constitutional rules, customary rules must be supported by the public’s conviction that they are laws. Further, as in the case of constitutional laws, the Court cannot ‘legislate’ or ‘enact’ customary laws – only the relevant legislative bodies of Korea can.

(d) Article 72 says that ‘[t]he President may submit ... to a national referendum if he deems necessary’. The language of this provision clearly confers the President an unfettered discretion to decide as to whether to submit the relevant matter to a national referendum. A plain reading of this clause does not seem to warrant that the President’s discretion contained in the clause is as restricted as what Judge Kim is suggesting. This is consistent with the view taken by Judge Chun (dissenting) who said that Article 72 may be conferring the President an excessive discretion, but the clause clearly confers the President the discretion as to whether to submit the relevant matter to a national referendum.

On the whole, the majority judgment appears to be more consistent with the requirements of the Constitution, and Article 130 seems to be a more appropriate route to decide the case. The role of the Court in deciding the modern legal culture of Korea is not without its problems, the chief problem being that the Court may misinterpret the relevant public view. But such a problem is difficult to avoid, and would exist in any event no matter who is interpreting the public view. Short of a national referendum, the Court’s interpretation of the legal culture may be persuasive and practical.

5. Conclusions

Judicial review by Korea’s Constitutional Court has become increasingly active and influential, with several landmark cases now decided. Such cases include the Special Law on the Establishment of a New Capital City Case discussed above, and the recent case involving President Noh Moo Hyun’s impeachment proceedings. In addition to the relevant constitutional provisions purporting to guard the rule of law, the work of the Court demonstrates an unambiguous readiness to enforce constitutional provisions to ensure that the rule of law is implemented. The attitude of the Korean government and people seem no different in recognising and upholding the integrity of the Court’s decisions.

Hence, it can be shown that the modern legal culture of Korea, as evidenced by the activities of the Court, strongly supports the provisions of the Constitution that in turn support the rule of law. The deeply rooted legal culture of Korea on constitutional petition (see Part III.2.E.ii of Chapter 3) has not disappeared from modern Korea. Rather, such normative legal culture is more visible in contemporary society, where globalisation of constitutional review has created yet another cultural space in which judicial activism is encouraged. Korea’s normative legal culture in relation to constitutional review is consistent with such a globalisation trend.

211 Emphasis added.
212 2004Hun-Ma554, 566, 21 October 2004, 7Ka(6).
During constitutional review, the Court engages in historical and cultural debates in search for customary laws or indigenous rules, which was evident in the *Same Surname – Same Origin Marriage Ban Case*. Such debate was elaborated in greater detail in the *Special Law on the Establishment of a New Capital City Case*. In these cases, on the one hand, the Court was dedicated in upholding the rule of law, even to a rather radical extent, and on the other hand, the Court attempted to base its decisions on aspects of indigenous legal culture. This may be viewed as somewhat paradoxical, especially given the fact that the modern official law of Korea already strongly supports the rule of law (see Part II.5 of Chapter 1). Why is the Court interested in identifying certain aspects of indigenous laws and legal culture in deciding the cases? Should the Court not simply rely on the current official laws in trying to decide cases if it wants to achieve the rule of law? In this regard, the following points may be noted:

(a) One way of interpreting the Court’s decisions is to look at what the Court is actually trying to do rather than focusing on the narrow holding. From a ‘constitutional ethnographical’ perspective (see Part II.2.B above and Part III.1 of Chapter 5), what are the judges trying to achieve? What is the Court’s ‘internal legal culture’ shown from these two cases? In both cases, the Court went a long way in trying to ascertain the public’s attitudes, both historical and current, in relation to the relevant law in question. In this way, the Court tried to balance the conflicting views on the ban on same-surname-same-origin marriages in the *Same Surname – Same Origin Marriage Ban Case*, and provide a check on the President’s power in the *Special Law on the Establishment of a New Capital City Case*. Thus, the judges’ approach was to recognise the notion that public consent is the basis of the legitimacy of the law. In the latter case, Judge Kim Young Il went so far as to ‘downplay’ the power of the President to achieve this, and Judge Chun Hyo Sook (while dissenting) also sought Korea’s deeply rooted legal culture in deciding the case.

The Court’s internal legal culture of recognising consent as the basis of the legitimacy of the law is itself similar to the relevant aspect of Korea’s normative legal culture evidenced in the *Hwabaek* institution (see Part II.3.D.i of Chapter 3) and the culture of the Chosun Dynasty regarding public opinion. This is a significant change from the Court’s earlier internal legal culture inherited from the colonial period (see Part IV.1.B of Chapter 3). The Court does not disapply indigenous legal customs but actively seeks to apply them to contemporary issues. Further, such internal legal culture of the Court also seems to require that the Court, rather than the majority, has the final say regarding matters in question: thus in both cases, it was the Court that determined the deeply rooted legal cultures in question. This is consistent with the very rationale of constitutional review as a check on majority power (see Part II.1 above).

Thus, the following observations may be made. Firstly, the Court emphasises the inner acceptance of the law by the public as being relevant to the legitimacy of the law (see

---

214 This practice of the Court is not different from, for example, the practice of the United States Supreme Court in referring to, and interpreting, cultural meanings, particularly in cases involving individual rights of speech, equality and privacy. See Timothy Zick, ‘Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography’ (2004) 45 Wm and Mary L Rev 2261 at 2301.

215 See 2004Hun-Ma554, 566, 21 October 2004, 6Ra(1).


217 See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 5 (arguing that public opinion in Chosun society and modern Korea has had particular political significance).
Part III.4.C.ii of Chapter 2), which supports the rule of law.\(^{218}\) The mere fact that the Court did not simply rely on written law, but searched for unwritten laws based on what the public viewed the law should be, is not inconsistent with the rule of law.\(^{219}\) Secondly, the Court is seen as powerfully asserting itself as the chief defender of the entire constitutional order,\(^{220}\) which is particularly significant in light of past authoritarian regimes (see Part IV.3.B of Chapter 3), and which requires public support.\(^{221}\)

(b) The Court tends to interpret the legal culture of Korea in such a way as to imply that it is consistent with the rule of law rather than the notions of Confucianism. This was the case in both the Family Ritual Standards Act Case and the Same Surname – Same Origin Marriage Ban Case. The Court’s view seems to be that many aspects of the deeply rooted legal culture of Korea are consistent with the rule of law. This supports the first of the two main arguments of this thesis. In these cases, had the Court taken the view that the relevant aspects of Korean legal culture were more in line with Confucianism rather than the rule of law, the cases would have been decided very differently (possibly undermining the Court’s own legitimacy). Moreover, the Special Law on the Establishment of a New Capital City Case shows that the Court’s view of normative legal culture would have a determinative influence in creating and shaping any new customary constitutional rules. This shows that one’s view of normative legal culture significantly influences aspects of legal practice: and this supports the second of the two main arguments of this thesis.

(c) In the Special Law on the Establishment of a New Capital City Case, in effect what the Court did was to identify an unofficial law that was supported by the normative legal culture of Korea. The unofficial law in that case was the fact that Seoul is the capital city of Korea. As discussed in Part IV.3.C.iii of Chapter 2, this may be seen as a case of a ‘lack of law’ situation where there are gaps in the law. Such a gap in law may be filled with rules that are supported by the normative legal culture. That is what the Court did when it tried to ensure that the rule that Seoul is the capital city of Korea is seen by Koreans as what the law should be.

(d) Was that unofficial law in question ‘normative unofficial law’ before it was made official law? Recall that, ‘normative unofficial law’ is a non-legal rule that supports the official law, which is based on the rule of law rather than on indigenous cultural norms (see Part IV.2.F of Chapter 2). It is difficult to say whether the law that states that Seoul is the capital city of Korea supports the rule of law or not. But it is reasonably clear from the judgment that the reasoning and the overall outcome of the decision demonstrate support for


\(^{219}\) Maxwell O. Chibundu, ‘Globalising the Rule of Law: Some Thoughts at and on the Periphery’ (1999) 7 Ind J Global Leg Stud 79 at 84. Chibudu (at 84) says that ‘two plausible (but extreme) conceptions of the rule of law should be eliminated-expeditiously, as it were. The first conception to be eliminated is the idea that the “rule of law” means the unyielding enforcement of whatever is deemed or proclaimed to be “law” by whoever is in power. The second is a set of immutable orders that must be undeviately adhered to or enforced against all persons to yield stability or order …’


\(^{221}\) Friedman argues that the legitimacy of judicial activism and judicial review requires the support of the relevant public opinion. See Lawrence M. Friedman, ‘Popular Legal Culture: Law, Lawyers, and Popular Culture’ (1989) 98 Yale L J 1579 at 1605.
the rule of law. The whole decision was based on the premise that public consent is required for fundamentally important decisions, as well as to act as a check on the exercise of excessive Presidential power. Hence, it is probably appropriate to call the customary constitutional rule in question normative unofficial law.

To sum up, the Court’s success challenges conventional views about Korean legal culture and the subtle prejudice found in the rule of law narratives of globalisation. Far from being inconsistent with the rule of law, indigenous legal culture is actually explicitly brought out by the Court to support its constitutional review. The Court views that Korea’s deeply rooted legal culture supports the rule of law and thus may form the basis of the Court’s decisions. In other words, Korea’s deeply rooted legal culture is not antithetical to judicial globalism, but it actually strengthens that process. In fact, it forms an indispensable part of that process.

---

222 For a discussion of the issues relating to excessive presidential power in Korea, see Part VI.3.B of Chapter 3.

223 Given the controversies relating to the exact legal characteristics relating to customary constitutional rules, the concept of ‘normative unofficial law’ seems particularly well suited for discussing customary constitutional rules. The problems with customary constitutional rules seem to be that, firstly, it is not clear whether they have the same effect as official laws. Even if they are official laws, their hierarchy vis-à-vis other laws is not clear (see Part III.4.B.i above). Secondly, it is not clear how and when they come into force. Note that they may lose force if the public opinion no longer supports them (see Part III.4.B.ii above). The concept of ‘normative unofficial law’ allows one to discuss potential legal rules without getting into details about the exact legal characteristics of such rules. Thus, the Court could discuss normative unofficial law (as suggestion) and the legislature could decide whether to make it official law.

224 Sally Engle Merry, ‘Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia’ (2003) 28 Law & Soc Inquiry 569 at 538 (arguing that contemporary globalisation encourages the view that Asia’s indigenous culture is inferior).
Chapter 5  The Legal Culture of Korea and Negotiations in Cross-Border Finance

I.  INTRODUCTION

Chapter 3 was concerned mainly with the first of the two main arguments of this thesis, while Chapter 4 dealt with both arguments. This chapter will focus mainly on the second argument, which proposes that ‘findings made in respect of the deeply rooted legal culture of Korea may have significant practical applications in certain areas of legal practice, particularly given that one’s view of the findings is likely to influence the way in which one carries out his or her legal practice’.

Hence, while the earlier chapters were concerned primarily with ascertaining aspects of normative legal culture, this chapter focuses on how they may be applied in legal practice. While the findings on normative legal culture were more theoretical in nature, this chapter is more concerned with practical applications of such theoretical ideas. Thus, the focus is on the practical side of legal culture, demonstrating to practising lawyers the significance of accurately understanding legal culture.

As discussed in Part III.4.C.1 of Chapter 2, normative legal culture may have a determinative influence on a particular law. Part I.2.B of Chapter 4 showed that this is the case with aspects of constitutional review where the views of the Constitutional Court judges on Korea’s normative legal culture have actually influenced the Court’s decisions. This in turn has influenced the achievement of the rule of law and resulted in greater constitutionalism, which are part of a global phenomenon.

What about the globalisation process in the area of ‘corporate/commercial’ enterprise, which is also related to the rule of law reforms? How does Korea’s deeply rooted legal culture matter in this area? The process of Western countries’ commercial law and corporate practice capturing the global market may be viewed as a process of ‘colonisation’ because of its imperial and hegemonic nature2 (see Part IV.1.D of Chapter 3 and Part I.1 of Chapter 4). Thus, a Korean lawyer has commented that ‘globalisation means an external mandate for legal, political and cultural changes and reforms for many emerging market economies such as Korea’.3 This globalisation/colonisation argument becomes conspicuous in the ‘corporate/commercial’ area. This is because, unlike the ‘human rights’ type of globalisation (such as constitutionalisation discussed in Chapter 4), this process is seen as distributing benefits unequally, mainly to those in the West at the expense of many elsewhere4 – thus showing a greater resemblance to colonisation/imperialism processes. Further, this

1 Bruce A. Markell, ‘The Rule of Law in the Era of Globalization: A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law’ (1999) 6 Ind J Global Leg Stud 497 at 501 (stating that organisations such as the International Monetary Fund often require rule of law reforms as a condition of providing loans).
'corporate/commercial' type of globalisation is progressing powerfully and rapidly, as Bruce A. Markell remarks:

'through market influence and dictates of international financial organisations, Western-style commercial law is, or will soon be, sweeping the world. Given its power, and its speed, aided by modern technology, this economically-driven phenomenon may augur well for the rule of law.'

Also, as John Flood says:

'I believe this raises a number of questions that we are only just beginning to consider. Is globalisation a new name for modernisation with its imperialist connotations? Are we seeing domination through a particularly Western mode of law discourse, a deterrioralisation of law? Does globalisation mean that the global and local co-exist or are the tensions too great? Can ideas of economy and justice co-exist or are they antagonistic to each other?'

Thus, the globalisation process in this area raises several questions relating to the rule of law, local versus global laws and cultures, and the way in which this process will shape the future of global financial laws. It is a relatively new area of study, but is of paramount importance to all nation states and individuals. Organisations such as the International Monetary Fund and the World Bank are heavily involved in this process as they require countries to adopt 'Western-style commercial law' as a condition of aid. The other major force behind rule of law reforms in this area relates to the practice of global law firms in cross-border financing transactions.

---

6 John Flood, 'Globalisation and Law' in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 328.
8 Ibid. See also Jan Dalhuisen, Dalhuisen on International Commercial Financial and Trade Law (Hart Publishing, 2004) at 3. Dalhuisen argues that cross-border financing law and transactions are increasingly viewed as the most important for the globalisation of law and culture. He argues that there has been a clear shift in emphasis from the international sale of goods to international financing when one talks about international commercial law. This is because, he argues, typical commercial law instruments such as the bill of lading and negotiable instruments are losing much of their importance in trading environments that are increasingly paperless and electronic. And especially for payments, closely connected with clearing, settlement and netting notions are the subject of financial law. For a discussion of the complexity and the relevance of financial law in relation to netting, clearing and settlement, see, for example, Roy Goode, Legal Problems of Credit and Security (Sweet & Maxwell, 2003) at 203-296. See also, generally, Ravi C. Tennekoon, The Law & Regulation of International Finance (Butterworths, 1991). Flood also notes that 'within the last 25 years of the 20th century capital markets work has soared at the expense of the decline of the industrial manufacturing economy, and has become dominated by a small number of players'. See John Flood, 'Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies' in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 149.
In its reform initiatives, the World Bank has been criticised for aiding countries that could themselves borrow funds in capital markets. This is because capital markets activities would facilitate those countries to develop better financial and legal systems. Thus, it has been argued that the focus of institutions such as the World Bank should be to help emerging markets develop the rule of law, that is, to develop 'a linkage to capital markets'. Hence, it appears to be capital markets work, rather than the work of organisations such as the World Bank, that is crucial for 'corporate/commercial' type of globalisation. The former type of globalisation activity constitutes the main focus of this chapter.

It has been said that '[c]apital markets work is symbolic of the globalisation of finance and professional services'. This is because capital markets create the links by which capital can finance ventures. Flood observes that '[t]he means of providing access to capital adopted in the recent globalisation have been original, inventive, and profitable, innovation being stimulated by the returns to exports of financial and ancillary services, which are enormous'. Capital markets work is one of the fastest growing forms of financial activity in the world, and is described as the 'purest global law' work. This is also the case in Asia.

It has been said that of all capital markets work, the most innovative, distinct and significant is securitisation. It is said that 'securitisation has become one of the dominant

---

9 John Flood, 'Globalisation and Law' in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 317.
10 Ibid. (Flood refers to the statements of the US Treasury Secretary and the general counsel for the European Bank of Reconstruction and Development (EBRD) to support this suggestion).
12 John Flood, 'Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies' in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 148-149. See also Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999) at 50 (stating that securitisation has contributed to the globalisation of finance).
14 John Flood, 'Globalisation and Law' in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 314. For a discussion of the nature of capital markets work, see Part II.2.A below.
16 John Flood, 'Globalisation and Law' in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 314 (referring to articles that discuss Korea and Japan's activities in this area).
17 John Flood, 'Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies' in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 153. Flood says (at 149) that 'the key to the success of capital markets has been the role played by securitisation, the ability to raise large amounts of money while shifting the resultant debt off the balance sheet'. He says (at 153) that securitisation is the most innovative of capital markets work.
financial techniques in capital markets'. Securitisation is also seen as the main contributor to the globalisation of finance. For these reasons, this chapter focuses particularly on securitisation.

The main purpose of this chapter is not to prove definitively that Korean legal culture, as evidenced in international financing transactions, supports the rule of law (although Part II.1 below briefly deals with this point). Rather, it shows how aspects of Korean legal culture (as discussed in previous chapters) may apply in securitisation and other capital markets transactions. Because this chapter has quite different aims to Chapters 3 and 4, a different methodology is developed (see Part III below).

If, as discussed in Chapters 3 and 4, significant aspects of Korean legal culture are consistent with the rule of law, then they are surely relevant for global rule of law reforms. If local legal culture supports the rule of law, then those driving the reform should take into account local legal culture rather than regarding it as an obstacle to reform. Indeed, it would be in the interest of rule of law reformers to ensure as much as possible the inner acceptance of laws proposed to be transplanted. Hence, this chapter argues that rule of law reformers, as specified below, should take into account Korean legal culture when dealing with Koreans.

Who is driving reform in this area of capital markets/securitisation? The main reformers are large international law firms that engage in these types of deals. Even though they are neither nation states nor public bodies such as the World Bank, their influence should not be underestimated. It has been said that the practice of global law firm lawyers ‘create’ global financial laws by executing transactions in areas where there are inadequate or no laws to govern the transactions. Thus, it has been said that each of these global law firms is ‘a dynamic entity that enables it to confirm that transactions will be accepted as real, true and valuable by the commercial community at large’.

---

18 Id at 147.
19 Bruce A. Markell, ‘The Rule of Law in the Era of Globalization: A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law’ (1999) 6 Ind J Global Leg Stud 497 at 501 (stating that securitisation is one of the main forces behind the global rule of law reform). See also Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999) at 50 (stating that securitisation has contributed to the globalisation of finance).
22 See Jan Dalhuisen, Dalhuisen on International Commercial Financial and Trade Law (Hart Publishing, 2004) at 3-4 (discussing the significance of the way in which these professionals execute international financing transactions).
23 John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 313 (original emphasis).
25 Flood says that ‘large law firms lawyers are endowed with priestly attributes, that by conferring their imprimatur on the transaction, the profane becomes sacred and believers have faith’. See ibid.
cross-border finance for the globalisation process. Ridgeway and Talib say that such a phenomenon ‘heralds a new era’.  

How does the deeply rooted legal culture of a country interact with such global legal practice? It has been recognised that international financial investment could not thrive where the rule of law, in general, failed to exist or remained weak. Markell argues that rule of law reform will be best achieved in these countries through their participation in international capital markets where they need to adhere to a sophisticated system of currency exchange and exchange rules. Indeed, many countries have borrowed laws from different legal systems in an attempt to signal to foreign investors that they comply with high legal standards. Markell, however, says that cultural commitment to the rule of law, ‘the adoption of its spirit – will perhaps take the longest [to achieve] because it will involve legal, political, and cultural changes that go far beyond the area of commercial law’. Hence, whether or not the deeply rooted legal culture of local parties supports the rule of law may be crucial to the success of the global legal practice in finance.

Part III below demonstrates how aspects of Korea’s deeply rooted legal culture may be applied in capital markets and securitisation transactions involving Korean parties. A ‘model pre-negotiation inquiry’ will be proposed for these deals. This inquiry does not purport to cover all aspects of the legal practice involved in these types of deals. Nor does it provide every solution to the complex commercial and legal issues involved. The model for the inquiry is limited to the legal cultural issues that may arise in cross-border capital markets and securitisation deals involving Korean parties. The main point is to show that legal cultural issues may have real ramifications in these deals, and that they should be considered by international counsel. This will have a particular significance from the perspective of rule of law reformers.

The model pre-negotiation inquiry proposed also attempts to provide certain narratives regarding the legal cultural issues involved in these deals. This manifests as the second argument of this thesis. As Flood says, ‘[i]f we want to know how organisations attempt to create a culture and establish their niche, we need narrative because these things are contested, ambiguous and inchoate’. The model pre-negotiation inquiry may be

27 See, for example, Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999) at 129.
31 The author draws on his experience as international counsel (advising English law) involved in this type of transaction.
32 That is, the proposition that: ‘Findings made in respect of the deeply rooted legal culture of Korea may have significant practical applications in certain areas of legal practice, particularly given that one’s view of the findings is likely to influence the way in which one carries out his or her legal practice’.
33 John Flood, ‘Socio-Legal Ethnography’ in Reza Banakar & Max Travers (eds), Socio-Legal Research Methods (Hart Publishing, forthcoming) at 47.
contested and subject to multiple interpretations. But there is no absolutely ‘correct’ way of explaining cultural negotiations. This chapter reveals these narratives through the model pre-negotiation inquiry. This provides resources allowing readers to interpret cultural negotiations as they take place in the transactions under discussion. This is precisely the point of this chapter and the second main argument of this thesis.

Before the model pre-negotiation inquiry is discussed in Part III, Part II.1 discusses Korean legal culture in the areas of commerce and finance. This represents aspects of modern local legal culture that interact with the globalisation process under discussion. Part II.2 discusses global legal culture in relation to finance, which largely reflects Anglo-American legal culture and the practice of large US and UK law firms. Part II.3 shows how, in theory, such global legal culture interacts with local legal cultures. Part III demonstrates how, in practice, such interactions take place.

II. GLOBAL AND LOCAL LEGAL CULTURE IN RELATION TO CROSS-BORDER FINANCE

1. Korean Legal Culture in the Areas of Commerce and Finance

Before examining the interaction between global and Korean legal culture in cross-border financing transactions, it will be helpful to consider broader Korean legal culture in the areas of commerce and finance. It was argued in Part III.7 of Chapter 3 that Korean legal culture supports ownership and property rights for individuals (as opposed to collectivism), which facilitates business transactions. There is considerable rights-consciousness (see Part III.9 of Chapter 3), and Koreans tend to be quite litigious and demanding of efficient and affordable justice (see Part III.8.D of Chapter 3). Such legal culture has ramifications in commerce and finance: it can facilitate business dealings based on the rule of law.

Those who hold conventional views about Korean legal culture (see Part II.1 of Chapter 1) tend to focus on the fact that the Korean government nationalised most of the banking institutions in 1948, which had ‘long-term effects in that this led to government pressure and interference in various aspects of banking such as management, personnel, and budgeting’. They point out that since then, the tripartite relationship between the government, business, and financial institutions was such that the stance of banks was passive; they simply responded to the commands of the government to extend or withdraw credit to designated firms.

Also, negative assumptions about Korean legal culture have been made due to the emergence of the chaebol. A legal culture that is paternalistic, hierarchical and collectivist has been deduced because of the government’s influence over the chaebol.

---

35 Id at 283-284.
36 As mentioned in Part II.5 of Chapter 1, chaebol may be defined as 'multi-product firms composed of smaller subsidiaries with the purpose of maximising group benefits and which operate under a single (or closely connected) managerial center, mostly through cross-shareholding and managerial connections'. See Sung-Hee Jwa, The Evolution of Large Corporations in Korea (Edward Elgar, 2002) at 1. It should be noted that the chaebols are not legal entities (see ibid at 2).
37 Id at 11.
The criticisms relating to the *chaebol* phenomenon include the fact that it has resulted in general economic concentration, monopolistic market structures, unfair and unequal government protection and support and ‘unsound management behaviour’.\(^38\) It has been argued that such ‘unsound management behaviours’ include authoritarian behaviour on the part of executives, unethical reliance on high government elites, undue regard to ‘face’ (see Part III.5.B.1 below), and lack of separation of ownership and control.\(^39\)

Yet, do these issues accurately reflect Korea’s deeply rooted legal culture? To understand the *chaebol* phenomenon and other issues discussed above, one needs to consider Korea’s modern history. During the Japanese colonial period a banking system was imposed on Korea, which was ‘tailored to the needs of the Japanese colonialists after annexation’.\(^40\) From this time, business relationships in Korea have been dominated by the state, as according to conventional wisdom there - in Japan itself.\(^41\) Despite this, Kim Pyung Joo says that ‘[t]he role of indigenous entrepreneurs should not, however, be underestimated; they established and maintained their own modern banking institutions under the adverse circumstances of occupation’.\(^42\) Buzo says that whereas the Chosun Dynasty relied heavily on self-regulation of businesses, the Japanese imposed a strong, interventionist central government.\(^43\)

\(^38\) Id at 3-12.


\(^40\) Pyung Joo Kim, ‘Financial Institutions’ in Lee-Jay Cho & Yoon Hyung Kim (eds), *Korea’s Political Economy: An Institutional Perspective* (Westview Press, 1994) at 273. Buzo argues that largely as a result of the Japanese influence, ‘[p]latforms of familistic organisation, responsiveness to state economic policy and close ties to Japan became common, and they created a pattern of business activity that strongly influenced the development of Korean capitalism after 1945’. See Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 26. Baum says that there has persisted in Japan until today a business culture in the area of finance that is ‘paternalistic’ and ‘archaic’, with the relevant laws constituting ‘collusive regulation’ or ‘situational regulation by administrative guidance’. See Harald Baum, ‘Emulating Japan?’ in Harald Baum (ed), *Japan: Economic Success and Legal System* (Walter de Gruyter, 1997) at 10-12. Baum argues that, in the area of finance, there is a close relationship between those regulated and the regulators in Japan. He says (at 12) that ‘[t]he laws and ordinances grant the authorities wide discretionary powers which are used to persuade and guide the party concerned to act in a certain way, in order to realise an administrative goal through the party’s cooperation. As compliance with the ministerial suggestions is considered legally “voluntary”, there is little ground for judicial review by the courts and the whole process has a rather non-transparent character’.


\(^43\) Adrian Buzo, *The Making of Modern Korea* (Routledge, 2002) at 47. It has been argued that the Japanese financial system is not a suitable model for others to follow, even if it might work for Japan. See Pyung Joo Kim, ‘Financial Institutions’ in Lee-Jay Cho & Yoon Hyung Kim (eds), *Korea’s Political Economy: An Institutional Perspective* (Westview Press, 1994) at 312. Kim (at 312) argues that the reasons why the Japanese financial system has worked relatively well, in spite of its ‘outdated’ framework, is due to, firstly, Japan’s high national savings rate, and secondly, an ‘accepted set of conventions or practice’. Regarding the latter, Kim (at 312) says that ‘[p]erhaps the clue lies in
However, it is inappropriate to over-attribute the chaebol phenomenon and the Korea's poor management of commerce and finance of the past to the Japanese influence. For example, in relation to the 'unsound management behaviour' of the chaebol, there is a 'strong systematic temptation to promote concentrated ownership in firms' in any emerging economy. Also, one should remember that the series of authoritarian regimes in Korea used a strong, autonomous, and state-directed economic growth deploying a variety of discretionary tools in order to effect a quick economic recovery after the Korean War (see Part IV.3.B of Chapter 3).

On the other hand, it is also inappropriate to over-attribute Korea's past 'irregular' business practices to Korea's deeply rooted legal culture. Factors other than legal cultural reasons may better explain such irregularities. This view is reinforced by the fact that Korea has taken an increasing number of steps to reform its business culture, so that it has shifted from state-led economic development (which prevailed until the Park Chung Hee regime) to an emphasis on private-sector market-oriented growth (which has increased since the Chun Doo Hwan and Roh Tae Woo regimes).

In the area of banking, steps towards the denationalisation of nationwide commercial banks began in 1973. Foreign banks have been allowed to operate actively in Korea since the 1980s. Although Korea is not a part of the Basle Committee on Banking Supervision, Korea introduced the capital adequacy rules of the Bank for International Settlements in 1992. Generally, '[n]otwithstanding the retardation of their development under governmental control, Korean financial institutions are highly diversified and specialised'.

Japanese conventions, including such a gimmick as the virtual alteration of appointment to the governor of the Bank of Japan between the former vice minister of finance and Bank of Japan senior officials, which helps to remove friction between the two organisations. There are a host of unwritten Japanese practices and conventions that apparently serve to lubricate the rigid and seemingly archaic financial system of Japan'. Also, Ohnesorge says that in Japan, 'the ability of the Ministry of Finance to influence the Bank of Japan, which in turn was able to influence private bank lending decisions, has been described as a particularly lawless phenomenon'. See John K.M. Ohnesorge, 'The Rule of Law, Economic Development, and the Developmental States of Northeast Asia' in Christoph Antons (ed.), Law and Development in East and Southeast Asia (RoutledgeCurzon, 2003) at 105. But compare Ramseyer's argument that denies the existence of such practice in Japan. See, for example, Yoshiro Miwa & Mark Ramseyer, 'Banks and Economic Growth: Implications from Japanese History' (2002) 4 J Law & Econ 127 at 158. But see the criticisms made by Freedman and Nottage that Ramseyer simply refuses to recognise facts. See Craig Freedman & Luke Nottage, 'The Chicago School of Economics and (Japanese) Law: The Invasions by Stigler and Ramseyer' unpublished paper to be presented at an ANJEL conference, February 2006 (www.law.usyd.edu.au/~luken/anjel2006.pdf) at 13.


Id at 299 (Kim says that by 1986, there were 53 foreign bank branches in Korea).


In the area of capital markets, the Korean Stock Exchange was established in 1956 and the Securities and Exchange Law was enacted in 1962. Initially, the major business of the capital market in Korea was limited to government and public debenture transactions.\(^{51}\) But after 1972, when the Public Corporation Inducement Law was enacted,\(^{52}\) the securities market became active in Korea.\(^{53}\) During the 1970s, the total value of listed public and corporate bonds increased 88.1 times.\(^{54}\) Efforts to upgrade the securities markets then continued.\(^{55}\) On 1 July 1996, the Korea Securities Dealers Automated Quotation System Stock Market (KOSDAQ) was established, which was modeled after the United States' NASDAQ to support securities market involving businesses specialising technology areas. More recently, Korean firms increasingly access US capital markets.\(^{56}\)

Political discourse in Korea has become more legalistic, as the courts have become a central arena for dealing with popular demands against corruption.\(^{57}\) This might be partly due to the financial crises faced by Korea in 1987; these prompted the International Monetary Fund (IMF) to demand legal and institutional reforms in exchange for providing bailout funds.\(^{58}\) But such reforms were not solely due to external pressures. Domestically, steps were taken by entities such as the Federation of Korea Industries to adopt a charter of business ethics in 1999, followed by the adoption by several *chaebol* companies of internal codes of conduct.\(^{59}\) That is, although the IMF reform was ‘imposed’, it was made possible by the active and voluntary response of the Koreans. The Koreans also ‘wanted’ the reforms.\(^{60}\) Kim Hwa Jin argues that the successful implementation of the IMF programme, that is, at a faster rate than expected, indicates that the need for rule of law reform was not denied by Korea.\(^{61}\) Rather, much of Korea’s business culture has been in line with international standards, which challenges conventional views about Korean legal culture in the area of commerce and finance.

While many countries have borrowed more advanced legal systems to attract foreign investment, very few have successfully convinced investors that the ‘law in books’ was

---

51 Id at 289.
52 Kim Pyung Joo says that ‘[t]he intent of the law was to invest the government with the power to designate firms eligible to go public and issue ordinances to that effect’. See id at 289-290.
53 Id at 289.
54 Id at 290.
55 Id at 299.
58 Id at 5.
60 Hwa-Jin Kim, ‘Taking International Soft Law Seriously: Its Implications for Global Convergence in Corporate Governance’ (2001) *Journal of Korean Law* 1 at 45. (Kim (at 45) says that ‘the legalisation was made possible through continuous requests by the Korean managers’).
61 Id at 16-17.
effective in practice. Adaptation of foreign legal standards is not enough; the legal infrastructure must be perceived to be effective. Pistor says that this requires 'local constituencies with a strong interest and understanding of the laws'. Korea's success with its recent reforms in the areas of commerce and finance shows that Korean legal culture supported the reforms. In relation to the reforms of the chaebol system, the Korean government's policy towards 'separation of ownership and control' has not necessarily been based upon efficacy; but it 'was largely related to strong historical and cultural public sentiments against the concentration of power, both political and economic, in a few privileged individuals'.

In the area of securitisation, which is a main focus of this chapter, Korea has been very successful in recent years. When it comes to securitisation transactions (detailed in Part II.2.B below), the legal regimes of the originator's jurisdiction must be sufficiently rigorous and reliable in order to meet various requirements for the transactions. Securitisation 'flourishes best, and thus returns its benefits more directly, in a legal atmosphere conducive to the easy and certain transfer of intangibles'. However, it has been argued that such an atmosphere 'has thus far only been native to common law countries, and then only in those common law countries with a history of financial leadership'.

In Korea, to facilitate securitisation, the government enacted the Law Concerning Asset-Backed Securitisation in September 1998. Since then, cross-border securitisation in Korea has been the most successful in Asia, with the exception of Japan. The legal structuring of these transactions has employed some of the most advanced legal techniques, such as the master trust structure. The broad range of the asset classes and the structuring that the Korean legal regime could successfully adopt seemed to go well beyond the international market participants' initial expectations.

Such an achievement is noteworthy given the relatively short history of Korea's modern financial institutions, and given the fact that Korea largely retains a civil law system.

---

64 Id at 129.
68 Ibid.
(see Part IV.2.C of Chapter 3). It also challenges the views of those skeptical about the compatibility of Korean legal culture with the globalisation of finance. It has been said that ‘[i]t is quite surprising to observe that Korea, a country that has experienced colonial rule, war and poverty, has come to stand at the center of globalisation, subscribing to the rules of modern international law’. Such a ‘surprise’ should at least partly be explained by Korea’s deeply rooted legal culture, as it often supports the rule of law.

While the above discussion has been concerned with identifying further dimensions to Korea’s normative legal culture, the rest of this chapter will mainly focus upon how such aspects of culture apply specifically in legal practice. As already indicated, the key practice area is cross-border capital markets and securitisation deals involving Korean parties. As with colonialism and modernity (see Part IV.1.D of Chapter 3), new ‘cultural spaces’ are created by virtue of areas of legal practice where global and local legal cultures influence and shape each other. It will be shown that, again, rule of law narratives become relevant in such ‘cultural negotiations’.

2. Structured Finance Transactions and Global Legal Practice

A. Structured Finance Transactions

Before discussing the model pre-negotiation inquiry relating to cross-border securitisation and capital markets practice in Part III below, it will be instructive to outline what is commonly involved in these transactions.

Capital markets work involves obtaining finance from investors around the world mainly by issuing securities. Such securities may be in the form of bonds, depositary receipts, shares or structured securities (which include collateralised debt obligations (CDOs) and asset-backed securities). Sometimes, these kinds of transactions are referred to by practitioners as ‘structured finance transactions’ (which probably excludes certain ‘plain vanilla’ capital markets transactions). Hence, for the sake of convenience, these types of transactions will be referred to here loosely as ‘structured finance transactions’.

---

72 It has been said that countries belonging to the English common law family have the most investor-friendly laws, followed by the Scandinavian countries, and then the French and German civil law countries with the least investor-friendly laws. See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, ‘The Transplant Effect’ (2003) 51 Am J Comp L 163 at 166. Given the fact that Korean law belongs to the third category of legal systems, Korea’s success in cross-border securitisation is noteworthy.


74 Compare Flood’s description of capital markets work in John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 315 (stating that ‘capital markets work’ involves ‘gaining access to finance in markets throughout the world. This may be through issues of stock, bonds, securitisation of debt or loans, depositary receipt programmes, initial public offerings (IPOs), or privatisations’).

Structured finance transactions share certain similar characteristics such as the following: (a) securities are issued to capital markets investors;\(^{76}\) (b) they represent good examples of some of the transactions that are ‘truly’ cross-border in nature;\(^{77}\) (c) perhaps other than certain ‘plain vanilla’ capital markets transactions, these transactions tend to be highly complex and the lawyers involved are usually very specialised; (d) many of these transactions have swaps\(^{78}\) within the structures, and they tend to be document-intensive and require extensive negotiations.\(^{79}\) A more detailed explanation of a typical deal structure is set out in the next section.

B. Deal Structure

There is no ‘standard’ deal structure for structured finance transactions. Each transaction will have unique features and differ in various ways from another transaction. For example, CDOs\(^{80}\) are a different category of transactions than securitisation. Even within CDOs and securitisation transactions themselves, there is a great variety of deal structures. The structures depend on, for example, the underlying assets, the identity of investors, credit enhancement mechanisms and so on. The ‘capital markets transactions’ category, on the other hand, represents a broad range of transactions (which includes securitisations and CDOs) pursuant to which securities are issued to capital markets investors.

It is helpful to outline some of the features of a ‘typical’ securitisation transaction by using the following diagram.

---

\(^{76}\) Strictly speaking, the relevant transactions may be structured in such a way that securities are not issued. But it is common that securities are issued as part of the structuring of transactions of these types.


\(^{78}\) Swaps are arrangements pursuant to which, for example, interest rate and currency risks are hedged. Many investment banks act as swap counterparties and provide the relevant services.

\(^{79}\) For a review of some of the common structures for these types of transactions, see Adrian Preston (ed), Global Securitisation and Structured Finance 2004 (Global White Page, 2004).

\(^{80}\) Within the CDO category, there may be many different types of deal structures, including managed CDOs, synthetic CDOs, cash CDOs, primary CDOs and so on.
The above deal structure has the following features:81

(a) Assuming that the deal type is a ‘cash flow’82 basis deal, there may be underlying assets that are being sold by the originator to a special purpose vehicle (SPV).83

(b) The ‘originator’ in that case will be the seller of the assets, and the SPV will the ‘issuer’ of the securities backed by the assets. Often the originator will engage its own English or US counsel to advise on matters affecting it.

(c) The terms relating to the underlying assets may be different to the terms of the securities to be issued by the SPV: for example, those relating to the currency and interest of the income. If so, the SPV may enter into a swap agreement with a swap counterparty in order to substantially hedge the interest and currency differences.

(d) The creditworthiness of the underlying assets and the originator84 will affect the credit rating of the securities to be issued by the SPV.

---

81 This securitisation deal structure is given as an example here because many of the case studies discussed in this chapter involve securitisation deals. For a detailed description of a typical securitisation transaction, see Thomas E. Plank, ‘Asset Securitization and Secured Lending: The Security of Securitization and the Future of Security’ (2004) 25 Cardozo L Rev 1655 at 1660-1666.

82 Some deals do not rely on the underlying cash flows to meet the relevant payment obligations under the instruments. They may adopt synthetic features by using, for example, credit derivatives.

83 A special purpose vehicle, or an SPV, for financing purposes is a company set up in a tax-efficient jurisdiction such as the Cayman Islands for the sole purpose of effecting the relevant financing transaction(s).

84 Originators are the entities that sell the relevant assets to the SPV. Theoretically, the originator’s creditworthiness should not affect the rating of the securities to be issued. But in practice, it is often relevant particularly given the fact that there are certain ongoing obligations of the originator.
(e) There may be various credit enhancement mechanisms adopted such as a guarantee or insurance. If the securities are guaranteed by a monoline insurance company, it will engage its own lawyers (English or US counsel) to advise on matters affecting it.

(f) Local lawyers will advise on the laws of the jurisdiction where the originators and the underlying assets are located. Assuming that the deal is a cross-border deal involving Korean parties and assets are located in Korea, the originator will be a Korean entity and Korean lawyers will need to be engaged.

(g) An arranging bank, which is often a US or European bank, will arrange the whole transaction and engage its own lawyers. They will usually be English or US law practising lawyers from law firms that specialise in these kinds of products. The arranging bank in most cases will subscribe for the securities issued with a view to on-sell them to other investors. The arranging bank is often called the ‘lead manager’. A syndicate of banks may be formed in order to purchase the securities. In that case, such banks may be called ‘managers’.

(h) The relevant documentation may include offering circulars, bond subscription agreements, swap agreements, asset transfer agreements, transaction administration agreements, trust deeds, and security documentation.

(i) A trustee (including a security trustee) and a transaction administrator may be appointed. They also appoint their own legal counsel to advise on matters that may affect them in the transaction.

(j) The SPV also appoints its own lawyers to advise on matters of the law of the jurisdiction where the SPV is incorporated. These lawyers assist in establishing the SPV and advise on tax and other legal issues affecting the SPV.

C. Global Financial Law Created by Global Legal Practice

In cross-border structured finance deals, banks that arrange the deals will typically want English law or New York law documentation and standards to be adopted in the deals. This

---

85 A monoline insurance company is a company that is in a business of providing insurance in respect of the performance of securities. Monoline wrapped securities achieve AAA ratings by Standard & Poor’s and Moody’s by virtue of the insurance. For a discussion of the way in which these credit rating agencies assign ratings to securities, see John Flood, ‘Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies’ in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2003) at 160-164.

86 In Asia, there are only a handful of international law firms that specialise in these products, and their Asia practice is mainly based in Hong Kong.

87 A trust deed may be used if the securities issuing documentation is governed by English law. If it is governed by US law, an indenture may be used.

88 As far as the US law documentation is concerned, New York law is often (but not necessarily always) the relevant law for these types of cross-border financing transactions. On the trend of global market participants choosing either English or New York law, see John Flood, ‘Megalawyering in Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice’ (1996) 3 International Journal of the Legal Profession 169. See also John Flood, ‘Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies’ in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 151 (stating that ‘[m]ost financial transactions, especially those relating to capital markets, are accomplished under the rubrics of English and/or New York state law’).
may be because the ‘malleability and dexterity of American and English law helps them maintain their competitive edge’.

And also, it may be because securitisation is basically a common law notion. But the issuers of debt securities will be entities that are subject to different laws and in different legal systems. Flood describes such a situation in the following terms:

‘most of these transactions are undertaken in New York state law and/or English law as the primary overarching legal categories ... As a result these two legal systems have become de facto global legal systems ... However, much of the detailed work of capital markets has to take into account of local conditions ... Therefore, we have a set of primary and secondary legal systems that have to be co-ordinated. This is performed by lawyers who employ the creativity of drafting - agreements, contracts, undertakings - to capture the myriad qualities of the global lex mercatoria.’

Thus, in this process, the use of English law and New York law and the relevant Anglo-American legal culture become part of the market norms for the area of practice, forming a kind of ‘third culture’. This aspect of legal culture becomes conspicuous because of its unique norm-generating effects. It has been argued that such norms take the form of ‘autopoietic norms’ (see Part III.3.D of Chapter 2). Also, such norms are described as ‘a malleable law made by professionals during the construction of deals’, which is ‘the sum of

---


93 Alastair Hudson, ‘The Regulatory Aspect of English Law in Derivatives Markets’ in Alastair Hudson (ed), Modern Financial Techniques, Derivatives and Law (Kluwer Law International, 2000) at 71 (suggesting that autopoietic norms are generated in these types of financing transactions by virtue of the practice of finance lawyers). This argument is plausible as the deal environment may be seen as ‘a hermetically sealed unit’. See John Flood, ‘Capital Markets: Those Who Can and Cannot Do the Purest Global Law Markets’ in R. P. Appelbaum, W. L. F. Felstiner & V. Gessner (eds), Rules and Networks: The Legal Culture of Global Business Transactions (Hart Publishing, 2001) at 249-271. Although not focusing solely on cross-border structured finance transactions, Friedman also says that ‘[t]he idea is that the transnational lawyers of today have their own customs, norms, and practices, and a sort of merchant law is emerging, without benefit of legislation, from their patterns of behaviour.’ See Lawrence M. Friedman, ‘Erewhon: The Coming of Global Legal Order’ (2001) 37 Stan J Int’l L 347 at 356. An English case that supports such arguments may be Kleinwort Benson v Lincoln City Council (Lincoln) [1998] All ER 513, where Lord Browne-Wilkinson, quoting Lord Denning, said that ‘[t]he practice of the profession in these cases is the best evidence of what the law is – indeed it makes the law’. In that case, the relevant financing transaction involved swaps.

94 John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 313 (original emphasis).
the legal/financial transactions in the world – a concatenation of micro events that fulfil macro-expectations and fears. Or, they may be seen as ‘meta-regulation’, or what Friedman refers to as ‘soft law’ (that is, ‘international customs, practices and behaviours’). The concept of lex mercatoria and the new global financial architecture are relevant to this area. Friedman recognises that such an international financial legal sector does exist, and is of growing importance.

The above kinds of malleable or soft laws are mainly derived from private contracts rather than the acts of state authorities, which may be partly because contracts can transcend national boundaries more easily than international law can. Thus, it has been said that ‘[l]aw making in a globalised world has become decentralised, disintermediated, and fragmented’. Dalhuisen says that ‘[t]he internationalising tendencies in this area are based on autonomously creative forces which increasingly lead to a transnational financial law

John Flood, ‘Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies’ in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 150. Regarding such ‘laws’, Flood says that ‘large law firms, in managing uncertainty and stabilising expectations, create a set of solutions that function, as it were, autonomously. That is, they do not supplant the state but rather supplement the state in providing solutions or support structures that operate in independent contexts by virtue of consensus and authority granted by the status of the law firm itself’. See John Flood, ‘Large Law Firms: Priests of the New Capitalism’, unpublished working paper at 9.


Lawrence M. Friedman, ‘Erewhon: The Coming of Global Legal Order’ (2001) 37 Stan J Intl’l L 347 at 356. Strictly speaking, one should distinguish, on the one hand, ‘soft law’, which operates in contexts where there is no governing law, and on the other hand, what John Flood refers to as ‘malleable law’, which depends on either New York or English law for its legitimation. See John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 313.


John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 313.

based on fundamental and general principles, industry practices, and party autonomy". Hence, it has been suggested that professional dealings should become the common denominator and true focus of study in this area rather than more traditional law. This is one of the reasons why this chapter focuses primarily on the practice of negotiations in cross-border structured finance deals, rather than the relevant laws applicable to the deals (see Part III.1 below).

This phenomenon may be seen as globalisation, like colonialism, eroding the sovereignty of states and weakening them—both said to be conspicuous in the case with globalisation in the area of international financial markets. This is partly due to the fact that the relevant transactions are highly complex, and because there tends to be a lack of detailed government regulation in the relevant areas of the law. Also, very few of these transactions tend to end up in the courts, which creates even more of a distance from the jurisdictional reach of states.

---


105 Id at 4.


108 Flood says that these deals are ‘replete with financial contingency, and extremely demanding of bodies of expert knowledge’. See John Flood, ‘Capital Markets: Those Who Can and Cannot Do the Purest Global Law Markets’ in R. P. Appelbaum, W. L. F. Felstiner & V. Gessner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001) at 258. See also Julia Tonkovitch, ‘Changes in South Korea’s Legal Landscape: The Hermit Kingdom Broadens Access for International Law Firms’ (2001) 31 Law & Pol’y Int’l Bus 571 at 581. Tonkovitch notes that these transactions are not only highly complex, but new. Therefore, it is extremely difficult to know, for example, the ultimate tax treatment of the SPV.

109 See Alastair Hudson, ‘The Regulatory Aspect of English Law in Derivatives Markets’ in Alastair Hudson (ed), *Modern Financial Techniques, Derivatives and Law* (Kluwer Law International, 2000) at 116 (stating that much of the litigation in the United States in the area of structured finance and derivatives has failed to reach any judicial resolution because the parties usually settle in advance of a full trial). This may be due to the complexity of the transactions, and the view of the financial markets community that courts may not be the best place to resolve such disputes as they do not have sufficient knowledge and expertise in these areas of the law and practice. Further, this may be due to the position that, as Friedman has suggested, ‘courts are heavy, tradition-bound bodies, and judges do not know the habits and needs of the business community’. See Lawrence M. Friedman, ‘Borders: On the Emerging Sociology of Transnational Law’ (1996) 32 Stan J Int’l L 65 at 81. Even in respect of cross-border loan agreements (which tend to be simpler than structure financing deals), enforcement is often out of question for the lenders. See Gidon Gottlieb, ‘Relationalism: Legal Theory for a Relational Society’ (1983) 50 University of Chicago Law Review 567. Unlike other areas of international legal practice, such as reinsurance practice, recourse to courts or arbitration seems also very rare in structured finance deals. See Christine Stammel, *Waving the Gentlemen’s Business Goodbye: From Global Deals to Global Disputes in the London Reinsurance Market* (Verlag Peter Lang, 1998) (stating that disputes
Hence, it has been said that ‘within the process of globalisation of capital the role of the state and its law has markedly diminished and that many of the supervisory duties undertaken by the state have been outsourced to private entities’. This is because ‘[t]he pace of globalisation has forced these developments as the state has been unable to maintain its grip, both financially and intellectually, over the ever-increasing demands made on it by the community’. Ridgway and Talib say that ‘while it may be premature to proclaim its demise, the nation/state is increasingly a flawed agent for cross-border bargains’. Closest to being seen as ‘global regulators’ in this area may be the Securities and Exchange Commission (SEC) of the United States (although their influence is still weak for non-US offerings), and rating agencies, such as Standard and Poor’s and Moody’s.

Thus, while globalisation has increased the power of the clients of international law firms, it has undermined nation states. At the same time, the international law firms ‘have colonised the world of global law’. Sometimes, such colonialism has been resisted. Hence, occasionally, emerging markets protest against the UK and US dominance of their laws and professions in the global marketplace. Indeed, it may be that ‘[t]he Anglo-American axis is too powerful to defeat in the capital markets field’. Hence, of particular interest in this

between insurance companies and reinsurance companies are often taken to the London Commercial Court).


Ibid.


John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 315. Thomas Friedman argues that the SEC’s financial reporting standards have created norms for corporations in countries around the world. See Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999) at 148-149. But compare Whelan’s argument that external regulation of global law firms is complex, and that globalisation has created forces that even the SEC is unable to combat. See Christopher J. Whelan, ‘Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?’ (2001) 34 Vand J Transnat’l L 931 at 948.

But where US investment banks are arranging deals, they may often insist on US-style due diligence and offering.


Id at 941. Whelan (at 942) says that these clients are very powerful, and they are the repeat players in the international economy.


John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 323.


250
chapter will be to examine the response and interaction of Korean legal culture in this context of globalisation. This time, the legal transplant involved is more dynamic as the laws are 'soft' and 'malleable'. Nevertheless, the rule of law rhetoric still remains (see Part II.3.C below).

In cross-border structured finance transactions, because the number of players is small and their social density high, there is a 'high-density trust' among the players, which creates a unique and strong culture.\(^{120}\) Hence, it encourages 'repeat-player patterns of activity'.\(^{121}\) It has been said that the small number of UK and US law firms in global capital markets field 'work with each other repeatedly and have adapted to each other's cultural norms'.\(^{122}\) Further, Whelan says that individual lawyers working in global law firms are under enormous pressure to conform to the law firm culture, which is 'a particular kind of law firm culture'.\(^{123}\) Although the culture would differ from firm to firm, it has been observed that global law firms 'in New York or Chicago have more in common with similar law firms in London or Brussels than with the single practitioner in their own jurisdictions'.\(^{124}\)

Clearly, global law firms in this area of cross-border finance share certain traits of legal culture,\(^{125}\) which in turn influence them in the creation of global financial laws. Since such laws are created not by legislatures but by the practice of lawyers, the legal culture under which the lawyers operate has a particularly close connection with the creation of the relevant laws. Thus, Anglo-American normative legal culture, as it were, will very often have a determinative influence on global financial laws (see Part III.4.C.i of Chapter 2).

Nonetheless, in a transaction of this nature, there will be applicable laws other than English or New York law. For example, in a securitisation transaction, the main transaction documents are often governed by English law.\(^{126}\) If a SPV is used as part of a deal structure, then matters directly relating to the SPV will be governed by the laws of the country in which the SPV is incorporated. This could be the Cayman Islands, Ireland, the British Virgin


\(^{121}\) Ibid.

\(^{122}\) Id at 129.

\(^{123}\) Christopher J. Whelan, 'Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?' (2001) 34 *Vand J Transnat'l L* 931 at 945.


\(^{125}\) Friedman says that '[t]here is probably also another, more subtle, but even more important inner lingua franca: a commonality of habits of thoughts and practices, including legal practices, that develops among the players in the game of international lawyering and international deal-making'. See Lawrence M. Friedman, 'Frontiers: National and Transnational Order' in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalisation* (Ashgate, 2004) at 35.

\(^{126}\) Such documents may include a trust deed, transaction administrator agreement, agency agreement, and security documents. But the bond subscription agreement may be governed by New York law if a US investment bank purchases the bonds.
Islands, or Labuan.  

If the securities are sold to US persons either directly or indirectly, then US securities laws become relevant, particularly for drafting the relevant offering documents. Furthermore, assuming that the originator is a Korean entity, then matters relating to the assets of the originator will be governed by Korean law.

Thus, in executing these types of transactions, typically at least two or three different sets of applicable laws become relevant, and lawyers and parties from various legal cultural backgrounds interact. This provides an interesting context for analysing the impact of legal culture on the negotiation processes. It also means that understanding the counterparties’ legal culture becomes important to the negotiation processes.

D. Negotiations in Structured Finance Transactions

If the practice of finance lawyers has ‘norm-generating’ effects, it is important to examine what these lawyers actually do when executing structured finance transactions. In a given transaction of this type, the English or US lawyers acting for the financial institution would typically do the following:

(a) conduct due diligence on the issuer or the originator;
(b) draft transaction documentation, including any offering circular;
(c) negotiate the terms of the documentation with the counterparties; and
(d) provide advice to the client.

In carrying out these sorts of tasks, lawyers would normally find that much of their work involves negotiating with the counterparties, including the Korean parties (on the basis that Korean parties are involved in the deal). There is constant communication between the parties, including regular conference calls in which clients listen to the lawyers ‘advocating’ on their behalf. Thus, other than drafting documents, negotiation forms a major task for the lawyers in these deals. Even during documentation processes, negotiating the terms of the documents becomes crucial. Before the documentation is agreed between the parties, it is usually heavily negotiated. Particularly in securitisation transactions where the documents are voluminous and the issues are complex (and which therefore are very much lawyer-driven deals), negotiations can become very extensive.

---

127 For tax and other reasons, Cayman SPVs are often used for securitisation transactions originating from Korea. Where the underlying assets are shares, Labuan SPVs are often used because of the favourable tax treatment between Korea and Labuan relating to shares.

128 Such matters include creating security interests over the assets or transferring the assets.

129 What lawyers would do in a given transaction would vary from transaction to transaction depending on whether the deal, for example, is a public or private deal; involves US investors; is of a large size; involves debt or equity and so on.

130 For more discussion of due diligence processes, see Part III.2.B.i below.

131 For more discussion of offering circulars, see Part III.2.B.i below.
Due diligence processes also often involve negotiations. During due diligence, the lawyers will communicate with the issuers or the originators to ascertain the risks and features associated with the issuers, the originators and the underlying assets. The lawyers would ask questions of the issuer or the originator and obtain information for the purposes of issuing and offering the securities. Such information will be disclosed in an offering circular prepared by the lawyers. International investors who subscribe for the securities will rely on the information contained in the offering circular. Hence, due diligence processes and their outcomes will be critical in making an assessment as to the risks associated with the issuer, the originator and the securities to be issued in the transaction.

What if the offering circulars contain false or misleading information, or omit to include material information in the context of the issue and offering of the securities? Then (a) the lawyers may be liable for negligence, and (b) the arranging banks and the issuers (and the originators) may be liable for misrepresentation to the international investors. Also, the level and the content of the disclosure in the offering circulars will directly affect the pricing of the securities. Therefore, it is critical for the international counsel to be able to obtain accurate facts concerning the issuer and the originator during due diligence.

Since most of the transaction documents are governed by either English or US law, the English or US counsel (each also referred to as 'international counsel' here) usually dominate the negotiation processes. In fact, such documents will typically be negotiated between English or US lawyers acting for different parties. Nevertheless, English or US lawyers acting for the Korean parties will need to communicate with the Korean parties in order to receive instructions and provide advice. Differences in legal culture may also be an issue when they communicate. These may be highlighted when trying to ascertain from the clients certain facts (see Part III.3.B.ii below), dealing with sensitive information (see Part III.3.B.iii below), or negotiating legal fees (see Part III.6.C.ii below).

Sometimes Korean parties may not engage English or US counsel, but simply engage their Korean counsel. In that case, English or US lawyers acting for the arranging bank would negotiate with the Korean lawyers on issues of English or US law. In such cases, for obvious reasons, English or US lawyers tend to dominate the negotiation processes. When important commercial issues are involved, negotiations may be protracted and deadlocks may occur.

When the legal documents are governed by, say, Korean law (for example, documents creating security interests over assets located in Korea), interestingly it seems to be common

---

132 Regarding due diligence, Flood says it is ‘a type of intensive legal audit ... It requires lawyers to check inventory to ensure it is real, to check contracts actually exist. The lawyers have to pore over every document within the company that commits the business in any way.’ See John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 316.

133 In a structured finance deal of the type described above, there will be originators that sell assets to SPVs. But in non-structured capital markets deals, the same company (i.e. the originator) may be the issuer of the securities.

134 See Part III.B.i below.


practice for the English or US counsel acting for the arranging banks to draft such documents in English from the outset. Korean counsel would then comment on the documents in respect of Korean law issues. The documents thus become very much Anglo-American style legal documents incorporating many common law concepts. Hence, even where the governing law of the documentation is local law, it has been said that often the documentation still ‘feels English and acts English’. This practice seems to have evolved to form part of the global legal culture for cross-border structured finance deals (see Part II.2.B above).

Other than matters relating strictly to issues of Korean law, negotiations about Korean law documents will be carried out in similar ways as negotiations about English or US law documents. Hence, again, the dominant deal-making culture in these transactions tends to be the Anglo-American legal culture, regardless of the governing law of the legal documentation and the jurisdictions in which the relevant originators are located.

The documentation used in structured finance transactions may be extremely technical and complex. It includes swap documentation as well as agreements that set out the cash flow of the transaction structure, often referred to as transaction administration agreements. ISDA (International Swap Dealers Association) documentation, in particular, requires specialist expertise, and separate teams of derivatives lawyers are often engaged in drafting and advising on these documents. Again, these documents are typically English or US law-governed documents, and as such, the Anglo-American style of deal-making predominantly applies.

In such negotiations, lawyers often attempt to support their arguments by citing relevant provisions in documentation executed in earlier similar deals, as well as by their view of the market practice. The negotiations are usually carefully prepared because the financial stakes for their clients are often very high. Only senior lawyers would normally directly engage in these negotiations. The outcome of the negotiations is often reflected in the transaction documentation, which will in turn become a precedent for future deals and evidence of the market practice (see Part II.2.C above).

---


138 John Flood, ‘Capital Markets, Globalisation and Global Elites’ in Michael Likosky (ed), Transnational Legal Processes (Butterworths, 2002) at 115 (stating that the lawyers try to ensure that the documents do not deviate from the English or US law norms, which constitute the global legal culture in this area).

139 Anglo-American legal culture in this context simply refers to the way in which English or US lawyers typically negotiate, draft and advise on transaction documents.

140 John Flood, ‘Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies’ in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 152 (stating that even where the governing law of the documentation is the local law, often the documentation still ‘feels English and acts English’, to quote a securitisation lawyer in an interview).


142 ISDA has created standard documentation for market participants to use. The documents help reduce the uncertainties and problems that commonly arise in these types of deals. They tend to be very complex, and are usually modified to accommodate the relevant transactions in question. See www.isda.org.
To sum up, Anglo-American legal culture tends to set the standard for the deal-making legal culture in structured finance transactions. The documentation is usually highly technical and specialised. Negotiation is a key component in the transactions. For this reason, negotiation is a focus of this chapter, in the discussion in Part III below of the ‘model pre-negotiation inquiry’ developed to further illustrate the importance of Korean legal culture even in a highly globalised area.

E. Legal Culture in Negotiations

This chapter argues that an understanding of the counterparties’ legal culture may be crucial in negotiations in structured finance deals. One’s view of the counterparties’ legal culture can significantly influence the negotiation strategies to be adopted in the deal. More specifically, the international counsel’s view of the legal culture of the Korean parties may impact the negotiation strategies. This may have a major impact on the documentation and the pricing of the securities to be issued.

The fact that cultural issues may be crucial to negotiations is widely accepted. This is true in commercial negotiations as well. The importance of culture is ‘magnified many times over’ in cross-border transactions where nation-state control and support of the regulatory framework are weak or absent. One of the key factors to be taken into account in negotiations are the legal cultures of the counterparties who may have diverse legal traditional backgrounds. It has been said that the dynamism of cultures, rather than cultures as collections of static traits and customs, should be focused on and taken into account in negotiations between foreign parties. It is submitted that the concepts of normative and non-normative legal culture represent an aspect of such cultural dynamism that should be taken into account in cross-border negotiations. This chapter mainly argues that the identification and application of the relevant aspects of the normative and non-normative legal culture of the counterparties makes a real and practical difference in the way negotiations are conducted (see Part III below).


Hence, it may be of a limited value to recognise, for example, that Koreans tend to be ‘relational’ and collectivist in their approaches. This thesis argues that such aspects of Korean culture are not part of the normative legal culture of Korea – albeit they may be part of the indigenous cultural norms of Korea. Applying this idea to negotiations, negotiators may appreciate certain dynamisms within the relevant cultural variables. This is explained in detail in the rest of this chapter.
If the practice of the finance lawyers in structured finance deals create global laws in this area (see Part II.2.C above), and if negotiations are a key component in such deals (see Part II.2.D above), then the negotiations themselves are of paramount importance in creating global financial laws. Further, if legal culture plays a crucial role in the negotiations, then it follows that legal cultural issues *themselves* form a highly relevant component of the development of global financial laws. This is where findings in relation to the parties’ normative legal culture become distinctly relevant. Because of the nature of global financial laws (see Part II.2.C above), cultural issues and legal issues become particularly closely connected.

English and US lawyers who fail to recognise and take into account aspects of the relevant legal culture of Korean parties (for that matter, parties from any other cultural backgrounds) may, firstly, fail to appreciate and anticipate the *form* of the negotiation that the Korean counterparties contemplate. Secondly, they may be unable to identify some of the *substance* of the cross-border legal issues relevant to the transaction. This is highlighted in, for example, Parts III.3.E, III.4.D and III.5.E.ii below.

3. **Global Legal Culture and Local Legal Culture**

A. **Global Legal Culture**

Part II.2.C above noted the dominance of US and English lawyers in cross-border structured finance transactions. The deal structure and the tasks involved show something of the global legal culture that prevails in these types of deals, one that is very much Anglo-American. This may be what Friedman identifies as ‘international deal making customs’, in respect of which the research so far has been rather thin 148 – and difficult to carry out. 149 In this regard, Friedman says:

> It would be good to know more about the huge American law firms that have branches in foreign countries. How do they structure and shape the way business is done, the way contracts are drafted, the way disputes are settled in international markets? How do Japanese banks compare with British or French banks in financing international trade? All this is all largely unexplored territory.150

More detailed aspects of such ‘international deal-making customs’ are found in the model pre-negotiation inquiry set out in Part III below. For present purposes, it suffices to note several points in relation to this kind of ‘third culture’. 151

---


150 Id at 78.

151 The ‘international deal-making customs’ show aspects of what Nelken refers to as ‘third cultures’ that reflect and further the processes of the globalisation of law. See David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) at 31.

256
Firstly, the transactions that are examined in relation to the model pre-negotiation inquiry are those executed primarily from Hong Kong (where the author has been practising) where the majority of the cross-border structured financing deals in the North East Asian region are executed. A small number of law firms (mainly the UK or the US law firms based in Hong Kong) handle these transactions. As mentioned in Part II.2.D above, the negotiations carried out in these deals are of particular significance because of the generally large financial risks at stake in these deals, and because of the norm-generating effects of the legal practice. The negotiations provide a unique context in which to examine the way in which parties from different cultural backgrounds meet and influence each other’s legal culture.

Secondly, consistent with the argument that Anglo-American legal culture dominates in this field, one notes Flood’s comments on the attributes of international business lawyers - characterised by:

‘a mastery of the English language, which is the common language of international business and finance; an ability to draft contracts, more in the prolix Anglo-Saxon style rather than in the concise continental way ... and ... admission to another jurisdiction, notably the New York bar.’

These attributes are (or are at least required to be) shown in, for example, conference calls and meetings, documentation processes, and the issuing of New York or English law legal opinions (see Part III.2.B.ii below). The global legal culture in this area cannot easily be deviated from or done away with in the execution of these transactions.

B. Local Legal Culture Shaping Global Legal Culture

Yet as indicated above, Anglo-American legal culture is not the only culture to consider in structured finance deals. There is a connection between global and local legal culture in these transactions. Hence, it has been said that ‘the services [in this type of work] are global but the products are local’. Even when the transaction documentation is governed by English or US laws, local law also becomes relevant, and the parties must take into account the relevant local legal cultures. Thus, it has been said that ‘[g]lobal lawyering cannot be parochial: it has to evolve at both the local law level and the meta-law level, which attempts

---

152 The author is currently the Head of Securitisation and Capital Markets at a UK law firm based in Hong Kong.

153 The other main place from which cross-border structured financing deals in Asia are executed is Singapore. But Hong Kong remains the place where the region’s major structured financing transactions are handled with law firms such as Clifford Chance, Linklaters, Sidley Austin Brown & Wood, DLA Piper Rudnick Gray Cary being among the main players. See Adrian Preston (ed), *Global Securitisation and Structured Finance 2004* (Global White Page, 2004) at 180-255.


to integrate and to co-ordinate the localisms’. Flood says that ‘the lawyers must synchronise the requirements of the different legal regimes’. Hence, there is a process pursuant to which global legal culture is shaped by local or regional legal cultures as well. This process (sometimes called ‘globalised nationalism’), together with the process of global legal culture shaping local legal culture (‘localised nationalism’), may be seen as operating in perpetual circular motion with each other. There has been a tendency to associate ‘human rights globalism’ with ‘localised nationalism’ and to associate ‘commercial/corporate globalisation’ with ‘globalised nationalism’. But the two aspects of globalisation may be merging.

Too much emphasis on the globalisation of legal practice as dominated by a few players may undermine or underestimate the relevance of nation-state law and culture.

156 John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 327.

157 Id at 317. According to Flood, this is why ‘[i]n order to succeed in the capital markets field, law firms must have multi-jurisdictional skills in sufficient strength that they are accepted as both strong global players and good local players. The investment bank will seek out local expertise as well as global reach’. See John Flood, ‘Capital Markets, Globalisation and Global Elites’ in Michael Likosky (ed), Transnational Legal Processes (Butterworths, 2002) at 131.


160 Part of which is constitutionalism – discussed in Chapter 4.


162 For example, it has been noted that multinational corporations have learned to focus on human rights issues as well as on their commercial objectives, as the former ‘pays dividends many times over in saving management time, brand reputation, and consumer loyalty that can be destroyed in a single high-profile negative incident’. See Delissa A. Ridgway & Mariya A. Talib, ‘Globalisation and Development – Free Trade, Foreign Aid, Investment and the Rule of Law’ (2003) 33 Cal W Int’l L J 325 at 330.

V. Gessner, R. P. Appelbaum & W. L. F. Felstiner ‘Introduction: The Legal Culture of Global Business Transactions’ in R. P. Appelbaum, W. L. F. Felstiner & V. Gessner (eds), Rules and Networks: The Legal Culture of Global Business Transactions (Hart Publishing, 2001) at 6-7. They argue that even lex mercatoria rules are used mainly to interpret domestic law or supplement international law (id at
Thus, it is also argued that there may be a new form of plurality of legal orders, rather than a uniform law and culture. This is perhaps why English and US lawyers are ‘desperately trying to understand foreign law and foreign negotiation styles’, rather than trying to ‘create and impose their own way of contracting, negotiating and litigating all around the globe’. The model pre-negotiation inquiry discussed in Part III may help English and US lawyers to understand Korean legal culture in the deal-making processes. It demonstrates how local legal culture interacts with, and shapes, the global legal culture governing deal-making processes in cross-border structured financing deals.

C. The Rule of Law and Cross-Border Finance

Some commentators suggest that there may be no place for the rule of law in cross-border transactions because ‘soft law’, rather than formal rules, often applies to those transactions. Global law may be deficient in the liberal virtues of generality, publicity, prospectiveness, clarity, consistency and stability (see Part II.3.B of Chapter 1). Scheuerman tries to explain this phenomenon by citing Lon Fuller’s statement that traditional legal devices are inappropriate for some forms of effective intervention of economy. The implication is that due to the speed and the dynamism associated with cross-border transactions, the rule of law, specifically, traditional rules, is inappropriate.

Also, Upham argues that the rule of law should not be a necessary requirement when bodies such as the World Bank and the IMF provide funding to East Asian countries, because for these countries legal informality works better when it comes to commercial transactions. With a slightly different focus, Whelan raises ethical issues relating to global

---


168) Similar arguments have been made in the Japanese context. See Veronica L. Taylor, ‘Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan’ (1993) 19 *MULR* 352 at 362-363. Taylor argues (at 362) that ‘Japanese contracting practice in international markets both conforms to, and shapes, international norms’.


171) See id at 106.

law firms and says that 'the rule of law rhetoric is particularly suspect for those transactional lawyers who work against the “spirit” of the law in deal making and advertising'.

However, such assumptions do not seem to be entirely accurate at least as far as cross-border structured finance transactions are concerned. The magnitude of the usual commercial risks associated with these transactions is such that only robust legal arrangements will suffice from the lenders' point of view. Although such transactions are often unregulated by nation-states in the traditional sense (see Part II.2.C above), they are based on the laws of several jurisdictions – typically those of the borrowers, lenders and the place where any SPV is incorporated, as well as English and/or New York law (see Part II.2.B above). The legal documentation in such transactions tends to be even more rigorous than those of domestic deals (see Part III.B.ii below). The law firms specialising in such deals are usually the top tier firms, and they require access to the best law graduates. Law firms would not sign off on legal opinions unless they are absolutely certain about the legality and enforceability of the transaction documentation. Unless banks can obtain legal opinions, they would not, in most cases, enter into transactions. Thus, Pistor notes:

'the fungibilities of securities makes it difficult for each country to unilaterally enforce its laws. Thus, there is a strong theoretical possibility of a race to the bottom, as issuers may prefer countries with loose regulations to countries with stricter ones. Available evidence, however, does not support this proposition. On the contrary, there seems to be strong trend of migrating to stricter regimes.'

Hence, the fact that there is very little 'traditional law' in this area does not mean that there is no rule of law. Rather, the practice of global law firms in cross-border financing transactions may be 'a case of imposing standards that lawyers can meet and others cannot'. Such standards set by law firms are often extremely high and effectively create a rule of law environment. Not only must the participants in these transactions comply with the rule of law requirements, but the jurisdictions in which they are located must also support such requirements.

The requirement for the rule of law is also necessitated by the fact that the globalisation process with respect to capital markets processes has been facilitated by the activities of the 'electronic herd', consisting of anonymous stock, bond, currency and multinational investors connected by networks and the Internet. The electronic herd demands from governments economic systems based on the rule of law. Particularly when it comes to securitisation transactions, the legal regimes of the originator's jurisdiction (Korea, for the present purposes) must be sufficiently rigorous and reliable in order to meet

---


176 Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999) at 93-94.

177 Id at 113-159.

178 For a discussion of the nature of such transactions, see Part II.2.B above.
various requirements for the transactions. For this reason, securitisation in, for example, China is currently not entirely feasible. Thus, these aspects of the globalisation are ‘tightly rule-bound’.

But if Korean legal culture, as the conventional views suggest, does not support the rule of law, how would that affect cross-border financing deals involving Korean parties? If the legal culture of Korean parties supports a relationship-based rather than a rule-based approach to deals (see Part III.2.D of Chapter 1), what implications does that have for the negotiations? If the corporate structures or relationship between various entities (including government) in Korea are strongly hierarchical in nature, how should international counsel take into account such factors? If the culture does not support individualism and egalitarianism in commercial dealings, would that present an obstacle to the deal-making process? These are some of the issues dealt with in the model pre-negotiation inquiry devised by the author, discussed in Part III below.

The purpose of such an inquiry is to demonstrate that the deeply rooted legal culture of Korea, or the international counsel’s view of it, may have significant applications in the deal-making processes in cross-border structured financing. The model pre-negotiation inquiry proposed by the author tries to show how the findings in relation to Korea’s normative legal culture may extend to cross-border structured finance transactions involving Korean parties. Upham argues that the rule of law is not a sufficient basis for the ‘international legal culture that penetrates each national culture’. He suggests that when it comes to East Asian countries, a more ‘Confucianism-oriented’ legal culture is more suitable. To what extent is Upham’s general observation helpful to international counsel in these deals? Part III examines such issues in an important specific context.

III. MODEL PRE-NEGOTIATION INQUIRY

1. Introduction

John Flood argues that the ‘best way to illuminate capital markets work is through case studies of capital markets work in action’. This is because ‘to know a field we must

---

180 To be sure, as far as the author is aware, there have been transactions in China that used some of securitization ‘techniques’, and transactions that securitized receivables of Chinese entities located outside China. But these are not the same as securitization (in its strict sense) originating from China.
181 John Flood, ‘Globalisation and Law’ in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 313. For a discussion of the way in which the rule of law operates under malleable laws in cross-border financing transactions, see id at 313-312. Flood describes how a director of the selling company in a transaction had to wait seventy-two hours in his lawyers’ office in London in person in order to sign the documents and close the deal. Flood (at 313) says that this is due to the strict rule of law requirement operating in this kind of deals, which, according to him, has a ‘harsher, more rugged character’, but one that is ‘remarkably successful in constituting the global legal order’.
183 Ibid.
become conversant with its epistemic practices, the interior of the world we focus on'.

Flood says that ‘too often the research process is truncated so the “essential” work of theorising can be undertaken’. But, in the field of law, the researcher must be liberated from the overbearing need to construct theories, which can be achieved by adopting ethnographical methods. Indeed, there has been an increasing use of narratives to ‘understand voices that have been silenced, or submerged, in traditional legal practice’ (see Part II.2.C above). Often the client’s or lawyers’ story is told, impacting on one’s understanding of the relevant issues.

Thus, Bruce A. Markell uses largely anecdotal evidence to discuss international law reform efforts in emerging markets, examining in particular the relevance of local cultures to the rule of law reform. Markell says that this kind of style of argument has been ‘deliberate’ and that ‘by proceeding in this way, perhaps the reader will be able to glean a different understanding of the practical dynamics of rule of law efforts at the heart of the intersection between globalisation and governance’.

Narratives are particularly useful to explain aspects of ‘soft laws’ or ‘malleable laws’ revealed in structured finance transactions where rather than written laws, ‘professional dealings’ are the subject matter of inquiry. The ‘semantic field’ created during deal-making processes where different cultures interact dynamically can best be explained by telling narratives of cases. This is particularly the case with securitisation: it is said that ‘the world of securitisation and its agents is complex, even baffling, secretive, often the activity of the elite, but it has an enormous impact on us all’. Also, in relation to credit rating agencies that rate the relevant securities, it has been said:

‘Although the raters claim to be transparent, in fact their systems are opaque. In many cases secrecy is necessary, as when they rate the bonds in securitisation.’

Such ‘secrecy’, together with the fact that only a small number of lawyers have experience in this field, makes it even more difficult to know the objective reality of the deal-making

---

186 John Flood, ‘Socio-Legal Ethnography’ in Reza Banakar & Max Travers (eds), Socio-Legal Research Methods (Hart Publishing, forthcoming) at 33.
187 Id at 35.
191 Id at 497-498.
193 Id at 161 (emphasis added).
processes. Hence, the suggestion has been that ‘[i]f we are unable to produce an objective account of reality as something “out there”, then the alternative is to explore subjective accounts and the process of social interaction’.195 Hence, the aim has been that, through the model pre-negotiation inquiry, the negotiation process for securitisation deals will be understood ‘intelligible internally as well as to the outside world’.196 The model pre-negotiation inquiry will, to the extent desirable, set out narratives and “thick descriptions”197 of the negotiations. This will, in turn, show how Korea’s normative legal culture, or the negotiators’ view of it, may be applied in and influence the negotiation processes.

Further, the model pre-negotiation inquiry is not merely a description of the negotiation processes. It also leads to practical suggestions for negotiations in cross-border structured finance deals.198 While it does not pretend to identify and solve every kind of issue found in such transactions, it is specifically relevant to dealing with legal cultural issues. But other than legal culture, there will be numerous other issues and considerations that may apply in devising negotiation strategies in these deals.199 Hence, the model pre-negotiation inquiry may not offer the ‘best’ suggestion in the circumstances: other issues may be more crucial or override cultural issues. But the aim is to suggest an interpretation of the legal cultural issues involved, and the way in which they could apply, in these deals.200

The author has been devising this inquiry for several years while practising as international counsel in cross-border structured finance deals. The task involved accepting ‘challenges of multiple roles and identities’.201 This meant accepting the roles of (a)

195 John Flood, ‘Socio-Legal Ethnography’ in Reza Banakar & Max Travers (eds), Socio-Legal Research Methods (Hart Publishing, forthcoming) at 40.
196 Ibid. This process may be described as rendering “emic” (insider) descriptions and interpretations, while acknowledging the influence of the “etic” (outsider/analyst) perspective on the production of social knowledge. See Timothy Zick, ‘Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography’ (2004) 45 Wm and Mary L Rev 2261 at 2268.
197 See Clifford Geertz, ‘Thick Description: Toward an Interpretative Theory of Culture’ in Clifford Geertz, The Interpretation of Cultures (Basic Books, 1973) at 6-7 (stating that a ‘thick description’ includes a description of circumstances, contexts, motives, purposes and the history of gesture itself).
198 In this sense, the present methodology is similar to the method of ‘experimental ethnography’. See generally Lawrence W. Sherman & Heather Strang, ‘Experimental Ethnography: The Marriage of Qualitative and Quantitative Research’ (2004) 595 Annals 204. Sherman and Strang say that “[e]xperimental designs offer greater internal validity for learning what the effects of a social program are, and ethnographic methods offer greater insight into why the effects were produced’. (Original emphasis.)
199 For example, there are commercial, issues, ethical issues, political and social issues, to name a few. Negotiation strategies may potentially take into account rational reasoning, multiple lines of reasoning, or even non-rational reasoning, or even no reasoning. See, for example, Jonathan R. Cohen, ‘Reasoning Along Different Lines: Some Varied Roles of Rationality in Negotiation and Conflict Resolution’ (1998) 3 Harvard Negotiation Law Review 111.
200 It should be noted that the model pre-negotiation inquiry has been applied and tested, and it has been found to be useful in reducing time and cost in negotiations in these types of deals. It may contribute to the efficient identification and resolution of the key issues of the transactions. It may even be helpful in finding a solution where deadlocks occur. Further, for Asian markets such as Kores, it is submitted that such an inquiry may be a valuable tool for international finance lawyers who wish to penetrate into those markets and execute financing transactions successfully.
201 John Flood, ‘Socio-Legal Ethnography’ in Reza Banakar & Max Travers (eds), Socio-Legal Research Methods (Hart Publishing, forthcoming) at 44.
international counsel in the deals, which involves viewing the negotiation processes from an international lawyer's perspectives, (b) a party who tries to see things from the Korean parties' perspectives, taking into account their cultural assumptions and considerations (which was possible due to the author's Korean background), and (c) a third party observer. Hence, the advantage was that, not only was the author fortunate enough to be one of the few practitioners involved in such transactions, but the author also had the benefit of seeing the subtle Korean cultural issues involved.

This is not to say that the author's interpretation of cultural negotiations taking place in such transactions is entirely correct. As Timothy Zick says, 'no claim to the "correct" interpretation can be sustained'.

202 Also, absolute suppression of the interpreter's own bias is not possible. 203 The narratives are necessarily limited by the authors' positions. 204 Indeed, the narratives underlying the model pre-negotiation inquiry may be, as Schepele says, 'complex and potentially contradictory'. 205 But the intention has been that each narrative 'opens the field to many interpretations'. 206 Zick argues that 't[he idea is to recover or expose the most plausible meanings among those for whom the gesture has meaning'. 207 The point is to give readers the resources to question the author's interpretations.

The following features of the ensuing model pre-negotiation inquiry should be noted:

(a) As mentioned, it is designed principally to support the second main argument of this thesis. Firstly, it attempts to give an interpretation of the legal cultural issues involved in the deals and, secondly, it suggests how it may practically be applied in the deal-making processes. As to the latter, the author has exercised professional judgments gained from experience in such transactions, drawing also on primary sources and secondary sources. 209 The point has been to contribute something to the current debate on the interrelated topics of the rule of law, legal culture, and globalisation.

(b) The findings about the normative legal culture of Korea in Chapters 3 and 4 are applied in formulating the model pre-negotiation inquiry. Also, the hypotheses set out in Part III.5 of Chapter 1 and Part IV.3.C.iii of Chapters 2 are applied.

(c) As mentioned, the model pre-negotiation inquiry is designed for negotiations in cross-border structured finance transactions involving Korean parties. However, it is submitted that many aspects of the model pre-negotiation inquiry may be applicable to other


203 Id at 2268.


206 John Flood, 'Socio-Legal Ethnography' in Reza Banakar & Max Travers (eds), Socio-Legal Research Methods (Hart Publishing, forthcoming) at 35.


209 For example, offering circulars and transaction documents.

210 For example, media reports and financial journals.

264
non-financing legal matters, also where parties other than Korean parties are involved. The
issues and suggestions set out below cannot be over-generalised because they are deal-
specific. But since cross-border structured finance transactions are an increasingly significant
type of deal for the globalisation process (see Part I above), they deserve particular attention.

2. Outline of the Model Pre-Negotiation Inquiry

A. Introduction

The model pre-negotiation inquiry devised in this chapter focuses on four areas of legal
financing practice. These are the legal practice areas involving:

(a) due diligence;
(b) contractual documentation;
(c) interaction between due diligence and the negotiation of contractual
documentation; and
(d) deal-specific issues.

In each of the above four areas of practice, four stages of inquiry are carried out. They are as
follows:

(1) Stage 1 – Identify the relevant cultural issues for negotiation.
(2) Stage 2 – Identify the applicable findings on legal culture.
(3) Stage 3 – Apply the findings on legal culture to the negotiation, taking into
account similar cases of negotiations.
(4) Stage 4 – Devise negotiation strategies.

It should be noted that these ‘areas’ of practice and ‘stages’ of inquiry have been structured as
such simply as a matter of convenience, and other ways of structuring the model pre-
negotiation inquiry should be perfectly possible. Further, there may well be other areas of
practice and stages of inquiry that are relevant for devising suitable negotiation mechanisms
that are not covered in the current model. Nevertheless, the current model may be a helpful
starting point for further research and development for more advanced models. The ‘four
areas of financing practice and four stages of inquiry’ concept is explained in more detail
below.

B. Four Areas of Practice

i. Due Diligence

This first area of practice focuses on the negotiation of offering circulars. This in turn
involves due diligence on the originators (or the issuers) and other relevant issues in the
transaction.
Drafting offering circulars is often a time-consuming due diligence process for lawyers, and many questions of fact (as well as law) arise during this process. An offering circular basically describes the issuer and the securities to be issued by the issuer (see Part II.2.D above). Therefore, an understanding of the relevant cultural issues relating to the transaction and the issuer may often be critical in drafting the offering circular. For example, the description of the source of funding of an issuer in the offering circular may involve a detailed explanation of the relevant 'relationships' and 'practice' of the issuer as well as any 'legal' procedures/requirements in respect of such funding (see Part III.3.B.ii below). This may particularly be the case if there is a lack of express laws that govern such funding mechanisms in the issuer's jurisdiction.

ii. Contractual Documentation

Other than offering circulars, there will be many types of contractual documents in a given transaction. Most of these documents will be negotiated and drafted by the international counsel. Regarding the fundamental importance of documentation processes in structured finance transactions, John Flood says:

'The creation of the documentation captures and represents the essence of homeostasis and attempts to assign chaos to the darkness of randomness, that which lies beyond the logic of the agreement drafted by the lawyers. Agreements and other documentation in capital markets work reach their apotheosis when their normative structures are inscribed in either New York state law or English law, or both. Since the major financial institutions are based in these two jurisdictions, their power usually ensures that there is no deviation from the juridical norm. Thus the global is deeply embedded in the local.'

The documentation in these type of transactions would typically be highly complex (see Part II.2.A above). They are usually drafted and negotiated extremely carefully as '[r]etrospective repair tasks can mean financial and legal exposure for lawyers and clients alike with potentially irredeemable prospects depending on local legal requirements'. As mentioned in Part II.2.D above, the provisions in such documentation will tend to be followed in subsequent similar transactions and treated as evidence of market practice and help create the relevant 'soft' or 'malleable' laws in this area.

Compared to offering circulars, contractual documentation processes raise mostly questions of law, and the relevant legal culture of the parties may often dictate the way in which (a) negotiations on the contractual documentation are carried out, and (b) the

---


212 John Flood, 'Globalisation and Law' in Reza Banakar & Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing, 2002) at 317.

213 Flood says that '[t]hrough repetition, these "templates" acquire an iconic status that raises them above their particularistic locations and implants them into a global legal discourse that characterises them as "virtual global law"'. See John Flood, 'Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies' in Michael B. Likosky (ed), Privatising Development (Martinus Nijhoff Publishers, 2005) at 150. Flood also says that 'certain "Magic Circle" law firms in London will adamantly refuse to use other firms' documentation because they consider theirs to be of holy status and must not be subverted by intermingling with heretical structures devised by these others'. See John Flood, 'Large Law Firms: Priests of the New Capitalism', unpublished working paper at 9.
documents should be drafted. Parties who are familiar with the common law tradition may have some agreement in respect of the way in which contractual documents should be drafted. But it is sometimes suggested that Korean parties (and for that matter, other Asian parties) may have different approaches to contractual documentation (see Part III.4.B.ii below). If this is correct, English or US counsel should properly understand such different approaches in order to negotiate the documents effectively and without unnecessary delays.

iii. *Interaction between Due Diligence and the Negotiation of Contractual Documentation*

There may be discrepancies between the way in which Asian parties on the one hand and international arrangers on the other view offering circular responsibilities and contractual documentation issues (see Part III.5.B below). Such discrepancies, in turn, may result in interesting but complex issues for negotiation.

The responsibilities attaching to offering circulars are essentially owed towards the international investors. On the other hand, contractual documentation governs the legal relationship between, among others, the issuers, the originators and the arrangers. However, depending on the legal culture of the originator, the originator may unduly emphasise the marketing effects (and the issue of ‘face’) relating to the offering circular (see Part III.5.B.1 below). On the other hand, the international investors would usually be concerned with the risks associated with the securities issued.

The author has observed that where deadlocks occur in negotiating offering circulars, potential areas of compromise might be found in the contractual documentation (such as the bond subscription agreement) instead because of certain complementary aspects of the two documents. For example, a deadlock may occur in negotiating the offering circular because of the issuer’s (or the originator’s) refusal to provide a broad responsibility statement in the offering circular (which is a common issue that is extensively negotiated in securitisation transactions). Then, the lead managers could try to ask for a more extensive indemnity in the note subscription agreement from the issuer (or the originator) instead – which covers, among other things, the issuer’s broad responsibilities in respect of the statements made in the offering circular. This will be explained in more detail in Part III.5.E below.

The point is that many of these issues may in fact be culture-driven as well as driven purely by legal and commercial considerations. It would be helpful for the negotiators to be able to understand how cultural factors may influence some of these documentation issues in order to carry out the negotiations more effectively.

iv. *Deal-Specific Issues*

Other than the above types of matters, there may be numerous legal cultural issues specific to the deals in question. It is beyond the scope of the model pre-negotiation inquiry to cover an extensive range of issues. Hence, a selection of what the author regards as being important cultural issues is discussed below under this heading. They include issues relating to legal fees and the *chaebol* (see Part III.6 below). These, and the other three areas of practice discussed above, represent a reasonable starting point from which to consider a greater range of issues for future research. In the next section, four stages of inquiry for negotiations will be discussed. Again, these are not the only way of structuring the stages of inquiry for negotiations. But they may be a useful starting point.
C. Four Stages of Inquiry for Negotiations

i. Stage 1 – Identify the Relevant Cultural Issues for Negotiation

For each of the four financing practice areas discussed above, there may be four stages of inquiry that may be undertaken by negotiators for the purpose of devising appropriate negotiation strategies. The first of these stages is to identify the relevant cultural issues for negotiations.

It has been said that ‘[t]he issue of culture is one of the neglected aspects of the literature on the globalisation of the legal profession.’ Therefore, one of the aims of the model pre-negotiation inquiry is to contribute something to the literature. But even if one has correctly identified the counterparties’ legal culture, this does not mean that one’s negotiation strategies will always work. This is because, firstly, other considerations (such as commercial or legal considerations) may dominate and critically influence the negotiations. Secondly, as discussed in Part II.3.C.iii of Chapter 2, one’s legal culture may not be reflected in one’s actions for various reasons. Hence, the better approach is to consider legal culture as one of the factors to be taken into account when negotiating these deals, and to balance various other factors that may be relevant to the deals.

The paradigm shift that occurs for the negotiators as a result of changes in cultural settings may be subtle and complex and difficult to generalise. Nevertheless, there are certain established cultural variables that may be identified in respect of issues such as those relating to the concepts of relationship versus rules (see Part III.3.B.i below), establishment of rapport (see Part III.3.B.iv below), power distance (see Part III.4.B.i below), collectivism (see Part III.3.C.ii below) and so on. Such cultural issues may often become more conspicuous in cross-border deals because of the diverse cultural backgrounds of the parties. Even between American and English lawyers, it is said that ‘[c]ultural differences intrude in styles of working ... The quest for disclosure in due diligence is quite different.’ Therefore, it is important for the negotiators to try to identify the specific cultural issues that may affect each negotiation.

To be sure, local cultural issues are not easy to identify by examining deal-making processes. This is because, even for local parties, the transactions are usually executed by experienced negotiators who are familiar with global deal-making processes. Their practice may not reflect the relevant local legal culture. But at the same time, the persons at the forefront of the negotiation processes are usually not the ones making critical decisions in respect of the transactions. Given the usually large size of the transactions, such decisions

---


tend to be made at the organisational level. The decision-making processes of a Korean organisation will reflect Korean culture. Also, these types of transactions often involve dealings with third-party Korean entities, notably government entities (see Part III.3.C.ii below). Thus, matters relating to local cultural issues do surface in these transactions, visibly shaping aspects of the transactions (see Part III.5.E below).

ii. **Stage 2 – Identify the Applicable Findings on Legal Culture**

In respect of each cultural issue identified, the applicable findings on legal culture should also be identified. As discussed in Part II.5 of Chapter 2, culture and legal culture may be seen as two different concepts. Also, the concept of normative legal culture may be further distinguished from the concept of culture. This thesis argues that it is possible to ascertain the aspects of normative legal culture that may apply to the negotiations. For the purpose of the model pre-negotiation inquiry, the findings about the normative legal culture of Korea in the earlier chapters will be applied in negotiation contexts.

The normative legal culture identified in this thesis is, of course, not the only normative legal culture of Korea. There may be other aspects of the normative and non-normative legal culture of Korea that are relevant to negotiations in these types of transactions. Further research on other aspects of normative legal culture will be helpful to develop more comprehensive negotiation strategies.

iii. **Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations**

It is difficult to appreciate the way in which aspects of normative legal culture apply (and ought to apply) to transactions unless this is examined and illustrated in the context of cases of actual transactions and negotiations that have taken place in the past (see Part III.1 above). For this reason, issues that were relevant to the negotiations in certain cross-border financing transactions involving Korean parties are examined and analysed.

For obvious reasons, it is not easy to find out information about negotiations conducted for past transactions. Unlike court cases, there are no precedents, and financial journals may not provide adequate information about negotiation processes. For securitisation transactions in particular, there may be a degree of 'secrecy' involved in executing the deals (see Part III.1 above). Hence, the methodology for conducting this aspect of the study involves the following:

1. Much of the 'inside' information about how negotiations were carried out is often difficult to find out unless one was directly involved in the transaction. Furthermore, such information is likely to be confidential in any event. Therefore, unfortunately, the very nature of the information in question makes it difficult to gain access to it.

2. Nevertheless, in the case of public offerings, the relevant offering documents and other transaction documents are filed with the stock exchanges on which the securities are listed.\(^{217}\) Therefore, such documents are available for public inspection. The terms of such documentation provide reasonably good indications about the kinds of issues that were relevant and negotiated in the transactions.

\(^{217}\) Transaction documents are also often kept with the paying agents.
(3) Accordingly, in this chapter, some of the publicly available offering documents and transaction documents in respect of certain public deals will be examined. Publicly available articles in financial journals that discuss such transactions will also be considered. The author's experience in being involved in similar transactions will also help in making the necessary analysis and judgments.

This methodology for studying the negotiation processes in these deals seems appropriate given the fact that the relevant documents (which are public available) clearly show the negotiated outcomes of the deals. As to the actual negotiation processes themselves, it would be largely a matter of conjecture. Nevertheless, experienced counsel should be able to draw reasonable inferences about the negotiation processes from the way in which the documents were drafted. Financial journals are also helpful in this regard: they often set out the relevant legal and commercial issues that were important in the deals. Hence, while the exact negotiation processes may not be ascertainable from these sources of information, reasonable narratives of the negotiation processes may be constructed from them.

iv. Stage 4 – Devising Negotiation Strategies

Having identified the relevant principles to apply in a given transaction, the negotiator should be in a position to devise negotiation strategies that take into account the relevant aspects of the legal culture of the counterparty. Such strategies may be in the form of (a) a communication strategy (such as the formulation of methods of communication involving direct or indirect methods or high or low context\(^{218}\)); (b) a documentation approach (for example, deciding what provisions to include in the offering circular or other documents); and/or (c) a due diligence approach (for example, deciding what questions to ask for due diligence purposes).

The 'four areas of financing practice and four stages of inquiry' concept will be applied below in formulating the model pre-negotiation inquiry.

3. Due Diligence

A. Introduction

The international counsel acting for the international investors must identify the relevant facts in respect of the issuer or the originator and the securities to be issued. This will be part of the due diligence process. The outcome of this process will be critical in making an assessment about the risks associated with the issuer, the originator and the securities to be issued in the transaction.

As mentioned in Part III.2.B.i above, during this process the international counsel would submit questions to the issuer or the originator and obtain information for the purposes of the issuing and offering of the securities. This information will be disclosed in an offering circular prepared by the international counsel. International investors will rely on the

information contained in the offering circular. Set out below is the four-stage inquiry applicable to some aspects of the due diligence process.

B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation

i. Relationship versus Substance and Trust versus Power

In negotiations during due diligence processes involving Korean issuers (or originators) of securities, the author observes that cultural issues such as those relating to relationship versus substance, trust versus power distinction, power distance, and establishment of rapport often become relevant. The international counsel must be aware of the existence of, and the way in which to deal with, such issues. This is illustrated in the example set out below.

ii. Source of Funding of Y Corporation

Suppose that Y Corporation, which is a quasi-governmental entity of Korea, proposes to obtain funding through a securitisation transaction. Suppose that, as part of the transaction, international lawyers are conducting due diligence upon Y Corporation, and part of the due diligence process requires the lawyers to ascertain the source of funding of Y Corporation. In relation to a government agency or a quasi-government agency of Korea, the ultimate source of funding for the originator is likely to be government funds. Also, in that case, one would expect that there would be rules or statutes that govern such funding mechanisms.

But what if the rules do not specify clearly such funding mechanisms? Suppose that the lawyers ask the staff of Y Corporation questions about funding mechanisms. And suppose that the staff’s response is that they simply rely on the relationship between Y Corporation and the relevant government bodies that usually provide the funding to Y Corporation. In other words, Y Corporation simply assumes or believes that the government

---

219 In negotiation terms, the substantive aspects of communication focus on the content of the communication whereas the relational aspects of communication focus on the form of the communication. Also, this dichotomy refers to the extent of the culture’s tendency to give weight to relational variables as opposed to objective rules.

220 It has been argued that the discussion of trust focuses on transactions, whereas the discussion of power centres on conflict resolution. See Shirli Kopelman & Mara Olekals, ‘Process in Cross-Cultural Negotiations’ (1999) 15 Negotiation Journal 377.


223 In a securitisation transaction, Y Corporation would be the originator rather than the issuer.

body that has been providing funding to it will continue to do so because of the existing relationship between Y Corporation and the government body concerned.  

In that case, such a response of the staff will hardly be satisfactory for the international investors who would look to the ability of Y Corporation to repay the debt. International investors generally must be satisfied with the funding mechanisms so that there is certainty about the repayment of the interest and the principal in a timely manner. However, there seems to be a cultural issue in this case that must be explained to the investors. The cultural issue seems to relate to the question of whether, according to the originator's culture, relationship often replaces written rules, and if so, why, how and to what extent the relationship can be relied upon. This may be called a 'relationship versus substance (or rules)’ issue. Such a cultural issue may have to be resolved in order to carry out the due diligence process successfully.

iii. Communication with the Ministry of Y

Another way in which the concept of relationship versus substance (or rules) is important in negotiating with Korean entities may relate to the way in which communication is carried out in negotiations. Suppose that, in the above example, the international investors are not satisfied with the fact that there is no objective rule that governs the funding mechanisms. Accordingly, they want Y Corporation to approach the responsible government authority (say, the Ministry of Y), and ask for a written statement that explains the funding mechanisms. In that case, what is the best strategy for Y Corporation and/or the investors to effectively communicate this to the Ministry of Y? To what extent will relational and substantive aspects of communication be relevant/appropriate in making such a request to Y Corporation? Should the request to the Ministry Y be ‘direct’ and to the point, or is this kind of communication likely to invite negative reactions?

Closely related to the question of relationship versus substance in this context would be the question of power distance. It has been said that people in hierarchial cultures may be uncomfortable when status differences are uncertain. In such a context, negotiations may be dominated by discussion of social norms/objective standards as negotiators attempt to determine social status. It has been argued that in egalitarian cultures, status differences exist, but people are less receptive to power differences than in hierarchial cultures.

---

225 It may be not uncommon to observe that networks of informal contracts cross business-government lines and ensure a constant two-way flow of information between the parties. See Tom Ginsburg, ‘Introduction: The Politics of Legal Reform in Korea’ in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 3.

226 In many structured finance deals such as securitisation transactions, strictly speaking the originators are not the entities that repay the debt evidenced in the securities issued, and as such, theoretically, the investors are not looking to the ability of the originators to repay the debt. Nevertheless, the originators often do have certain ongoing responsibilities (such as the obligation to buy back defective assets), and in reality, their creditworthiness is regarded as important.

227 In this regard, one notes that differences in the phrasing of substantive information (a) may indicate the negotiators' perceptions of interdependence, and (b) might be crucial depending on, say, Y Corporation's perception of the role of relationship and rules in respect of its funding obligations.


229 Ibid.

Since social status distinctions may be significant factors in Korean society (see Part III.4.C of Chapter 3),\textsuperscript{231} will the actual or perceived power differences between the relevant parties in the above example influence the negotiation processes to a considerable extent? This will be another cultural issue relevant to the transaction.

\textit{iv. Rapport and Trust between the Parties}

Also related to the questions of relationship versus substance and power distance in this context is the extent to which rapport between the relevant parties may be created in the negotiation process. It has been said that in cross-cultural negotiations, parties find it more difficult to establish rapport and build a negotiating relationship.\textsuperscript{232} According to the author’s experience, rapport may not be critical for deals of this nature, but may be helpful,\textsuperscript{233} particularly for carrying out a thorough and successful due diligence. Compared to the international parties, do the Korean parties regard rapport and trust more important because of their ‘Confucian way’ of dealing with others? Or, contrary to the conventional views, do the Korean parties, like the international parties, simply emphasise the commercial realities and bargaining positions?

These are some of the cultural issues that negotiators in cross-border structured finance deals involving Korean parties may face during due diligence. Such cultural issues may raise difficult questions, and there is probably no single way of adequately answering such questions.\textsuperscript{234} The next section will examine how findings on legal culture may apply to such issues to help devising negotiation strategies.

C. Stage 2 – Identify the Applicable Findings on Legal Culture

\textit{i. Lack of Law Situation or Relational Approach?}

Which aspects of the normative legal culture of Korea apply to these cultural issues? One such aspect of the normative legal culture of Korea may include those relating to ‘lack of law’ situations (see Part III.5 of Chapter 4). The hypothesis made in Part IV.3.C.iii of Chapter 2 was that:

\textsuperscript{231} Therefore, it has been argued that special relationship or connections are crucial – without which it is difficult to get things done, particularly with the bureaucrats. Hence, the common practice might be to approach a bureaucrat through his or her friend or acquaintance. See Dae Kyu Yoon, \textit{Law and Political Authority in South Korea} (Kyungnam University Press, 1990) at 49.


\textsuperscript{233} See, for example, Francis Fukuyama, \textit{Trust: The Social Virtues and the Creation of Prosperity} (Hamish Hamilton, 1995) (arguing that trust in particular is the decisive basis for the creation of prosperity).

\textsuperscript{234} There have been some studies on explaining the cultural behaviour of Koreans versus Americans. According to such studies, Koreans placed credence on situational and interactional factors more than Americans, and were better able to recognise the influence of situational constraints on individual behaviour than Americans. See Ara Norenzayan, Inchoel Choi & Richard E. Nisbett, ‘Cultural Similitudes and Differences in Social Inference from Behavioural Predictions and Lay Theories of Behaviour’ (2002) 28 Personality & Soc’l Psychol Bul 109, and Inchoel Choi & Richard E. Nisbett, ‘Situational Salience and Cultural Difference in the Correspondence Bias and Actor-Observer Bias’ (1998) 24 Personality & Soc’l Psychol Bul 949. While acknowledging that there are various ways in which to view the negotiating circumstances (including from a psychological point of view), for the purposes of this thesis, the legal cultural dimension of the negotiation is focused upon.

273
Korean law is still relatively undeveloped and there are many ‘gaps’ in laws. Because of this ‘lack of law’ situation, sometimes Koreans are left to rely on ‘relationships’ and ‘practice’ rather than objective rules. The way forward for such a lack of law situation is to create appropriate legal rules that fill the gaps in law, rather than attributing the situation to any assumption that Koreans favour a ‘relational approach’ rather than a rule-based approach to solve issues. The relational approach may be part of general culture (or indigenous cultural norms) rather than the normative legal culture of Korea.

If the international counsel takes the above view about Korean legal culture, then how will the relevant cultural issues be perceived by him or her? In the example of Y Corporation illustrated above, the international counsel may perceive that the reason why the law does not prescribe the relevant funding mechanisms is probably because it is a ‘lack of law’ situation – rather than because the Koreans favour a ‘relational approach’, as opposed to a rule-based approach. In other words, the international counsel may view that the reason why there is no rule that describes the funding mechanisms is simply because there is a gap in the law, which needs to be fixed. That is, there needs to be a ‘normative unofficial law’ (see Part IV.2.H of Chapter 2) that fills the gap in the law.

On the other hand, what if the international counsel takes the view that Koreans favour a ‘relational approach’ rather than a rule-based approach? In that case, the international counsel may view that the reason why there is no law on the point is due to cultural factors. This creates a situation where the problem may look greater than it really is. While a gap in law is easier to understand (although it needs to be fixed), cultural complexity is more difficult to explain, particularly to the international investors. A gap in the law seems capable of being fixed (albeit not easy), but cultural issues are often perceived to take a long time to be changed, if they can be changed at all.235 Such a perception would not be helpful to either party to the deal, if in fact Korean legal culture is not what is perceived to be.

Assuming that the international counsel takes the conventional view of the matter, how may the relevant cultural complexity be disclosed in the offering circular? This would not be an easy task to carry out. It would involve describing intricate aspects of the cultural issues, which may not be regarded as a suitable type of disclosure in an offering circular. Further, international investors may not be able to assess the relevant risks and take the necessary level of comfort from such a disclosure. In a worst case, this could lead to a situation where the deals cannot proceed any further.

If the international counsel takes the view that the starting point of the inquiry in respect of the funding mechanisms is that there is simply a lack of law in Korea, then what difference may that make? In that case, firstly, as mentioned, it may be easier to explain the whole situation to the international investors. Secondly, the parties are more likely to look for alternative solutions at an earlier stage. This could be important since the time schedule for this kind of deal is usually very tight, and timing is often of the essence. As the deal

---

delays, interest rates, swap pricing, size of the underlying asset pools and other economic circumstances may change, and the transaction may no longer be justified.

Hence, depending on the views taken by the international counsel about normative legal culture (or indigenous cultural norms), the due diligence process may proceed differently. Such views may also have ramifications in establishing rapport and trust between the parties. This is because the emphasis on relationship rather than rules is more likely to lead to the assessment that ‘law in books’ will not be strictly adhered to in practice. Hence, even if the funding mechanisms of Y Corporation are governed by written rules, there will be a greater doubt about whether such rules will be effective in practice. This will not help building trust and rapport between the parties.

ii. Collectivist and Hierarchy-Based Type of Relationship or Rights-Conscious and Individualistic Approach?

It was proposed in Parts III.7 and III.8.D of Chapter 3 that the normative legal culture of Korea supports individualistic and personalistic traits of legal culture, and that Koreans are considerably rights-conscious. Also, Part III.4.B of Chapter 3 proposed that the notion of social status distinction may not be supported by the normative legal culture of Korea, although it may be part of the country’s indigenous cultural norms. How do these propositions apply in negotiations?

In the earlier illustration, it was discussed that when requesting the Ministry of Y for a statement that it is responsible for funding Y Corporation, a question may arise about how best to ‘communicate’236 this to the Ministry of Y. If the parties take the view that Koreans tend to emphasise a collectivist and hierarchy-based type of relationship,237 how would that affect the communication strategy?

In the author’s experience, this is a type of issue that is subtle and often not considered carefully by the parties. And yet, it may have considerable ramifications in the way in which the parties carry out the transaction. In cross-border structured finance deals, communications with government entities, notably, the Bank of Korea, the Financial Supervisory Commission of Korea and the Ministry of Finance and Economy of Korea, are common.238 The communication may be with the originator, Korean counsel or the international banks, with the international counsel often behind the scenes providing advice.

---

236 In negotiations, it has been said that culture impacts on communication, as well as setting the context for negotiations. See Kevin Avruch, ‘Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators’ (2004) 9 Harvard Negotiation Law Review 391.

237 Individualism versus collectivism is a cultural dimension in negotiation that has several meanings. See Jeanne M. Brett, Wendi Adair, Alain Lempereur, Tetsushi Okumura, Peter Shikhirev, Catherine Tinsley & Anne Lytle, ‘Culture and Joint Gains in Negotiation’ (1998) Negotiation Journal at 63. For example, it refers to the emphasis on rationality or costs and benefits versus relatedness and the needs of others (see H.C. Triandis, ‘Cross-Cultural Studies of Individualism and Collectivism in J. Berman (ed), Nebraska Symposium on Motivation (University of Nebraska Press and Trandis, 1989)), and also, it distinguishes the view of the self as autonomous and independent from groups versus interdependent with others (H. R. Markus & S. Kitayama, ‘Culture and the Self: Implications for Cognition, Emotion and Motivation’ (1991) Psychological Review 98 at 224-253).

238 For example, borrowing foreign currencies may require the Bank of Korea’s approval, and any innovative securitisation structures may require the Financial Supervisory Commission’s review and approval.
Hence, not only the view of the international counsel, but also the views of the parties about Korean legal culture, are relevant.

Conventional views about Korean legal culture encourage the idea that it is better to avoid a 'direct' and straightforward approach to communication with the Ministry of Y (see Part II.1.D of Chapter 1). It is preferred that the substantive information communicated is phrased in such a way that recognises the power differences and shows respect (in a Confucian-type manner). According to this view, if Y Corporation asks the Ministry of Y for a statement that defines their relationship based on rules, it may be harmful to their harmonious and hierarchically defined relationship. It may be better to rely on 'indirect' methods of communications based on school ties or other relationships.

How would the communication strategy change if the parties took the view that hierarchical relationship is only a matter of indigenous cultural norms, and that the normative legal culture does not tend to support social status distinctions? In this case, it would be possible to view that, while the parties still recognise the importance of approaching the Ministry Y cautiously and with respect (taking into account its superior status), they would not place an undue emphasis on these aspects of negotiation. The Confucian manner of approaching people would be important (as it is part of indigenous cultural norms) but not crucial — at least not when it comes to legal rights. Hence, when it comes to 'hard-bargaining', the need for recognising the individual legal rights of Y Corporation becomes paramount: the need to keep harmony and yeui (see Part III.8.D of Chapter 3), on the other hand, is less crucial.

Accordingly, the differences in the views about legal culture may result in differences in the strategies for communication with Ministry Y. While this may not be the difference in

---
239 Similar arguments have been made in respect of the Japanese negotiation style. See Ronald Dore, 'Goodwill and the Spirit of Market Capitalism' (1983) 24 The British Journal of Sociology 459. See also Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, 'Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance' William Davidson Institute Working Paper Series 2003-605 at 8 (arguing that in this type of culture, people are more likely to accommodate the exercise of power from above).

240 On this view and for a discussion of the literature supporting such a view, see Amir N. Licht, 'Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform' (2004) 22 Berkeley J Int'l L 195 at 221 and 224. Licht (at 224) argues that, according to East Asian culture, where conformity is the norm, 'speaking one's mind ... is not viewed positively'.


243 Researches indicate that, contrary to the conventional views, favouritism based on school ties in Korea is not significant. This shows that while relationship is seen to be important in social contexts, it does not play a decisive role when it comes to dealing with issues of 'rights'. See Taejong Kim, 'Do School Ties Matter? Evidence from the Promotion of Public Prosecutors in Korea' KDI School of Public Policy & Management Paper No. 05-08 (July 2005).
the question of whether to approach Ministry Y or not, it may be the difference in the
question of how far, and how, to pressure Ministry Y. To be sure, one cannot predict the
response of Ministry Y. But it is suggested that the latter approach is more consistent with
Korean legal culture as shown in the earlier chapters, and therefore more likely to lead to a
better negotiation strategy from a cultural perspective.

D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into
Account Similar Cases of Negotiations

i. The Small Business Corporation (SBC) of Korea Case – Outline

How would the above discussion about legal culture apply in actual deal situations? In this
section, the structured finance transaction entered into by the Small Business Corporation
(SBC) of Korea in 2004244 will be discussed.

In December 2004, Piraruku Fund Limited issued securities pursuant to a primary
collateralised debt obligations transaction.245 The senior class securities issued in that
transaction had the benefit of a credit enhancement provided by SBC,246 and such
arrangement was evidenced in a credit enhancement deed. The Dutch bank ABN AMRO
acted as the lead manager in the deal. There were multiple originators, consisting of certain
small- and medium-sized enterprises in Korea.

In that transaction, the offering circular states that, pursuant to the credit enhancement
deed, ‘SBC will, inter alia, absolutely, unconditionally and irrevocably undertake to make
payments ... in respect of any shortfall in payments of interest and principal of the Class A
Notes’.247 Hence, the senior class bondholders would rely ultimately on the creditworthiness
of SBC for payment of interest and principal on the bonds. Therefore, SBC’s
creditworthiness was of paramount importance to bondholders.

SBC conducts its operations through the management of four government sponsored
funds. SBC would make any payment under the credit enhancement deed by using the
money from the assets of one of the four funds, namely, the ‘SME Fund’.248 However, SBC
does not beneficially own the SME Fund: the Korean government does. Further, SBC does
not beneficially own any asset itself.249

Reading the offering circular thus far, the investors would be extremely concerned
about the ability of SBC to make any payment under the credit enhancement deed. This is
because SBC does not own any assets itself and completely relies on the government to be

244 US$25million Class A1 Floating Rate Notes due 2007, US$25million Class A2 Floating Rate Notes
due 2008, and US$71million Class A3 Floating Rate Notes due 2009 issued by Piraruku Fund Limited,
listed on the Channel Islands Stock Exchange. A copy of the offering circular (subsequently referred to
as the ‘Piraruku Offering Circular’) is available at the office of Management International (Guernsey)
Limited.

245 In a primary collateralised debt obligations transaction, the SPV issues securities backed by underlying
assets that comprise primary issuances of debt instruments.

246 Small Business Corporation (SBC) is a quasi-governmental entity that promotes and provides funding
to small- and medium-sized businesses in Korea.

247 Piraruku Offering Circular at 5.

248 Piraruku Offering Circular at 82.

249 Piraruku Offering Circular at 82.
responsible for its payment obligations under the credit enhancement deed. The investors would be concerned about the fact that the Korean government (which is not a party to the deal) should be entirely responsible for SBC’s payment obligations under the credit enhancement deed. The investors would also be concerned as to whether the government would, on behalf of SBC, meet such payment obligations punctually. This is because any failure of SBC to meet any of its payment obligations within certain grace periods from the relevant due dates would result in an event of default.\textsuperscript{250}

\textit{ii. SBC’s Relationship with Government Organisations}

As may be seen, the funding mechanisms between the government and SBC were crucial for the deal. The key concern for the investors would be to obtain comfort in the government’s financial support in favour of SBC. In this regard, the offering circular states that ‘[t]here is no statutory or other legal requirement for the government to provide SBC with direct financial support to meet its obligations’.\textsuperscript{251} Thus, it appears that the law does not explicitly specify the funding mechanisms between the government and SBC – much like the earlier example in relation to Y Corporation above. How the funding mechanisms between SBC and the government would work was largely left to ‘past practice’ and the relationship between the parties.\textsuperscript{252}

It may be observed that provisions of the offering circular attempt to describe the funding mechanisms in detail, presumably in order to help the investors understand SBC’s source of funding. Two sections of the offering circular seem noteworthy in this respect. One of them is under the heading ‘Relationship with Government Organisations’.\textsuperscript{253} This section basically describes SBC’s relationship with other government organisations, namely, the Small and Medium Business Administration (SMBA), the Ministry of Commerce, Industry and Energy of Korea (MOCIE) and the Ministry of Planning and Budget (MOPB).

Basically, this section says that SBC drafts its annual budget, which it submits to SMBA and MOCIE, and then SMBA and MOCIE submit the budget to MOPB. MOPB then submits the budget to the National Assembly of Korea for final approval. After its annual budget has been approved, if SBC finds out that the annual budget is insufficient to meet its payment obligations during the year, then it has the authority to amend its annual budget by up to thirty per cent of the entire annual budget amount after a prior consultation with MOPB. If its funds are still insufficient to meet all of its payment obligations during the year, SBC will try to borrow money from elsewhere in the first place, and then subsequently seek to obtain approval for the relevant changes in the annual budget.

Although this section of the offering circular attempts to explain to the investors how SBC obtains its funding from the government, it is doubtful how much comfort such an explanation would provide the investors. In this regard, the following points may be noted:

(a) Regarding the size of the funds available for SBC to meet its various payment obligations during the course of a year, although SBC may increase its annual budget by thirty per cent without going through the long budget approval process, this may not be

\textsuperscript{250} Piraruku Offering Circular at 45.

\textsuperscript{251} Piraruku Offering Circular at 82.

\textsuperscript{252} Piraruku Offering Circular at 85-87.

\textsuperscript{253} Piraruku Offering Circular at 85 and 86.
sufficient to meet its entire payment obligations. This may be particularly the case if it incurs large and unexpected expenses during the course of the year.

(b) In that case, although SBC would attempt to borrow funds from elsewhere, there is no guarantee that it will be able to do so.

(c) Even if SBC can borrow funds from elsewhere, it may not be able to obtain such funds within the time period permitted under the credit enhancement deed. Similarly, the thirty per cent increase in its budget is subject to prior consultation with MOPB, and the whole process may not meet the timing requirements under the credit enhancement deed.

(d) In any event, any problem of SBC in repaying its debt in a timely manner may trigger one of the events of default under section 8 of the terms and conditions of the notes.\(^{254}\)

To sum up, the offering circular tries to describe the relationship between SBC and the relevant government bodies regarding the funding arrangements. The purpose of such disclosure is to give comfort to the international investors regarding the government funding mechanisms in favour of SBC. However, the above analysis suggests that the relevant disclosure may not provide much comfort to the investors. There is no certainty of government funding if SBC is unable to pay its debt. One needs more than merely a description of the relationship between SBC and the government. There must be some rules that govern the funding mechanisms. This is further discussed below.

### iii. Government Support

The section of the offering circular under the heading ‘Government support’ sets out the government support arrangement in respect of any payment obligation of SBC.\(^{255}\) It says that ‘under Paragraph 2 of Article 42 of the Promotion Act, the government must, within the limits of the government’s total budget, appropriate in its annual expenditure capital contributions and lendings to the SME Fund’.\(^{256}\) The offering circular then states as follows:

> ‘Accordingly, in practice, the government reflects in its annual expenditure the funds needed for the operation of the SME Fund, which includes the amounts needed to make repayments under any debt instruments issued by SBC or under the Credit Enhancement Deed.

Therefore, SBC believes that … although the provisions of Paragraph 2 of Article 42 of the Promotion Act do not impose an express obligation on the government to give such approval according to the terms as requested by SBC … the government is not likely to refuse to give such approval.

Further, SBC believes that … the government may take certain appropriate steps in order for SBC to make any payment under the notes when due because (i) SBC, as a government-controlled entity expects to receive government financial support if there are insufficient funds and (ii) the government will take into account its obligation under Paragraph 2 of Article 42 of the Promotion Act’.\(^{257}\)

---

254 Piraruku Offering Circular at 44.
255 Piraruku Offering Circular at 86 and 87.
256 Piraruku Offering Circular at 86.
257 Piraruku Offering Circular at 86 and 87 (emphasis added).
The following points may be noted in respect of the above statements:

(a) The above statements do not seem to add much to the previous statements under the heading ‘Relationship with Government Organisations’ in terms of setting out new substantive facts that would give more comfort to the investors. The only new substantive information set out here seems to be that relating to Paragraph 2 of Article 42 of the Promotion Act. However, it is noted that even this Act does not create an express obligation for the government to assist SBC in meeting its payment obligations.

(b) Much of what the above statement is stressing is a matter of ‘belief’, ‘expectation’ and ‘practice’, rather than obligations arising out of rules. Such factors are not likely to provide the investors with added comfort because the investors are already relying on SBC’s creditworthiness anyway. That is, SBC’s statement of its own belief will not add much value to the investor’s claim against SBC. The situation would be different if another entity provides a similar statement of belief because then the investors may have a claim against such an entity (in addition to its claim against SBC under the credit enhancement deed) by virtue of such a statement.

(c) It is difficult to find out exactly how the parties, particularly the international lawyers responsible for the due diligence, viewed the legal culture of the Korean parties in this transaction. Nevertheless, one may make reasonable assumptions in that regard from the relevant statements in the offering circular. It appears from the above analysis of the relevant statements in the offering circular that (1) aspects of the ‘relationship’ between SBC and higher government bodies, and (2) SBC’s expectations from the existence of such relationship were both focused upon in great detail. This was done despite the fact that such factors were not likely to give the investors much comfort. Such factors would not provide the level of comfort commonly required by international investors subscribing for securities of this type.

(d) If this is correct, could it be that the parties assumed that such relational factors were material in the circumstances? Did the parties want to emphasise that the Korean government, with its paternalistic and hierarchical approaches, would take care of the payment obligations of SBC and not leave it to go bankrupt? Could it be that the parties compromised on the basis of the view that relationships are just as important as rules in Korea? While such a mindset cannot be proved with certainty, one can neither rule out the possibility of such ideas having an influence upon the due diligence process. This observation may be supported by the fact that the ‘Risk Factor’ section of the offering circular omits to include a warning about such a ‘lack of law’ situation, which arguably

---

258 The phrase ‘relationships are more important than rules’ is what one often hears when executing cross-border deals involving Korean parties, reflecting some of the common assumptions in respect of the legal culture of Korea.

259 The ‘Risk Factors’ section of an offering circular sets out warnings to the investors as to the possible risks associated with the securities and the transaction. Such warnings tend to be comprehensive and detailed. They also show what risks the parties thought were material and what risks the parties were prepared to take in the deal.

260 Piraruku Offering Circular at 21. It contains risk factors relating to SBC under a separate heading, ‘Credit enhancement and risks relating to the SBC’. But it omits to highlight the risks associated with the fact that there is no law regarding the government support of SBC.
reflects the parties’ tacit acceptance that relationship could supplement rules in these circumstances.\textsuperscript{261}

How would the due diligence be different if the parties took the view that Korean legal culture supports a rule-based approach rather than a relationship-based approach? According to the rule-based approach, one is more likely to pursue a strategy of requesting the relevant government authority to issue a statement regarding the relevant funding mechanisms – provided that such a statement will have the necessary legal effect. Further, one may ask a suitable government authority (such as SMBA) to issue a letter of comfort\textsuperscript{262} or a commitment letter pursuant to which the government authority would directly provide comfort to the investors. These arrangements are discussed in the next section in Part III.3.E. Such arrangements would provide the investors with a much greater degree of comfort.

One notes that, even without such additional comfort, the deal in fact closed successfully. How did the deal close? The exact reason why and how the investors accepted the relevant disclosure in the offering circular and purchased the bonds is not known to third parties. Arguably, one explanation is that the investors simply took certain risks in relation to the creditworthiness of SBC. However, given the fact that SBC ultimately guarantees the performance of the senior securities, this seems unlikely.

Another explanation may be found from the terms of the offering circular that contemplate that a liquidity provider\textsuperscript{263} is expected to be appointed in order to ‘facilitate or assure the satisfaction of SBC’s payment obligations under the Credit Facility Deed’\textsuperscript{264}. It may be that the investors took the necessary additional comfort from this liquidity facility, and hence, accepted the relevant risks associated with SBC. But the problem with this arrangement is that this seems to be a future arrangement, one that probably did not exist at the time of closing.\textsuperscript{265}

In any event, what seems clear is that the disclosure, as currently drafted, would be insufficient to provide investors with the necessary comfort regarding SBC’s source of funding. This would have had implications for the pricing and marketability of the securities. Also, the liquidity facility, which might not have been necessary had additional comfort been obtained from the government, would have added to the overall costs of the transaction.

The next section suggests negotiation strategies that take into account the issues discussed above.

\textsuperscript{261} This should be compared to the Hanareum securitisation deal, discussed in Part III.3.E below, where the parties successfully obtained a commitment letter and a letter of acknowledgement from a government body. In that deal, the ‘Risk Factor’ section of the offering circular clearly sets out a warning about the relevant ‘lack of law’ situation. See Hanareum Offering Circular at 44.

\textsuperscript{262} It should be noted that a letter of comfort is not legally binding. Nevertheless, a letter of comfort issued by a government authority provides much comfort and credibility because of political pressures to honour the relevant representation.

\textsuperscript{263} A liquidity provider is an entity (or a person) who agrees to provide funds in the event that there is a shortage of funds from the relevant cash flow in a given financing transaction.

\textsuperscript{264} Piraruku Offering Circular at 1.

\textsuperscript{265} Bondholders do not tend to prefer such future arrangements because it is practically difficult for the bondholders to enforce such obligations.
E. Stage 4 – Devising Negotiation Strategies

In carrying out due diligence on SBC, what kinds of negotiation strategies can the international counsel adopt that take into account aspects of the legal culture of Korea? As discussed above, it is suggested that the parties should either (a) request the relevant government authority to issue a statement regarding the relevant funding mechanisms, or (b) request a suitable government authority to issue a letter of comfort or a commitment letter pursuant to which the government authority will directly provide comfort to the investors. To be sure, the parties in the SBC deal may have actually taken such steps but failed. But based on the author’s knowledge, this was probably not the case. This assumption is also supported by the fact that in other similar deals, relevant government bodies were actually willing to issue such statements, as discussed below.

i. **Letter of Comfort**

The first option for SBC is that it may request a government body such as SMBA to issue a letter of comfort. A letter of comfort, while not legally binding, can provide reasonable comfort to international investors; certainly more comfort than not having it. This kind of arrangement was made in an exchangeable bond transaction in 2000, involving Korea Deposit Insurance Corporation (KDIC) as issuer and Deutsche Bank and UBS Warburg as joint managers. In that transaction, the Ministry of Finance and Economy of Korea (MOFE) provided a letter of comfort in favour of the investors in the bonds issued by KDIC. The letter of comfort stated, among other things, the fact that MOFE acknowledged and supported the financing transaction in question.

It appears that the reason why the investors requested such a letter of comfort was because KDIC, being Korea’s deposit insurance entity, almost always had more liabilities than assets, because of the nature of its operations. Further, as in the case of SBC, the government was not legally required to provide financial support to KDIC.

ii. **Commitment Letter**

Alternatively, as a better, legally binding strategy, a commitment letter might be requested from SMBA. Pursuant to such a letter, in effect, SMBA would promise the investors that it would be responsible for SBC’s payment obligations under the securities.

A similar arrangement was made in a securitisation transaction involving Hanareum International Funding Limited, which closed in September 2001 and was arranged by, among others, Credit Suisse First Boston and SG Investment Banking. In that transaction, the

---

266 US$1,001,800,000 2.25% Exchangeable Notes due 2005 exchangeable into common shares or American Depositary Shares of KEPCO, closed in October 2000 (referred to as the ‘KDIC Transaction’ here). This is not a structured finance transaction in a strict sense, but it is relevant to the current discussion on due diligence. The notes were listed on the Luxembourg Stock Exchange and a copy of the offering circular (referred to as the ‘KDIC Offering Circular’ here) is available from Deutsche Bank Luxembourg SA.

267 KDIC Offering Circular at 14.

268 KDIC Offering Circular at 15.

269 KDIC Offering Circular at 15.

270 US$278 million Guaranteed Secured Floating Rate Notes due 2011, issued by Hanareum International Funding Limited (referred to as ‘Hanareum Transaction’ here). The notes were listed on the
originator was a statutory body created by the Korean government to carry out certain tasks. The originator was an insolvent entity, and, again, the government was not legally obliged to provide financial support to the originator. Accordingly, the investors required additional comfort from a government entity.

Since the originator was a statutory entity that was wholly-owned by KDIC, and KDIC being a government entity, it could have been arguable that such a ‘relationship’ between the originator and KDIC ensured that KDIC would be responsible for the originator’s payment obligations under the transaction. Nevertheless, the investors in this transaction sought a commitment letter from KDIC pursuant to which KDIC ‘guaranteed’ that it would be responsible for the originator’s payment obligations in the transaction, which they successfully obtained.

iii. Letter of Acknowledgement

In that transaction, not only did the international investors successfully obtain a commitment letter, but they also successfully obtained a ‘letter of acknowledgement’. Pursuant to this letter, KDIC acknowledged the fact that KDIC had, in the past, provided financial support in favour of the originator, thus providing a representation to the investors. Such a document also might have been helpful in the SBC’s case.

iv. Assessment

As these cases show, international investors have tried, and successfully obtained, additional comfort from third-party Korean entities where the law did not clearly provide the relevant comfort required by the investors. To be sure, the process of seeking to obtain such documents involves more than legal cultural issues. A range of considerations such as the competency of the parties, the requirements of the target investors, the quality of the underlying assets, and other risk assessments and factors each potentially play a role. But the point is that legal culture is not an unimportant factor in this process, and yet, it is, in the author’s opinion, often a neglected part of the process. An accurate assessment of legal culture may provide the basis for judging the cultural sensitivity of a particular step to be taken, and the extent to which it should be taken.

4. Contractual Documentation

A. Introduction

Negotiations of provisions in contractual documentation involve largely questions of law, whereas negotiations relating to offering circulars often involve questions of fact. Accordingly, when it comes to negotiating contractual documentation, the dialogue tends to

---

Luxembourg Stock Exchange and both the offering circular (referred to as ‘Hanareum Offering Circular’ here) and the transaction documents are available for inspection at Deutsche Bank in Luxembourg and Bankers Trust Company in New York, respectively.

271 The transaction being a securitisation transaction, the originator had limited payment obligations under the transaction, and therefore, the need for additional comfort from third parties was not as great as in the case of the KDIC transaction.

272 Hanareum Offering Circular at 76.

273 Hanareum Offering Circular at 75.
be more 'legalistic', adversarial and intense. Unlike due diligence processes, there may be 'winners' and 'losers' in contractual documents negotiations.

In financing transactions, many provisions in the documentation are viewed in terms of 'pricing' and 'risks' in the sense that, depending on the way in which certain provisions in the documents are drafted, the pricing of the securities may be directly affected. Also, the risk weighting assigned to the transactions will be established.\(^\text{274}\) Hence, it is of particular importance that clauses in financing documentation are detailed and specific in addressing all the relevant risks, and effective in delivering the required arbitrage. Set out below is the four-stage inquiry applicable to some aspects of negotiations relating to contractual documentation.

B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation

i. **Power Differences**

When an international counsel negotiates contractual documentation with Korean counterparts (either the Korean counsel or the originators), the author observes that cultural issues relating to power differences may be relevant.\(^\text{275}\) To be sure, power differences will almost always be an issue in negotiations in cross-border finance whether it involves Korean parties or non-Korean parties. But as discussed in Part II.1.C of Chapter 2, there may be a close relationship between culture and power, and as such, different cultures may perceive power differences differently. Therefore, it is possible that Korean parties have a particular tendency towards power differences that is different to that of the people from other cultures.

Before turning to Korean culture, in what circumstances do power differences between parties generally influence negotiations relating to contractual documentation in cross-border structured finance? Power differences may exist in the following circumstances.\(^\text{276}\)

(a) Power differences may not be a significant issue between the originators and the arranging banks. This is because the arrangers will be mainly concerned with ensuring that the securities to be issued achieve a certain level of pricing and that the documentation is properly done. The arrangers are not necessarily in a superior negotiating position vis-à-vis the originator. Although in one sense, the arrangers may act like the 'lenders', they are usually selected by the originator out of a pool of candidates (and the competition is often severe). Therefore, the power differences between the arrangers and the originators are often fairly evenly balanced.

(b) But power differences may be an issue between the originators and the guarantors or monolines\(^\text{277}\) (if they are parties to a transaction). This is because, in such cases,

\(^{274}\) This tends to be particularly the case for ISDA documentation.

\(^{275}\) These include issues relating to power distance, high versus low context communication, and the trust versus power distinction. These cultural issues are discussed under Part III.3.B.i above.

\(^{276}\) It has been argued that the discussion of trust focuses on transactions, whereas the discussion of power centers on conflict resolution. Shirli Kopelman & Mara Olekalns, 'Process in Cross-Cultural Negotiations' (1999) 15 Negotiation Journal at 377. However, negotiations between lawyers in international financing transactions often tend to be extremely adversarial and confrontational in nature – and hence the question of power differences is often an important consideration in the negotiations.

\(^{277}\) See Part II.2.B above.
the guarantors or the monolines will take most of the risks associated with the transaction, and the originators will be relying on the credit enhancement provided by the guarantors or the monolines. Therefore, quite often, monolines or guarantors in this type of transaction have superior bargaining power and will not easily compromise when they negotiate.

c) To an extent, there may be some power differences between the originator and the swap counterparty if a swap is used in the deal. This might be particularly the case if the cash flow aspects of the transaction structure depend on a high credit rating of the swap counterparty. Similar arguments have also been made in respect of Japanese business people. See Danan Zhang & Kenji Kuroda, 'Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies' (1989) 10 Northwestern Journal of International Law and Business 195 at 195-212.

Swaps have a high credit rating because of their strict internal risk management policies regarding their exposures.

What is Korean culture regarding power differences? Conventional views hold that Korean parties tend to respect cultural values such as yeui (decorum or manner), but egalitarian values and rights-consciousness may be downplayed in observing the relevant power and status differences (see Part II.1.D of Chapter 1). Hence, the assumption would be that power differences are respected and taken seriously when Koreans negotiate with other parties who are in superior (or inferior) positions of power. According to this view, when, for example, Korean parties negotiate contractual terms with monolines (or their international counsel), one would assume that the monolines will have substantial advantages over the Korean parties because of the way in which the Korean parties react to power differences.

On the other hand, if one adopts the findings on the normative legal culture of Korea made in this thesis (see Part III.4 of Chapter 3), what are the implications? Firstly, despite any power differences, when negotiating with Korean parties, a low-context nature of communication may be consistent with the legal culture of Korea (see Part III.4.D below). Secondly, Korean parties tend to favour direct communication, in particular over rights (both legal and commercial), priorities and preferences (see Part III.3.D above). Thirdly, Korean parties are not likely to be concerned with power differences over and above that which is necessary to achieve the commercial objectives of a transaction. Fourthly, Korean parties tend to expect that the deal will be done on an egalitarian basis (see Parts III.4, III.6 of

---

278 This basically means that the parties are relying on the credit rating of the swap counterparties to enhance the creditworthiness of the deal.


280 In low-context cultures, messages are transmitted explicitly and directly, and communications are action-oriented and solution-minded. See, generally, E. T. Hall, Beyond Culture (Anchor Press, 1976). It has been argued that egalitarianism and low-context communication are closely connected whereas high-context communication is more likely in hierarchical relationships. See Jeanne M. Brett, Wendi Adair, Alain Lempereur, Tetsushi Okumura, Peter Shihirew, Catherine Tinsley & Anne Lytle, 'Culture and Joint Gains in Negotiation' (1998) 14 Negotiation Journal 61 at 68. On the other hand, it has been said that in high-context cultures, information comes not only from explicit message, but also from contextual factors that are transmitted indirectly and implicitly. See, generally, Stella Ting-Toomey, 'Toward a Theory of Conflict and Culture' in W. Gudykunst, L. Stewart & S. Ting-Toomey (eds), Communication, Culture, and Organisational Processes (Sage Publications, 1985). It has been argued that the Japanese have a high-context culture, and so there is much less direct information sharing, especially answers to questions. See John L. Graham, 'The Japanese Negotiation Style: Characteristics of a Distinct Approach' (1993) 9 Negotiation Journal 123 at 123-140.

281 For a discussion on this kind of communication tendency, see Jeanne M. Brett, Wendi Adair, Alain Lempereur, Tetsushi Okumura, Peter Shihirew, Catherine Tinsley & Anne Lytle, 'Culture and Joint Gains in Negotiation' (1998) 14 Negotiation Journal 61 at 68.
Chapter 3 and Part III.2 of Chapter 4) and that the provisions in the documentation will be fairly and commercially drafted and executed.

Hence, applying the findings on the normative culture of Korea, the basic assumption would be that the approach to negotiations with Korean counterparties should be, by and large, commercial and reasonable, downplaying any power differences. But at the same time, a situational or variable interpretation of power might be appropriate in view of the commercial realities of the parties and the transactions.282

ii. Cultural Understanding of the Role of Contract

Another cultural issue when negotiating contractual documentation relates to the cultural understanding of the role of contract. It has been argued that, depending on one’s culture, one may, on the one hand, view a signed contract as a definitive set of rights and duties that binds the parties and determines their interaction thereafter. On the other hand, one may take the view that the signed contract only describes the general principles and the relationship, and that the essence of the deal is the relationship itself. The argument goes that depending on such views, firstly, one may regard the goal of negotiation more as a signed contract or the creation of a relationship between the two sides. Or secondly, one may prefer the written contract (as and when entered into) to contain detailed terms instead of general terms and vice versa.283 Having said that, it may be difficult to say that a particular culture (even the ‘Western’ culture) prefers one over the other.284

What about Korean culture on this point? The findings on the ‘legalistic’ and rights-conscious nature of the normative legal culture of Korea (see Parts III.7 and III.8 of Chapter 3) suggest that Koreans would view the goal of the negotiation more as concluding a signed contract rather than creating a relationship. However, it is quite common to observe that contracts entered into between Korean parties under Korean law tend to be relatively brief and do not contain detailed terms.285 Does this indicate that Korean legal culture prefers the

282 On this issue, see ibid.


285 Ginsburg describes the way in which contracts are (or were) entered in Korea as follows: ‘As far as the law was concerned, formal contracts were seen as less important to governing economic transactions than formal, ongoing relationships. Contracts were loosely written and could be adjusted to fit changing business conditions. Network of informal contracts crossed business-government lines and ensured a constant two-way flow of information among key players’. See Tom Ginsburg, ‘Introduction: The Politics of Legal Reform in Korea’ in Tom Ginsburg (ed), Legal Reform in Korea (RoutledgeCurzon, 2004) at 3.
relational aspects of the deal rather than a rule-based approach? This would be consistent with conventional views about Korean legal culture, and one notes that similar arguments have been made about the Japanese\textsuperscript{286} and Taiwanese\textsuperscript{287} cultures.

It is submitted that one should not over-attribute cultural issues for understanding the role of contract.\textsuperscript{288} Rather, the brief nature of contract may be partly explained by the fact that Korea adopted the continental law system (see Part IV.2.C of Chapter 3) under which private contracts tend to be simpler and shorter than those under the common law system.\textsuperscript{289} In addition, some suggest that the systematic under-capacity in the Korean legal system has contributed to the way in which contracts are currently drafted in Korea.\textsuperscript{290} Another reason for this kind of practice is probably related to cost concerns, which is discussed in Part III.6 below.

C. Stage 2 – Identify the Applicable Findings on Legal Culture

i. Clarity, Supreme Authority, and Stability of Law, or the Confucian Li?

It was argued in Part III.2.D of Chapter 3 that the normative legal culture of Korea supports the notions of clarity, supreme authority and stability of the law. But the concept of Confucian li is not supported by, and/or does not constitute, the normative legal culture of Korea, albeit it might be characterised as an indigenous cultural norm (see Part III.4.C of Chapter 3). How are these findings relevant in the present context?

According to these findings, Confucian li, which is related to the notion of yeui, does not play a major role when negotiating contractual documentation. This is because li, not being part of normative legal culture, is less likely to have a determinative influence on what the rules should be (see Part III.4.C.i of Chapter 2). The concept of yeui is, however, not wholly irrelevant as indigenous cultural norms should also matter in social interactions. It may be helpful, for example, for building rapport and trust (see Part III.3.B.iv above).


\textsuperscript{287} See John K.M. Ohnesorge, 'The Rule of Law, Economic Development, and the Developmental States of Northeast Asia' in Christoph Antons (ed), Law and Development in East and Southeast Asia (RoutledgeCurzon, 2003) at 100 (saying that according to the 'perceived wisdom', the people of Taiwan, Japan and Korea 'have not dealt with increasing transactional complexity by attempting to draft contracts that cover all possible contingencies').


\textsuperscript{289} See, for example, Jan Dalhuisen, Dalhuisen on International Commercial Financial and Trade Law (Hart Publishing, 2004) at 37-109. Dalhuisen also elaborates on other aspects of the differences between civil and common law. For example, for the civil law, legal certainty is expected from a legislator, whereas for the common law, it is expected from the participants themselves or from their ways of operating. Hence, compared to the common law, the civil law tends to be more localised and territorial or statist in nature. See also John Flood, 'Large Law Firms: Priests of the New Capitalism', unpublished working paper at 6 (stating that '[t]ypical continental contracts are only a few pages in length, whereas the usual English or American contract will run to hundreds or thousands of pages or more with schedules').

In other words, having yeui will constitute a good negotiation style with Korean parties. But as the above analysis shows, and according to the author's experience, yeui will not be critical when it comes to 'hard-bargaining' of legal issues. The fact that Koreans tend to respect yeui and the proper order of the proceedings should be distinguished from their actual expectations and views in respect of the process, substance and outcome of the negotiation. According to the findings on normative legal culture, Korean parties will tend to demand clarity, supreme authority and stability of rules in the contract.

ii. Cultural Issues or Simply Lack of Expertise?

Before proceeding further, certain observations regarding legal cultural issues must be qualified. One should distinguish between, on the one hand, Korean parties respecting yeui and power differences, and on the other hand, there being simply a case of lack of experience on the part of the Korean parties. The author's observation is that the latter factor together with a weak command of English tend to be a considerable disadvantage in negotiations. But that is not a legal cultural issue, rather it is an issue of competence. The fact that Korean parties sometimes do not hire lawyers, even in large transactions, due to their concerns over legal fees, also contributes to the problem (see Part III.6.C.ii below).

iii. Individualism, Social Status, and Strong Sense of Entitlement

According to Parts III.7 and III.8.D of Chapter 3, the normative legal culture of Korea, firstly, supports individualistic and personalistic traits of legal culture. Secondly, the notion of social status distinction may not be supported by the normative legal culture of Korea, albeit it may be part of indigenous cultural norms (see Part III.4.C of Chapter 3). Thirdly, the normative legal culture of Korea supports the notion of a strong sense of entitlement and adjudication. What are the implications of these findings when negotiating contractual documents?

291 In this regard, it is interesting to note Bernstein's argument that non-legal norms are used to preserve the relationship, whereas legal norms offer solutions for ending the relationship. See Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms' (1996) 144 University of Pennsylvania Law Review 1765. If one can draw an analogy between non-legal rules and indigenous cultural norms, on the one hand, and legal norms and normative legal culture, on the other hand, then applying Bernstein’s theory produces an interesting result. Indigenous cultural norms may be useful in relational matters - such as getting along well between the parties. But when it comes to significant legal issues that affect the deal substantively, then it may be that normative legal culture plays a crucial role.

292 In this regard, one notes the distinction between 'mannerisms' and deeply rooted culture articulated by Buzo. See Adrian Buzo, The Making of Modern Korea (Routledge, 2002) at 8. Buzo (at 8) says that 'social practices and values help to define a distinct manner in which people continue to conduct public business. Because they impress on a personal level, they often form the basis of an external observer's perception of a distinct political culture in operation. Yet we should be careful to distinguish between such mannerisms and the more abstract, formal features discussed above [relating to deeply rooted culture], for such mannerisms can often exaggerate the way in which the Korean past informs the Korean present'. A good example showing such a distinction is the occasion when President Bush addressed Kim Jong II as 'Mr Kim Jong II' rather than a 'tyrant', which seems to have helped North Korea agreeing to host the fourth six-party talk on North Korea's nuclear programme. See 'Now What? Six Parties, 13 Days, but No Deal' The Economist (11 August 2005). In that case, knowing the cultural issue relating yeui was helpful when dealing with Korean (albeit North Korean) parties. But it was also noted that 'the politeness will only carry the things so far' (ibid). That is, when it came to hard bargaining, the North Koreans strictly focused on the key issues and their positions rather than on yeui.
As discussed in Part III.4.B.i above, these findings support the view that power differences between, for example, the Korean originator and the monoline in a transaction, will be played down, and negotiations will tend to be on an egalitarian and commercial basis. Also, because contractual documentation sets out the parties’ entitlements in the transaction, the parties’ sense of entitlement will be relevant in negotiating contractual documentation. The findings that Koreans tend to be litigious and rights-conscious would indicate that they are likely to drive a hard bargain when negotiating contractual documentation. They are likely to view that the rights and the obligations of the respective parties should be clearly set out in the document (see Part III.4.C.i above). They would negotiate the documentation on the basis that the terms of documents will be critical in an adjudication context.

Set out below are case studies that highlight the above legal cultural issues in the negotiation of contractual documentation with Korean parties.

D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations

i. Samsung Life RMBS Case – Outline

In December 2002, Samsung Life, Korea’s largest life insurance company, closed a residential mortgage-backed securitisation (RMBS) transaction.²⁹³ In that transaction, Morgan Stanley was the lead manager and Ambac, a US monoline company, provided a guarantee in respect of the securities issued. This transaction was highly complex and several transaction documents were executed by the parties.²⁹⁴ The quality of the transaction documentation was of the highest standard, and this was evidenced by the fact that the transaction won the International Financial Law Review’s 2002/2003 Asian Securitization/Structured Finance Deal of the Year Award.²⁹⁵

ii. Mortgage Loan Transfer Agreement

For the purposes of the present discussion, certain clauses of the mortgage loan transfer agreement entered into in the Samsung Life transaction will be examined.²⁹⁶ This document is one of the most negotiated contractual documents in a deal of this nature between, among others, the originator, the lead manager and the monoline. It provides a reflection of the negotiation process that took place in the transaction. The final terms of this document, which is available for inspection at JPMorgan Chase Bank, New York Branch, indicate the negotiated outcome of the relevant terms and any compromise reached by the parties. Hence, it is instructive to review some of these terms to find out how the negotiation between the parties proceeded.

²⁹³ US$299,600,000 Guaranteed Secured Floating Rate Notes due 2022, issued by Bichumi Global I Limited (referred to as ‘Samsung Life Transaction’ here). The notes were listed on the Luxembourg Stock Exchange, and the offering circular (referred to as ‘Samsung Life Offering Circular’ here) and the transaction documents are available for inspection at JPMorgan Chase Bank, New York Branch.

²⁹⁴ There were about twenty-five main transaction documents in this transaction. See Samsung Life Offering Circular at 210 and 211.

²⁹⁵ See International Financial Law Review (February 2003). This award is widely known as the most prestigious award for financing law transactions.

²⁹⁶ A copy of the Mortgage Loan Transfer Agreement is available for inspection at JPMorgan Chase Bank, New York Branch, the Principal Paying Agent in that deal.
Pursuant to the mortgage loan transfer agreement, Samsung Life transferred its mortgage loan assets to an SPV for the purpose of securitising its assets. From the point of view of the monoline and the lead manager, they certainly would want to ensure that the assets sold meet the relevant criteria and that they are performing assets. Also, they would want to ensure that Samsung Life would be responsible for any defects in the assets, which would be covered by the representations and warranties in the document. Samsung Life, on the other hand, would not have wanted the representations and warranties and other terms of the agreement to be too onerous, so as to minimise any continuing liabilities after the sale of the assets.

This agreement is governed by Korean law because it deals with the transfer of the assets located in Korea and various other Korean law issues, including perfection of the transfer of the assets. However, this agreement was drafted by the international counsel acting for the lead manager (which was Clifford Chance), and Korean counsel’s comments regarding Korean law issues would also have been incorporated. This reflects aspects of the global legal practice in relation to these types of transactions (see Part II.2.D above).

The way in which the agreement was drafted would be that, after the international counsel acting for the lead manager had prepared the initial draft of the agreement, the agreement would have been circulated to all the relevant parties for their review and comment. After the parties provide their comments on the agreement, the parties would then negotiate the documents based on such comments. Then, the parties’ comments could be (a) incorporated in the agreement, (b) rejected, or (c) incorporated with any agreed modification. The lawyers acting for each party would provide significant input on the comments to be made and how to negotiate (and indeed they would be the ones who were at the front line of the negotiations). Nevertheless, the clients (that is, the principal parties) themselves would ultimately decide all significant matters and have the final say in the negotiation process. After all, the lawyers’ bargaining position will be only as good as that of their clients.

Thus, the clauses in this agreement reflect the negotiated outcome of the parties, and one may be able to draw reasonable inferences about (1) the bargaining positions of the respective parties based on the outcome of the drafting; (2) the kinds of suggestions made by the parties in respect of the clauses; and (3) the extent to which the parties paid attention to the details of the clauses. Set out below is a discussion on some of the clauses in the mortgage loan transfer agreement as they might relate to the negotiations between the parties.

## iii. Perfection of Title Clause

Under clause 6.1 of the agreement, the originator is required to, following a specified event, give perfection notices to each of the obligors to the mortgage loan assets that are being transferred pursuant to this agreement. Perfection of the transfer of the assets would have been of critical importance to the lead manager and the monoline in this transaction. This is because they would certainly want to ensure that the full title to the assets would be

---

297 Third Schedule of the Samsung Life Mortgage Loan Transfer Agreement.
298 See the front page of the Samsung Life Mortgage Loan Transfer Agreement.
299 Whelan links the increase in the power of global law firms to the powerful clients of the law firms. See Christopher J. Whelan, ‘Ethics beyond the Horizon: Why Regulate the Global Practice of Law?’ (2001) 34 Vand J Transnat’l L 931 at 941-941. Whelan (at 942) says that these clients are very powerful, and they are the repeat players in the international economy.
transferred to the purchaser SPV pursuant to this agreement, and that such transfer would be perfected against all the relevant parties. If the transfer of the assets was not perfected, then the purchaser would not be able to enforce its rights under the transferred assets against the relevant third parties, including the obligors under the mortgage loan assets.

In order to perfect the transfer of the assets, the originator would have to send ‘perfection notices’ to each of the obligors to the mortgage loan assets. But given the fact that there would have been numerous obligors (possibly tens of thousands), it would have been a huge administrative burden on Samsung Life to send perfection notices in relation to each of the assets transferred. Under the relevant Korean law requirement, such notices must be sent by way of ‘fixed-date stamped notices’ and individually signed by various parties. The cost of sending the perfection notices would thus be considerable. Therefore, it can be reasonably inferred that considerable negotiations would have taken place in relation to this particular issue between Samsung Life, on the one hand, and the monoline and the lead manager, on the other hand.

One expects that the monoline and the lead manager would have argued that, since the need to perfect the transfer of the assets would be of a great importance to them, Samsung Life must send out such notices prior to the closing of the transaction regardless of the financial or other burdens imposed upon it. After all, Samsung Life is obtaining funding through the transaction, and this aspect of the transaction should have been regarded as part of the overall cost of the funding.

Samsung Life, on the other hand, would have argued that, firstly, sending out such notices involves an unexpected administrative and cost burden upon Samsung Life. Secondly, strictly speaking, perfection of the transfer is only relevant if the transferee wants to enforce its rights under the assets transferred against the obligors of the assets. But such instances would not arise while the assets are performing, and therefore, perfection notices can be sent as and when there are defaults in the performance of the assets. According to the author’s experience, these kinds of arguments are not uncommon in this type of transaction.

The final wording of clause 6.1 of the agreement reflects the relevant negotiated outcome of this issue. It appears from this wording that Samsung Life had succeeded in convincing the monoline and the lead manager to dispense with the requirement to send out perfection notices prior to the closing of the transaction. Clause 6 says that the perfection notices shall be sent out ‘following the occurrence of a Notification Trigger Event’. A Notification Trigger Event includes, among other things, an event in which there are certain defaults in the performance of the assets.

While it is impossible to ascertain with certainty the exact ways in which the parties negotiated this issue, it is clear that the monoline was unable to win the point despite its superior bargaining position (see Part III.4.B.i above). The carefully worked out solution in Clause 6.1 shows that Samsung Life and its advisors went a great distance to ensure that the contract reflected detailed provisions agreeable to Samsung Life. Samsung Life did not appear to have compromised on general provisions in the contract and leaving the

---

300 Clause 6.1 of the Samsung Life Mortgage Loan Transfer Agreement.
301 It is costly to send ‘fixed-date stamped notices’ in Korea, and also, Samsung Life would have had to pay for the costs incurred in obtaining all the signatures of the relevant parties.
302 Samsung Life Offering Circular at 196.
implementation of the contract to other parties’ discretion (see Part III.4.B.ii above). The apparent power differences between the originator and the monoline did not prevent Samsung Life from successfully negotiating against the monoline. This is noteworthy because Samsung Life did not have prior experience in cross-border securitisation.

How does this situation in the Samsung Life transaction compare to that of other similar transactions? In a securitisation transaction involving Hyundai Capital (another Korean company) in 2002, similar issues seem to have been negotiated between Hyundai Capital, the lead manager (JPMorgan) and the monoline (FSA) company.\(^{303}\) Clause 6.1 of the asset transfer agreement sets out a similar arrangement as that found in the corresponding provision agreed in the Samsung Life transaction. Hyundai Capital in that transaction also had successfully negotiated against the monoline and the lead manager to achieve Hyundai Capital’s side of the bargain.

However, this was not the case in the Hanareum transaction discussed earlier. In that transaction, the Korean party had agreed to send out perfection notices prior to the closing date of the transaction.\(^{304}\) Why was the Korean party unsuccessful in its negotiation in this case? Several reasons may be suggested. Firstly, this was one of Korea’s first cross-border securitisation transactions and therefore it is reasonable to imagine that the Korean parties lacked experience in this type of transaction. Secondly, the number of perfection notices to be sent out in that transaction was significantly less than those in the Samsung Life and Hyundai Capital transactions; hence, it would have been more reasonable for Hanareum to accept the relevant obligations. Thirdly, Hanareum (and its parent, KDIC) were government agencies whereas Samsung Life and Hyundai Capital were private commercial enterprises. Therefore, the latter entities were likely to be more commercially-orientated and cost-conscious.

It is also important to note that, since Korean parties such as Samsung Life and Hyundai Capital have been able to negotiate successfully in these transactions, parties in similar transactions tend to follow suit. Experience shows that market practice or norms result in this regard (see Part II.2.C above). In subsequent transactions, it becomes increasingly difficult for the monolines to change this position. Thus, the legal culture of the parties (which affects the way in which the parties negotiate) in one transaction tends to have effects beyond the particular transaction in question. This may be seen as an aspect of local (Korean) legal culture influencing global legal culture in creating a kind of ‘regional legal culture’ for these types of transactions (see Part II.2.C above).

**iv. Representations and Warranties Clauses**

Related to clause 6.1 of the agreement is a representation given by Samsung Life regarding perfection of the transfer of assets. In this asset representation\(^{305}\) given by Samsung Life, Samsung Life represents as follows:

---

303 US$160,112,000 Guaranteed Secured Floating Rate Notes due 2005. The notes were listed on the Luxembourg Stock Exchange and the offering circular and the transaction documents are available for inspection at JPMorgan Chase Bank Luxembourg S.A. and JPMorgan Chase Bank, New York Branch, respectively.

304 See Clause 6.1 of the Hanareum Portfolio Transfer Agreement.

305 Asset representations in a securitisation transaction are the representations and warranties given by the originators to the purchasers of the assets regarding certain aspects of the assets.
Immediately following transfer of title to the Mortgage Loan Assets on the Transfer Date, the Purchaser will have full and sole title to and ownership in each Mortgage Loan Asset (other than any File and records and data), which will be perfected against all third parties other than the relevant Borrowers upon the registration of the transfer of the Mortgage Loan Assets with the FSC and perfected against the relevant Borrowers upon the giving of notices to the relevant Borrowers as contemplated in Clause 6.1 (Notice), and will have full and sole perfected title to and ownership in any File and records and data relating to each Mortgage Loan Asset."  

This representation would have been of critical importance to the lead manager and the monoline. This is because they would want to ensure that Samsung Life provides a representation to the effect that the full title to the assets would be transferred to the purchaser SPV pursuant to this agreement, and that such a transfer would be perfected against all the relevant parties. Even though the monoline and the lead manager in this transaction did not manage to have Samsung Life agree to send out perfection notices prior to the closing, they probably had asked for a broad representation of Samsung Life that says that the transfer of the assets have been perfected against all relevant parties.

Technically, the latter kind of representation would be factually incorrect because the perfection notices would not have been sent when the representation was made. However, the author’s experience is that the dominant party in a negotiation would often ask the party with less bargaining power to provide representations and warranties which, even though factually not correct or cannot be ascertained as to its correctness, cover broad factual circumstances. The rationale is that the idea of providing representations and warranties in a deal may be seen as essentially a risk-allocation exercise, and someone has to take the relevant risks in the transaction. Suppose that the monoline or the lead manager suffers a loss because the purchaser SPV cannot enforce its rights under the assets against the obligors of the assets because there is a failure to perfect the transfer. In that case, by having Samsung Life’s representation saying that the transfer of the assets has been perfected, the monoline and the lead manager may be able to sue Samsung Life for any losses.

In that case, the argument of the monoline and the lead manager would be that, since they had agreed that Samsung Life did not have to send out the perfection notices at the outset, it had saved Samsung Life a considerable administrative burden and expenses. Therefore, the argument could be that, the least that Samsung Life could do was to provide representations in relation to the perfection of the transfer so that the monoline and the lead manager could rely on them. After all, Samsung Life cannot escape from the fact that it should be responsible for perfecting the transfer.

On the other hand, Samsung Life could argue that it cannot represent something that is factually incorrect. Therefore, all the comfort that Samsung Life could give to the monoline and the lead manager by way of representations and warranties would be that which was factually correct.

The author’s experience is that these types of arguments are quite typical when negotiating representations and warranties in cross-border structured finance transactions. The outcome of such negotiations tend to depend on, among other things, (a) the bargaining power of the respective parties, (b) the detail and strength of the arguments put forward by

---

306 Paragraph 2 of Part 3A of the Third Schedule of the Samsung Life Mortgage Loan Transfer Agreement.
the parties, and (c) the extent to which the parties insist on getting what they want, bearing in mind that the transaction costs would almost certainly increase as the deal gets delayed.

The final wording of the relevant representation in this transaction indicates that Samsung Life was successful in restricting its representation to that which was factually correct, and that it did not agree to give a broad representation regarding perfection of the transfer. Also, the language of the provision indicates that Samsung Life and its counsel suggested a carefully worded representation that takes into account the detailed legal position of the Korean parties. This is evident from the following aspects of the representation:

(a) In the first leg of the representation, it says that the transfer of the assets will be perfected against all third parties other than the relevant ‘Borrowers’ upon registration of the transfer with the Financial Supervisory Commission of Korea (FSC). ‘Borrowers’ refers to the obligors of the assets that are being transferred. This wording reflects Article 7(2) of the Act on Asset Backed Securitization of Korea, pursuant to which, if an asset transfer is registered with FSC, then perfection of the assets is deemed to have taken place, but only against third parties other than the obligors of the assets.

(b) In the second leg of the representation, it says that the transfer of the assets will be perfected against the obligors upon giving perfection notices to the obligors as contemplated in clause 6.1. This shows that Samsung Life and its counsel went a long way to ensure that its representation regarding perfection of the transfer covered only so far as that which was factually and legally correct, while refusing to give a representation that was not supported by the facts.

If the Korean parties were not so rights-conscious, if they excessively respected yeui in negotiations or did not regard legal rules as highly as relationships, would the above negotiated outcome be likely? As mentioned, one must bear in mind the fact that the longer the negotiations lasted, the higher the costs that Samsung Life had to incur because the originators are usually responsible for the transaction costs. Therefore, each suggestion made by Samsung Life during the negotiation must have been weighed against the fact that the costs were increasing accordingly. Apparently, despite the costs involved, Samsung Life pursued and succeeded in convincing the parties about a carefully worded representation. Parties in subsequent transactions of a similar nature are likely to view this clause as setting the standard for representations in respect of the perfection of asset transfer.

E. Stage 4 – Devising Negotiation Strategies

What does the preceding discussion suggest for devising negotiation strategies in cross-border deals involving Korean parties? To be sure, it is difficult to generalise about negotiation styles by examining a few transactions. Each party, whether Korean or not, has a different negotiation style and bargaining strength, which change from time to time. Negotiation style and bargaining power are not the same as cultural tendencies. But the latter are not infrequently expressed through the former.

Although the Samsung Life case is not, and cannot be, conclusive on the matter, in the author’s opinion it challenges conventional views about Korean legal culture. Contrary to conventional views, yeui does not play a key role in this transaction. Although it may be helpful to respect li and yeui in order to build up greater rapport and trust with Korean parties, it is unclear to what extent they are helpful especially when negotiating contractual
documents. Rather, the better suggestion seems to be that international parties should expect from Korean parties a proactive styles of negotiation in which attention is given to the detailed wording in the contract and downplaying any power difference between the parties. A major deviation from global legal culture (see Part II.2.E above) on negotiating contracts should not be expected from Korean parties. Problems associated with the local parties’ ability to communicate in English and their lack of transaction experience should be distinguished from cultural issues.

5. Interaction between Due Diligence and Negotiation of Contractual Documentation

A. Introduction

While each contractual document and offering circular are usually negotiated individually, the results of a due diligence (based on which the offering circular will be drafted) and any contractual documentation issues are sometimes closely connected. This is the case with many other issues in a deal: they are often not straightforward and may be interconnected. Experienced negotiators will be able to leverage between various bargaining points and decide what to give and take. This section on the model pre-negotiation inquiry will examine how cultural issues may be taken into account in considering compromises between different issues.

B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation

i. Issue of ‘Face’

Closely related to the idea of emphasising social status distinctions is the issue of ‘face’. This may be particularly prevalent among chaebol corporations in Korea (see Part II.1 above), the features of which are said to be based on Confucian traditions. Whether or not the originators are chaebol companies, the cultural tendency of Koreans in emphasising social status distinctions (see Part III.4.C of Chapter 3) may play a role in influencing the deal motivations of Korean parties in these transactions. Cross-border securitisation transactions are often viewed as prestigious, offering opportunities for local entities to have international exposure. Accordingly, the local originators may be highly conscious of such possibilities of the transactions, particularly if their culture emphasises the issue of ‘face’. Their culture may influence the way in which negotiations take place in these transactions.

---

307 Taylor argues that (in the Japanese context), even if such conventional wisdom on legal culture holds true, for practising lawyers, knowing such factors would not enable them to offer ‘value-added’ advice to their clients. See Veronica L. Taylor, ‘Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan’ (1993) 19 MULR 352 at 353.


The issue of ‘face’ may be relevant when drafting offering circulars as the originators (that are often chaebol corporations$^{310}$) would want to make sure that the offering circulars (which are basically marketing documents for the bonds to be issued) do not contain any wording that may give negative impressions of them. Such a concern is not peculiar to Korean originators, but as a matter of degree, it has been suggested that Korean originators are particularly concerned about these issues because of their cultural tendencies.$^{311}$

This section examines how the cultural tendencies of Korean parties may impact on the way in which negotiations take place, with a particular focus on negotiations on ‘responsibility statements’ in offering circulars.

**ii. Responsibility Statements**

Originators in a securitisation transaction are often concerned about the way in which the responsibility statements in the offering circular should be worded. A responsibility statement may read as follows:

Party A is responsible for all of the information included in this offering circular under section X of the offering circular. Party A, having made all reasonable inquiries, confirms that its information is true and correct in all material respects, that there is no omission of a material fact necessary to make its information, in light of the circumstances under which it is provided, not misleading, and that the opinions and intentions expressed in its information are honestly held.

If the securities are to be listed, this type of responsibility statement is usually required by the relevant stock exchange.

In a structured finance transaction (particularly in a securitisation transaction), there is often a dispute between, on the one hand, the originator and, on the other hand, the monoline (if there is one) and the lead manager, with respect to the content of the responsibility statements to be included in the offering circular. How the responsibility statements should be worded may be seen as part of the due diligence process. It may also be seen as a matter of allocating responsibility between the parties in respect of the information obtained from the due diligence process.

The monoline and the lead manager would normally ask the originator to provide a broad responsibility statement that, in effect, says that the originator will be responsible for substantially all of the information contained in the offering circular. The originator, on the other hand, would argue that the originator is not the issuer of the securities. The SPV that has been set up in the transaction will be the issuer of the relevant securities. Accordingly, the argument would be that the issuer (that is, the SPV) should give a broad responsibility statement, and not the originator. The originator’s responsibility should only cover information about itself and its assets to be sold in the transaction.

For obvious reasons, the monoline and the lead manager are not likely to accept the above type of argument because the SPV’s responsibility statement would not be very valuable. This is because the SPV’s only assets are those it bought from the originator that

$^{310}$ For example, Samsung Life and Hyundai Capital are chaebol corporations.

$^{311}$ See, for example, Matthew Davies, ‘Samsung Life Readies Korea’s First Offshore MBS’ *IFR Asia* (8 June 2002) at 6.
are, in turn, held as security in favour of the noteholders. Therefore, if the noteholders attempt to sue the SPV based on the SPV’s responsibility statements, the noteholders will find that the SPV owns nothing other than the noteholders’ own assets. For these reasons, the monoline and the lead manager would normally insist that a party other than the SPV who has a ‘deep pocket’ gives a broad responsibility statement in the offering circular. Practically speaking, such a party will have to be the originator. And if the originator does not provide such a broad responsibility statement, then investors who suffer a loss because of the misstatements in the offering circular will attempt to sue the other parties in the transaction – which will be the monoline and the lead manager themselves.

Conscious of the fact that the offering circular will be read by international investors and market participants, the originator will have certain views about how the responsibility statements should be worded. Conventional views would suggest that the issue of ‘face’ for the Korean originator may influence such attitudes. It is not entirely easy to predict how (if any) such cultural issues will matter in this regard. But one interpretation could be that the party that takes the issue of ‘face’ seriously is more likely to be concerned with the issues that are visible to others, while willing to compromise on things that are not easily noticeable. Hence, the emphasis is on the outward presentation rather than the substance of the matter.

As mentioned, offering circulars are read by a wide audience and they are essentially marketing documents. While most of the transaction documents may be inspected by the public where the securities are listed, they are not distributed to the public like offering circulars.\footnote{See generally the sections headed ‘General Information’ in offering circulars.} Offering circulars, on the other hand, are widely distributed and may even be purchased for a fee from commercial web sites.\footnote{See, for example, www.perfectinfo.com.} Offering circulars are, in effect, like the ‘face’ for the relevant securities and the originator as far as the transaction is concerned. It follows the emphasis on the issue of ‘face’ means that any negative impressions in the offering circulars will be of particular concern. This will include the giving of a broad responsibility statement by the originator, as it may give rise to the impression that:

(a) the arrangers did not have confidence as a result of the due diligence, which was why they insisted that the originator give a broad representation about most of the matters in the offering circular; and/or

(b) the quality of the underlying assets was not high, and therefore, the originator’s bargaining power was weak.

To be sure, a third party may or may not get these kinds of impression from the broad responsibility statement. The kinds of impression one would get will depend on his or her experience and knowledge about the deal. But the point is that from the originator’s perspective, such a broad responsibility statement can be viewed as giving a negative signal and impression of the originator to others. At least this has been the author’s observation from several deals that he was involved in.

If the originator refuses to provide such a broad responsibility statement, a real deadlock may occur because that is unlikely to be acceptable to the lead manager and the monoline. This will be elaborated in Part III.5.E below.
C. Stage 2 – Identify the Applicable Findings on Legal Culture

It was suggested in Part III.4.C of Chapter 3 that the cultural issue associated with social status distinctions may be part of the indigenous cultural norms of Korea rather than part of normative legal culture. If one applies this finding, the cultural issue of ‘face’ is not likely to be critical for Korean parties. Korean parties are unlikely to risk breaking the deal simply because of such a cultural issue.

On the other hand, Korea’s normative legal culture suggests that Korean parties are likely to pursue their rights and ensure that the provisions in the documents clearly and correctly set out the parties’ respective rights and obligations (see Part III.4.C.i above). In the next stage of the inquiries, these aspects of normative legal culture will be examined in the context of past transactions.

D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations

i. Responsibility Statements Given by Korean Originators in Recent Transactions

In many of the recent cross-border securitisations involving Korean originators, the typical responsibility statements given by the Korean originators were ‘broad’ in nature. That is, pursuant to those types of responsibility statements, the Korean originators would be responsible for substantially all of the information contained in the offering circular. For example, in the Hyundai Capital transaction, the offering circular states that Hyundai Capital will be responsible for all of the information included in the offering circular other than the information in the offering circular relating to the monoline. This means that for any misstatements contained in the offering circular, whether or not Hyundai Capital had supplied the relevant information, it will be responsible to the investors.

There may have been various reasons why the Korean parties gave in on this point; the most usual reason would be that they had less bargaining power than the other parties. But it should be noted that originators’ bargaining power in this type of transaction is generally not weak. These companies are large chaebol companies or quasi-government entities, and funding is usually not a problem for them. As far as the author is aware, these entities in the past few years securitised their assets largely in order to diversify funding mechanisms and for market recognition. If bargaining power was not an issue, then why did the Korean parties end up giving such responsibility statements? Although one cannot answer this question with certainty, one does know that the issue of ‘face’ was not a decisive factor for the Korean parties in these deals. It was not an issue over which to break the deals.

ii. Responsibility Statement Given by Samsung Life

In the Samsung Life transaction, the responsibility statement of Samsung Life states as follows:

---

314 See, for example, Hanareum Offering Circular at 4 and Hyundai Capital Offering Circular at 4.
315 Hyundai Capital Offering Circular at 4.
The Seller [Samsung Life] is responsible for all of the information included in this Offering Circular under “The Seller”, “Description of the Mortgage Loan Assets”, “The Mortgage Loan Servicer” and “The Korean Residential Mortgage Industry”.  

Hence, unlike most of the other similar transactions, Samsung Life had in effect successfully restricted the scope of its responsibility statement to cover only certain specific sections of the offering circular. Such sections of the offering circular contain information supplied by Samsung Life itself. Given the relevant market practice on responsibility statements in this type of transaction, it would have been extremely difficult for Samsung Life to successfully negotiate this provision this way. What are the implications of this negotiated outcome?

It may be the case that the cultural issue of saving face played a role in the relevant negotiation. This is plausible because it was known in the market that Samsung Life entered the transaction, not because it needed funding, but because it wanted the prestige of completing a cross-border transaction. In respect of this transaction, one financial journal commented: ‘You have to wonder whether doing a cross-border deal is sensible or whether it is ego and status driven.’

Then, does this mean that the cultural issue of saving face was so significant for Samsung Life that it went such a long way, even at the risk of possibly breaking the deal, in order to have the other parties agree to the ‘narrow’ scope the responsibility statement? While such an argument is plausible, it is not entirely convincing. The desire for international exposure is not necessarily connected to the issue of ‘face’. It is also often related to commercial reasons. Samsung Life at the time was the top life insurance company in Korea, but had very little international exposure. Its shares were not listed on any stock exchange, including the Korean domestic exchange. At the same time, Samsung Life was increasingly facing competition from US and European life insurance companies even in the domestic market. In such circumstances, it is reasonable to contemplate that, as a commercial matter, rather than a cultural matter, Samsung Life strategically opted for a cross-border securitisation transaction.

E. Stage 4 – Devising Negotiation Strategies

i. Taking into Account Cultural Issues

Whether for commercial reasons or for cultural reasons, it is clear that the case for wanting to restrict the scope of one’s responsibility statements in the offering circular may be particularly strong. For Korean parties, even if the issue of ‘face’ is not related to their normative legal culture, it is part of their indigenous cultural norms (see Part III.4.C of Chapter 3). Also, as in the case of Samsung Life, they often tend to be conscious of the international exposure in doing cross-border deals. Hence, it would be helpful for

316 Samsung Life Offering Circular at iii.
317 See, for example, Matthew Davies, ‘Samsung Life Readies Korea’s First Offshore MBS’ IFR Asia (8 June 2002) at 6.
318 Ibid.
international counsel to take into account such commercial and cultural sensibilities in dealing with Korean parties.

\[\textit{ii. Suitable Compromise?}\]

What if a deadlock occurs in negotiating the scope of the responsibility statements? If so, can there be a suitable compromise between the parties that would save time and cost of the parties? Can the global deal-making culture accommodate these local issues? Are the malleable or soft laws sufficiently flexible to deal with such a deadlock in a creative manner? How can the local legal culture influence and shape the global legal culture on the point? In this regard, the author proposes a compromise strategy that aims to balance the various interests of the parties concerned.

The compromise is this: on the one hand, the parties could agree to reduce the scope of the originator’s responsibility statement, and on the other one hand, the originator could agree to provide an extensive indemnity in favour of the lead manager and the monoline for any misstatement contained in the offering circular. The scope of such an indemnity could cover broad matters including misstatements made in respect of the information not covered by the originator’s responsibility statement. Such an indemnity clause can be included in the note subscription agreement (for the lead manager) or the guarantee and indemnity agreement (for the monoline). The indemnity clause may say, for example:

The originator represents and warrants that all statements contained in the offering circular are true and accurate in all material respects and not misleading in any material respect.

The originator shall indemnify and hold harmless the lead manager and the monoline from and against any and all losses, claims, damages and liabilities caused by any untrue statement or omission in the offering circular.

The effect of the above compromise would be that, if the investors sue the lead manager or the monoline for any loss suffered by them as a result of any misstatement or omission in the offering circular, then the lead manager and the monoline can seek an indemnity from the originator. Could such a compromise satisfy both the originators, on the one hand, and the monolines and the lead managers, on the other hand? How does this kind of compromise take into account the relevant cultural issues discussed above?

Firstly, from the perspectives of the lead manager and the monoline, the merits of this compromise as a negotiation strategy may be as follows:

(a) From a practical point of view, what happens if investors suffer a loss as a result of any misstatement or omission in the offering circular? In that case, whether or not the offering circular contains the originator’s broad responsibility statement, the investors are likely to sue all the relevant parties that they can sue, including the lead manager and the monoline. In other words, the investor’s decision to include the lead manager and the monoline as defendants in their law suit to recover their losses, will not depend on whether or not the offering circular contains the originator’s broad responsibility statement. In this

\[\text{\footnotesize \textsuperscript{321} See Part II.3.A above.}\]

\[\text{\footnotesize \textsuperscript{322} See Part II.3.B above.}\]
respect, the originator’s broad responsibility statement would not help the lead manager or the monoline very much.

(b) On the other hand, if the investors sue the lead manager and the monoline, and as a result, the lead manager and the monoline suffer a loss, then what actions are available to the monoline and the lead manager? If the monoline and the lead manager have obtained the originator’s broad indemnity like the one described above, then the lead manager and the monoline may seek an indemnity from the originator. But if they have not obtained the originator’s broad indemnity, then it might be difficult for them to seek an indemnity from the originator for their losses suffered. In other words, unlike the originator’s broad responsibility statement contained in the offering circular that does not necessarily help the lead manager or the monoline, the originator’s indemnity actually helps the lead manager and the monoline to a considerable extent.

(c) The above analysis suggests that, from the lead manager and the monoline’s points of view, if they had a choice between the originator’s responsibility statement in the offering circular, and the originator’s indemnity in other contractual documents, it would be better to choose the latter. Hence, if there is a deadlock on this point, from a commercial point of view, this could be a particularly helpful compromise for the monoline and the lead manager.

What about from the originator’s point of view? It appears that even from the point of view of the Korean originator, the above compromise might be a reasonable compromise for the following reasons:

1. Whether because of the issue of ‘face’ or for commercial reasons, this may be a good compromise for the originator. In this way, the offering circular (which will be reviewed by any potential investor) does not explicitly contain language that the originator is uncomfortable with. The indemnity clause in the subscription agreement, on the other hand, cannot be inspected by third parties (this document is typically excluded from the documents available for public inspection at the paying agent’s office). Hence, the public has no way of knowing this arrangement.

2. Such extensive indemnities are often required by lead managers and monolines in deals of this nature anyway. Usually, it is very difficult to get the lead managers and the monolines to agree on anything less than a comprehensive indemnity to be given by the originators in these deals. Therefore, the originator may not be giving in too much even if it provides such an indemnity.

3. Suppose that the originator has a choice between, on the one hand, providing a broad responsibility statement in the offering circular, and on the other hand, providing an indemnity for any loss suffered as a result of any misstatements or omission contained in the offering circular. For the originator, this may be interpreted as a choice between, on the one hand, being sued by the investors directly, and on the other hand, being sued by the lead manager and/or the monoline in the transaction if there was any misstatement or omission in the offering circular. This is because the cause of claim for the investors will be based on the responsibility statements in the offering circular, whereas the monoline and the lead manager will rely on the indemnity clause to sue the originator. If so, it is probably the case that, other things being equal, the originator would prefer to be sued by the lead manager and/or the monoline, rather than being sued by the investors. This is because the originator would have
some existing relationships with the monoline and the lead manager, and as such, they may hesitate to sue the originator for commercial reasons. On the other hand, the investors would have no such relationship with the originator, and therefore, they would not hesitate to sue the originator. Further, because the originator, the lead manager, and the monoline would have a good knowledge of the transaction, it would probably be easier to negotiate between them for a reasonable settlement, whereas the same cannot be said in relation to the investors.

(4) If investors sue the lead manager, it is possible that the lead managers may have a ‘due diligence defence’ against such claim if it had conducted a due diligence exercise that was of a reasonable standard. It might be a moot question whether the monoline could rely on such a defence. But certainly, such a defence would not be available for the originator. Hence, for the purpose of minimising the relevant risks, the most suitable arrangement might be that the lead manager be exposed to potential liabilities against the investors, whereas the originator would be exposed to potential liabilities against the lead manager and the monoline.

The above analysis demonstrates that a complex combination of cultural, legal and commercial considerations often becomes relevant in devising negotiation strategies in these deals. They constitute elements of global financial laws that are being created and evolved in cross-border structured finance transactions.

6. Deal-Specific Issues

A. Introduction

Cross-border structured finance transactions employ creative financial techniques and structures. Each deal tends to have unique features and issues. While it is beyond the scope of the model pre-negotiation inquiry proposed here to cover such a broad range of issues, two particular issues will be discussed in this section. The first relates to the chaebol phenomenon discussed in Part II.1 above, and the second relates to legal fees. The four-stage inquiry relating to both these two issues is discussed below.

B. Stage 1 – Identify the Relevant Cultural Issues for Negotiation

The transaction parties’ relationships with external parties may influence the transaction. For example, the parties’ relationships with their customers, parent companies or the government may influence the way in which the transaction proceeds. The way in which Korean legal culture may affect the relationship between Korean entities was discussed in Part III.3.B.iii above in the context of examining the relationship between government entities. Similar issues are also relevant in respect of the relationship between chaebol corporations and the government. As discussed in Part II.1 above, although chaebol corporations are not government entities, and although there is no official law that requires the government to support chaebol companies, in practice chaebol companies have received considerable support (financial or political) from the government.323 This trend is changing, but the chaebol phenomenon still has not disappeared completely, and to that extent, international investors should be made aware of the relevant cultural issues.

Another cultural issue that will be examined relates to legal fees. The level of legal and other fees to be incurred in respect of a transaction will influence the way in which the transaction proceeds. Korean originators’ attitudes towards legal fees may be a matter of particular interest for present purposes. It has often been observed that Korean parties tend to allocate very tight budgets for legal fees.\textsuperscript{324} In some instances, because of the burden of legal fees, they do not instruct lawyers at all even in significant transactions.

This cultural tendency of the Korean parties has notable consequences. Firstly, because of the low level of legal fees that Korean parties are prepared to pay, it tends to be more difficult for them to receive high-quality legal services. Secondly, lacking the professional assistance of lawyers, it becomes more difficult for the Korean parties to negotiate effectively. Arguably, for these reasons rather than any other, Korean parties (a) may stand in a disadvantageous position when negotiating in cross-border transactions, and (b) may (from the perspective of holders of the conventional view) appear to be occupied with the concept of yeui and power differences, rather than aggressively pursuing their legal rights. Parties in these types of transactions who do not have the reasonable support of lawyers are, in some ways, bound to appear unprofessional. The next section will examine aspects of Korea’s normative legal culture that are relevant to these cultural issues.

C. Stage 2 – Identify the Applicable Findings on Legal Culture

\begin{itemize}
  \item[i.] Chaebol
  \end{itemize}

According to Parts III.7 and III.8 of Chapter 3, the normative legal culture of Korea supports individualistic and personalistic traits of legal culture rather than a collectivistic legal culture. Also, it does not support hierarchical relationship but prefers egalitarianism. Applying these findings, the chaebol phenomenon, which implies a paternalistic, hierarchical and collectivistic sort of legal culture (see Part II.1 above), is not supported by normative legal culture.

\begin{itemize}
  \item[ii.] Legal Fees
  \end{itemize}

Part III.8.D of Chapter 3 suggests that Korea’s normative legal culture demands an affordable and efficient justice system. Applying this, it is inappropriate to explain Korean parties’ low budgets for legal fees by the fact that they do not appreciate legal services. But it is explained more by the normative legal culture that demands a high quality of legal services at affordable prices (see Part III.8.D.iii of Chapter 3). Legal fees charged by international law firms are usually very high, and this creates a conflict between the global and local legal culture on the point.

The next section sets out case studies that highlight how this aspect of Korea’s normative legal culture may apply in cross-border transactions.

D. Stage 3 – Apply the Findings on Legal Culture to the Negotiation, Taking into Account Similar Cases of Negotiations

\begin{itemize}
  \item[i.] Chaebol – LG Card Crisis
  \end{itemize}

\textsuperscript{324} See, for example, Matthew Davies, ‘Samsung Life Readies Korea’s First Offshore MBS’ \textit{IFR Asia} (8 June 2002) at 6.
In November 2003, LG Card, Korea’s largest credit card issuer, temporarily suspended all of its cash services.\textsuperscript{325} Its creditors provided US$2 billion in emergency loans on the condition that LG Group, LG Card’s holding group, relinquished control of the company. In January 2004, LG Group agreed to assume seventy-five per cent of the projected W500 billion in losses, with the Korea Development Bank assuming any additional losses. This had allowed creditors to approve a W5 trillion (approximately US$4.35 billion) rescue package.\textsuperscript{326} As a result of the restructuring of LG Card, the earlier financing obtained by LG Card through cross-border securitisation transactions\textsuperscript{327} faced an early amortisation event.

Although several reasons may explain the problems faced by LG Card, one of the reasons may be related to the Korean government’s past support provided to chaebol companies such as LG Card. Such support was discontinued in about November 2003 for various political reasons,\textsuperscript{328} and this contributed to the financial problems faced by LG Card.\textsuperscript{329} This was not something that the international investors had necessarily contemplated when the earlier securitisation transactions were entered into. The relational factors between LG Card and the government was more of a risk factor than the investors expected. Such factors had created unrealistic expectations about how the markets perform.\textsuperscript{330}

The due diligence conducted by the international counsel acting for the international investors during the earlier LG Card securitisation transactions appears to have failed to reveal the potential impact of such ‘relational factors’. For example, in the ‘Risk Factor’ section of the offering circular of one of these deals, the relevant risk warning states:

‘Developments that could hurt the Korean economy include ... the financial problems of Korean conglomerates and their potential impact on Korea’s financial sector and adverse developments in the economies of countries to which Korea exports.’\textsuperscript{331}


\textsuperscript{326} In 2003, another notable incidence involving a chaebol was the SK Group’s US$1.2 billion accounting fraud. It has been suggested that this was as a result of the combination of high leverage, low returns, equity cross-holdings and intra-group debt guarantees orchestrated by the chaebol’s chairman. See Craig P. Ehrlich & Dae-Seob Kang, ‘A Look at Korean Corporate Codes of Conduct’ in Tom Ginsburg (ed), \textit{Legal Reform in Korea} (RoutledgeCurzon, 2004) at 96.

\textsuperscript{327} There were several cross-border securitisation transactions entered into by LG Card, including the US$500 million Guaranteed Secured Floating Rate Notes due 2007 (referred to as the ‘LG Card transaction’, and the relevant offering circular, ‘LG Card Offering Circular’).

\textsuperscript{328} See, for example, Matthew Davies, ‘Samsung Card to Test International Appetite After ABS Panic...’ \textit{IFR Asia} (29 March 2003) at 10 (stating that the government discontinued its support due to the changes in the political climate resulting from, among other things, the SK accounting scandal and geopolitical tensions with North Korea). See also David Scofield, ‘Korea-centrism and the foreign “threat”’ \textit{Asia Times Online} (15 January 2004) at paragraphs 9-13 from www.atimes.com (discussing complex political challenges faced by the government that started since 1999).

\textsuperscript{329} Ibid.


\textsuperscript{331} LG Card Offering Circular dated 17 December 2001 at 53. This document is available from Deutsche Bank Luxembourg SA.
This risk warning appears to be too broad, and fails to mention that government support in favour of chaebol corporations may create an unrealistic expectation about the performance of the chaebol, including LG Card itself. But Korea's normative legal culture does not support the chaebol phenomenon (see Part II.1 above), which creates a risk that such a support may at any time be discontinued. This is a legal cultural issue that the international counsel clearly omitted to take into account.

ii. Legal Fees – JPMorgan and SK Group Dispute

In 1997, SK Group and JPMorgan entered into a complex swap transaction. Subsequently, events occurred that triggered obligations of SK Group to pay approximately US$500 million to JPMorgan pursuant to the transaction. JPMorgan demanded payment and SK Group refused to pay on the basis that it had not been given the benefit of a detailed explanation of the transaction, particularly since the transaction was extremely complicated. In this case, SK Group did not obtain detailed legal advice in respect of the transaction, which was, as it turned out, a critical mistake. This led to a long and expensive litigation between SK Group and JPMorgan, which was settled in September 1999 by JPMorgan agreeing to accept US$200 million plus an option to acquire shares of SK Securities (one of the group companies of SK Group).

Why did SK Group not seek detailed legal advice in relation to such a complex deal in which it had a high financial stake? Conventional views would suggest that this was due to Koreans' lack of appreciation for legal services (see Part II.1.A of Chapter 1). Findings on normative legal culture, on the other hand, suggest that it was due to the Koreans' view that they should be entitled to a high quality of legal services at affordable prices (see Part III.8.D.iii of Chapter 3). Assuming that one adopts the latter view, then the following points may be noted:

(a) Besides the problems highlighted in the SK Group case, the normative legal culture relating to legal fees may have far-reaching consequences. For example, in the absence of lawyers' involvement in transactions, relational approaches rather than rule-based approaches to the issues arising in the transactions are likely to be adopted. This is not because the Korean party's legal culture favours relational approaches, but simply because the party lacks the expertise. Bargaining power may also be weakened, and the idea of the rule of law is more likely to be ignored by such a party. Without engaging a lawyer, it is difficult to participate in cross-border financing transactions. This arguably shows that the global deal-making culture generally requires experienced lawyers to be hired by local parties for executing the deals.

(b) This suggests that there is a conflict between global legal culture and Korean legal culture on this point. Based on the author's observation, Korean legal culture is slowly changing in this regard: Korean parties are increasingly engaging international counsel when involved in cross-border deals. However, the level of legal fees that they are prepared to pay still tends to be relatively low; they usually prefer capped fees and often choose lawyers who bid the lowest.

(c) Korean legal culture in respect of legal fees may have an impact on the Korean legal profession as a whole, as well as on originators. If the demand for legal services is low, then there will be less work and fewer opportunities for Korean lawyers to develop a sophisticated legal environment in Korea. The process of 'legalisation' will be slow.\textsuperscript{333} Hence, gaps in law and lack of law situations (see Part IV.3.C.iii of Chapter 2) may result.

E. Stage 4 – Devising Negotiation Strategies

\textit{i. Chaebol}

What negotiation strategies may the international counsel devise when negotiating with a chaebol company? As the LG Card case shows, the international counsel should investigate how the relationship between the company and the government may affect the transaction in question. Such a relationship may have a significant impact on the pricing of the securities to be issued and the way in which the risk factor section of the offering circular should be drafted (see Part III.6.D.ii above). In this regard, the following points may be noted:

\begin{itemize}
\item[(a)] During the negotiations, the international counsel should explore and ask questions about the relationship between the chaebol and the government and the potential risks associated with such a relationship.
\item[(b)] The international counsel should discuss any arrangements between the parties pursuant to which such risks may be substantially mitigated. If unable to effect such a mitigation of risks, then such risks would be reflected in the pricing of the securities.
\item[(c)] In addition, specific, rather than general, risk warnings should be included in the offering circular with respect to the above.
\end{itemize}

\textit{ii. Legal Fees}

Turning to the cultural issues relating to legal fees, how would these influence the way in which negotiation strategies should be devised in structured finance deals? One implication of such a legal culture is that the international counsel acting for the international investors should ascertain whether the Korean parties are receiving proper legal advice. This is because of the possibility that if the local party is not receiving proper legal advice, this may give rise to certain types of duties upon the international counsel.

It was argued in Part II.2.C that the practice of the lawyers in these types of transactions often sets the market practice and market norms. This argument is supported by the fact that government regulators and courts are often not involved in cross-border structured finance transactions in a meaningful sense.\textsuperscript{334} Hence, it has been suggested that international counsel in these transactions in fact act as \textit{ad hoc regulators} of the market.\textsuperscript{335} Furthermore, in addition to the lawyers' duty to the client, there may be an increasing level of

\begin{footnotes}
334 See Part II.2.C above.
\end{footnotes}
duty to the public and of ethical duties for global law firm lawyers. Irrespective of whether or not such an increasing level of duties is currently enforceable, it would be prudent for international counsel to take steps to discharge such potential duties, which may be owed towards local parties who are under-represented.

Accordingly, when the Korean counterparty (or any local party) is legally under-represented, the following suggestions are made to the international counsel:

(a) The international counsel should make real and reasonable efforts to advise the Korean counterparty (or advise the lead managers to ask the Korean counterparty) to engage experienced counsel to advise them in respect of the issues affecting them.

(b) The international counsel should advise the investors that the counterparty’s lack of legal representation may affect the way in which negotiations will be carried out, and that the investors and the international counsel may be duty bound to ensure that the counterparty becomes aware of the main issues affecting it. This would be particularly the case if the transaction in question has complex dimensions to it.

(c) If one accepts the argument that lawyers practising in these areas are acting as ad hoc regulators of the market, then what are the implications of such an argument? One might be that the lawyers, to a certain extent, have duties that are related to issues such as (1) the protection of the investors, the market and the financially vulnerable, (2) minimising the risk of market collapse, (3) regulating business conduct, and (4) imposing relevant ethical standards in dealings. To be sure, such duties seem rather broad and are currently not contemplated by many market participants. Nevertheless, given the practical significance of global law firms in the contemporary globalisation process (see Parts I and II.2.C above), one cannot preclude the possibility that similar duties may arise in future.

(d) The details and the level of international counsel’s duty will vary depending on the nature of the transactions. However, as a general rule, in transactions involving complex swaps/derivatives and ISDA documentation, there would be a greater need to follow the above suggestions more strictly.

IV. CONCLUSIONS

A new ‘cultural space’ has been created by the practice of international finance lawyers. This is one of the most significant aspects of the contemporary globalisation process in which the rule of law is still the dominant theme. The model pre-negotiation inquiry is an attempt to provide an interpretation of the cultural negotiations taking place within this cultural space between global and Korean parties. The author’s interpretation of such cultural negotiations is that the gap between global and local legal culture in this area is not as wide as

---

336 In this regard, one notes Whelan’s argument that there should be an increasing duty to the public by lawyers practising in global law firms. See generally Christopher J. Whelan, ‘Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?’ (2001) 34 Vand J Transnat’l L 931. Whelan (at 951-952) points out that currently, the core values proposed for global law practice place too much emphasis on the lawyer’s duty to the client, which benefits the clients and the lawyers themselves rather than the public. Also, it has been argued that uniform ethical standards applicable to global legal practice may be emerging in future. See Andrew Boon & John Flood, ‘Globalisation of Professional Ethics? The Significance of Lawyers’ International Codes of Conduct’ (1999) Legal Ethics 29 at 55.
conventional views would suggest. Further, Korean legal culture dynamically interacts and shapes global legal culture, thereby contributing to the evolution of global financial laws.

Another aim of the model pre-negotiation inquiry is to demonstrate how aspects of Korea's normative legal culture may be applied within this cultural space. As the LG Card case indicates, cultural interpretations may lead to an early warning of a major risk. The SBC case demonstrates how different views about legal culture may result in different communication strategies, which in turn may have ramifications in the deals. The SK Group case reminds the international counsel of their potential duties to local parties that may be emerging in the near future.

Soft or malleable laws created by global law firm lawyers are contemporary, new and fast-evolving. Anglo-American dominance and the rule of law rhetoric in this field are not doubted. But local dimensions must also contribute. The model pre-negotiation inquiry attempts to suggest how such a contribution may be made in respect of cross-border structured finance deals involving Korean parties.
Chapter 6 General Conclusions

It is probably true to say that many Asian legal cultures, including Korean legal culture, possess at least some elements that conflict with rule of law ideals. And that is probably true for most of other legal cultures as well. But colonialism, modernity and globalisation have provided an added dimension to the assumption that many Asian countries culturally lack the rule of law spirit. In the past, such an assumption was often the official position of 'rule of law reformers'; in the contemporary period it is more subtle. In the past, such an assumption was often a political necessity to legitimise colonisation and imperialism. In modern times, it seems to be largely an inherited understanding from the past. Given the seemingly unstoppable and ubiquitous influence of globalisation and its agents, it is easy for such a view about Asian legal cultures to become the dominant view. In fact, it appears to have become a powerful and imposing view.

To be sure, such a view is increasingly being challenged from time to time. But there is still an inadequate understanding of indigenous legal cultures. Studies of these cultures often focus unduly on narrow and selective dimensions of social lives, and fail to distinguish political and economic issues from cultural issues. Even when cultural issues are rigorously identified, there is often no clear separation of legal cultural issues from cultural issues. Seldom is the concept of legal culture discussed in detail in order to define what it is that one is really ascertaining. Two consequences follow from this. Firstly, there may be too much over-generalisation of findings on legal culture. Secondly, there are not enough studies on indigenous legal history.

Chapter 3 of this thesis goes into some detail about Korean legal history. Specific concepts about legal culture developed in Chapter 2 are applied to interpret that history. The findings show that significant aspects of Korean legal culture are not inconsistent with the rule of law. These aspects include gender and social status issues, property rights and attitudes towards law and litigation. To be sure, these issues do not represent an exhaustive description of legal culture. Also, there is more than one way of interpreting such issues as more historical evidence is revealed in future. Nevertheless, the findings represent a challenge to the conventional views about Korean legal culture. The findings incorporate a methodology for studying Korean legal culture that conventional views usually do not. The findings necessitate the need for the reassessment of Korean legal culture.

What is the significance of reassessing Korean legal culture? What is the purpose of identifying the normative legal culture of Korea? In this regard, the author’s focus is not on nationalistic or historical concerns. While such concerns may be of interest to politicians, sociologists or historians, this thesis is primarily directed to lawyers. It attempts to inform lawyers, judges and others of the idea that legal culture still – and increasingly - matters in practice. Lawyers and judges are trained to identify legal issues and the laws that apply to such issues, and then to apply the laws to the issues to solve legal problems. Indeed, they need to continuously study the law, learn to identify legal issues, as well as to develop the most appropriate, creative and effective applications of laws to facts. However, they rarely study legal culture carefully or appreciate its practical relevance to legal practice.

This thesis demonstrates that legal culture, and lawyers’ views of other people’s legal culture, do have significant ramifications in legal practice. The most striking examples include the practice of the Constitutional Court of Korea, outlined in Chapter 4. There,
Korean legal culture, and the judges' view of it, often form an indispensable part of constitutional review, which in turn critically influences the rule of law environment in Korea. In other words, Korean legal culture and its applications form an important part of the Court's jurisprudence. Given the significance of legal culture in this context, however, the judges' ad hoc analyses of Korean legal culture are perhaps not enough. The 'determinations' of Korean legal culture are simply too important to be left to such methods. Further studies and training are needed to back up such determinations.

'Studies' on legal culture are increasing. This is not surprising given the increasing significance of legal culture in influencing law. One of the best examples is in the area of cross-border finance practice, where malleable or soft laws play a large role in transactions. The way in which such laws are created is closely related to the legal culture of the practitioners and parties. Yet, despite the increasing significance of legal culture, there is very little, if any, 'training' on how to apply cultural principles to legal practice. As this thesis tries to demonstrate, legal culture is not merely a matter of a vague idea or theory. It has practical implications for lawyers and it matters for the development of the law. This becomes all the more significant as the globalisation process brings together many legal cultures to interact as never before. People with diverse attitudes towards law are transacting with each other at unprecedented scales and increasing speed.

Chapter 5 of this thesis attempts to show how its findings about Korean legal culture may be applied in cross-border finance transactions. This calls for 'training' on identifying, firstly, cultural issues in cross-border deals, and secondly, the relevant findings about legal culture that potentially apply to such issues. Lawyers should then examine how such findings may apply to the cultural issues by referring to similar deals done in the past. Finally, suitable strategies should be devised that take into account the inevitably complex legal cultural dimensions of the transaction. The author suggests that while such strategies will not solve every problem in the deal, they will contribute to the deal-making process, particularly for those faced with counterparties from diverse cultural backgrounds. The author is of the view that the proposed 'model pre-negotiation inquiry' is a helpful starting point for further research on practical applications of cultural principles.

The emphasis, however, is not solely on practical issues; it is closely linked with substantive legal issues and to the theoretical debates about globalisation process itself. As already mentioned, legal culture and its applications are closely related to the creation of malleable or soft laws applicable in cross-border financing practice. Therefore, a study of global financial laws necessitates consideration of legal cultures. A study of legal culture and its applications must be part of any study of global financial law. Such a study should, among other things, involve an assessment of local legal cultures from the perspective of rule of law requirements. If aspects of local legal culture conflict with the rule of law, these malleable laws need to enhance mechanisms, which insulate the effects of such aspects of culture from the financing structures, bearing in mind that this is likely to add to the costs of the financing, and may even make it unfeasible.

On the other hand, if aspects of local legal culture are consistent with and support the rule of law, they should also be taken into account. This time, these will tend to help the deal-making process, arguably lowering the costs and increasing the probability of successfully closing the deal. But it is more than that. For the rule of law reformers in the globalisation process, it means giving a voice to deeply rooted local legal cultures. As already mentioned, globalisation is not a one-sided process of transplanting foreign laws;
rather, it involves recognising a greater role for local laws in shaping global laws. It means creating global laws, many aspects which are already internalised by local people. It means having global laws that are supported by the deeply rooted legal culture of a greater number of people, rather than only the deeply rooted legal culture of the West. Most importantly, it means taking a significant a step towards achieving something closer to the 'true' rule of law, which must remain the common goal of all lawyers, irrespective of where, and what laws, they are practising.
REFERENCES


Aubert, Vilhelm, ‘Competition and Dissensus: Two Types of Conflict and of Conflict Resolution’ (1963) 7 J Conflict Resolution 26.


Bae, Kyung Sook, Women and the Law in Korea (Korean League of Women Voters, 1973).


Black's Law Dictionary (West Group, 1999).


Bodde, D., & Morris, C., Law in Imperial China (Harvard University Press, 1967).


Bryant, T. L., 'Marital Dissolution in Japan: Legal Obstacles and Their Impact' (1984) 17 Law in Japan 73.


Buzo, Adrian, The Making of Modern Korea (Routledge, 2002).


Chang, Gyung-Hak & Suh, Don-Gak & Im, Hong-Geun, 'Discussion: Korean Legal Traditions' in Shin-Yong Chun (ed), Legal System of Korea (International Cultural Foundation, 1975).


Chiba, Masaji (ed), Asian Indigenous Law: In Interaction with Received Law (KPI, 1986).


Choi, Chongko, Hankukpopinmun [Introduction to Korean Law] (Bak Young Sa, 1994).


Choi, Ming-hong, A Modern History of Korean Philosophy (Seong Moon Sa, 1980).


Chon, Pong-dok, ‘Chontong-jok sahое wa poppasang [Traditional Korean Society and Legal Thought]’ (1978) 19 No.1 Pophak 52.

Chonyul t‘ongbo [Conspecctus of Chinese and Korean Codes].


Ch’ugwanji (Keijo Chosen sotokufu, 1937).


Chung, Henry, The Case of Korea (Fleming H. Revell, 1921).

Chung, Jong Hyu, Yeuksasokeuminpop [Civil Law in History] (Koyukkwhahaksa, 1995).


Dudden, Alexis, Japan's Colonisation of Korea: Discourse and Power (University of Hawaii Press, 2005).

Duncan, John B., ‘Uses of Confucianism in Modern Korea’ in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002).

During, Simon (ed), The Cultural Studies Reader (Routledge, 1993).


Dworkin, Ronald, Law's Empire (Fontana, 1986).


Fingarette, Herbert, Confucius: The Secular As Sacred (Harper and Row, 1971).


Friedman, Lawrence M. The Horizontal Society (Yale University Press, 1999).


Friedman, Thomas L., The Lexus and the Olive Tree (Farrar, Straus, Giroux, 1999).

Friedmann, Wolfgang, Law and Social Change in Contemporary Britain (Stevens & Sons, 1951).


Frow, John & Morris, Meaghan (eds), Introduction to Australian Cultural Studies: A Reader (Allen and Unwin, 1993).

Fukuyama, Francis, Trust: The Social Virtues and the Creation of Prosperity (Hamish Hamilton, 1995).

Fuller, Lon L., Anatomy of the Law (Greenwood Publishing Group, 1976).


Geertz, Clifford, Local Knowledge: Further Essays in Interpretive Anthropology (Basic Books, 1985).


Goode, Roy, Legal Problems of Credit and Security (Sweet & Maxwell, 2003).


Haboush, JaHyun Kim, ‘Gender and the Politics of Language in Chosun Korea’ in Benjamin A. Elman, John B. Duncan & Herman Ooms (eds), Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam (UCLA Asian Pacific Monograph Series, University of California, Los Angeles Press, 2002).


Han, Young Woo, Dashichatneun wooriuyeoksa [Korean History Revisited] (Kyungsewon, 2005).


Hankuksa Teukangpyunchanweironhw [Committee for Preparing Special Lectures on Korean History], Hankuksa Teukang [Special Lectures on Korean History] (Seoul National University, 2005).


Hartley, John & Pearson, Roberta (eds), American Cultural Studies (Oxford University Press, 2000).


Hofstede, Geert, Culture's Consequences: International Differences in Work-related Values (Sage Publications, 1980).


Kim, Taegong, ‘Do School Ties Matter?: Evidence from the Promotion of Public Prosecutors in Korea’ KDI School of Public Policy & Management Paper No. 05-08 (July 2005).


Kuper, Adam, Culture: The Anthropologist’s Account (Harvard University Press, 2000).

Kyongguk Taejon (Chosen sotokufu chusuin, 1934).


Macauley, Melissa, Social Power and Legal Culture – Litigation Master in Late Imperial China (Stanford University Press, 1988).


McKenzie, Frederick, Korea’s Fight for Freedom (Fleming H. Revell, 1920).

Merry, Sally E., Colonizing Hawai‘i: the Cultural Power of Law (Princeton University Press, 2000).


Nelken, David (ed), Comparing Legal Cultures (Dartmouth, 1997).


324


Ooms, Herman, Tokugawa Village Practice: Class, Status, Power, Law (University of California Press, 1996).


Park, Byung Ho, Hankukupop [The Law of Korea] (Sejongdaewangkinyumsaupwhe [Association for the Commemoration of King Sejong], 1974).


Park, Young Do & Choi, Sung Geun & Sohn, Heui Doo, Popryulmoonhwamit popryuljongeryegwanhan kookminyeronjosa [Survey of the People on Legal Culture and Legal Languages] (Hankookpopjeyeunkoowon [Korea Legislation Research Institute, 2001).


Pospisil, Leopold, Kapauku Pauans and Their Law (Yale University Publications in Anthropology, No. 54, 1964).


Pratt, Mary Louise, Imperial Eyes: Travel Writing and Transculturation (Routledge, 1992).


Residency-General of Korea, Annual Report for 1907 on Reforms and Progress in Korea (Seoul, 1908)


Residency-General of Korea, Annual Report on Reforms and Progress in Chosun Korea 1912-13 (Seoul, 1912).


Same Surname - Same Origin Marriage Ban Case (9-2 KCCR 1, 95Hun-Ka6, 16 July 1997).


Scott, James, Weapons of the Weak (Yale University Press, 1985).


Shiach, Morag (ed), Feminism and Cultural Studies (Oxford University Press, 1999).


Soktajeon [Supplementary Great Code] of 1746.


Song, Sang-Hyun, Korean Law in the Global Economy (Bak Young Sa, 1996).


Steinberg, David I., 'The Republic of Korea: Pluralising Politics' in Larry Diamond, Juan J. Linz & Seymour Martin Lipset (eds), Politics in Developing Countries: Comparing Experiences with Democracy (Lynne Reiner, 1995).


Taejon t'ongp'yong (Popchech'o, 1963).


Teubner, Gunther, Law as an Autopoietic System (Blackwell, 1994).


Thompson, E. P., Whigs and Hunters (Allen Lane, 1975).


Watson, A., Legal Transplants (University of Georgia Press, 2nd ed, 1993).


Whitehead, Fred (ed), Culture Wars: Opposing Viewpoints (Greenhaven Press, 1994).


Williams, Raymond, *Keywords: A Vocabulary of Culture and Society* (Oxford University Press, 1985).


