

Overview

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1 Introduction

The purpose of this chapter is to give an overall picture of Korean legal history and legal system and to give some insight on essential aspects of these areas of Korean law.

This chapter begins with a brief overview of the history of Korea and the development of Korean law with a view to understanding current features of the Korean legal system and legislative process.

Part II provides an overview of the history of the development of Korean law, aiming at providing readers with relevant background information concerning Korean legal history. Part III presents a general overview of the legal system of Korean law and legal institutions of Korean government. Part IV explains the role of Korean law in the development of Korea's successful achievement of democracy and economy. Part V explains the legislative process of Korean laws and regulations in the Legislative and the Executive. Part VI consists of a summary and conclusion of this chapter and prospect of Korean law in the future.

The purpose of this chapter is to introduce an outline and main aspects of the legal system of the Republic of Korea (hereinafter "Korea") and to provide readers with general information on Korean law. To understand Korean law, it is essential to have knowledge about Korean legal history, legal system and legislative process in general. These areas of Korean law cover a wide range of subjects.

Foreigners may find the Korean legal system difficult to understand because it has its own unique and traditional legal history and system different from those of Western and other countries. It is more difficult for them to understand the overall concepts of the legal system and legislative process of Korea without knowing Korean language and history. This chapter is designed to help readers, especially for foreign readers who are interested in Korean law, understand and become

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familiar with the Korean legal history and system, and present the legislative process of Korean by giving an overall picture on essential aspects of Korean legal history and system in plain English.

Although Korean traditional legal system had no separation of powers and the judicial function was incorporate with the executive function, Korea had its own legal system even before the modern judicial system was first introduced to Korea at the end of the nineteenth century.

The legal system of Korea and contents of Korean law have undergone drastic procedural and substantive reform from the late nineteenth century of Joseon Dynasty to the present. There have been many significant changes and development in the Korean legal system since the Korea's independence from Japanese colonial rule in 1945 and the establishment of the Korean government in August 1948.

This chapter begins with a brief explanation of the history of Korea and the development of Korean law in order to help understand current features of the Korean legal system more easily. Part II provides an overview of the history of the development of Korean law, aiming at providing readers with relevant background information concerning Korean legal history. Part III presents a general overview of the legal system of Korean law and legal institutions of Korean government. Part IV explains the role of Korean law in the development of Korea's successful achievement of democracy and economic development. Part V explains the legislative process of Korean laws and regulations in the Legislative and the Executive. Part VI consists of a summary and conclusion of this chapter and prospect of Korean law in the future.

2 History of Korean Law

2.1 Overview

Korea is located in the Korean Peninsula between China and Japan in the East Asian region. It is divided into two parts since the independence from Japan in 1945, in the south with the Republic of Korea and in the north with the Democratic People's Republic of Korea. Korea has a long history more than 4,300 years since its first dynasty, Gojoseon (2333–108 BC) was established in 2333 BC in the northern part of the Korean Peninsula.

Legal tradition of Korea dates back to 4,300 years ago when the Gojoseon Dynasty enacted its own statutory law, Eight-Article Law (Pal-jo-geum-beob in Korean) which consisted of eight articles. The contents of three articles among them are known to the present. One of the articles stipulates that anyone who kills a person shall be killed. It reflects the old legal idea of *lex talionis* or eye for eye and ear for ear.

The development of Korean traditional law was greatly influenced by the introduction of the Confucianism and China's legal culture. But the Korean traditional and unique legal system and customary laws have existed throughout the long Korean history even though its legal system had been influenced from China. Korean

society maintained its own traditional legal system until the modern judicial system was introduced to Korea at the end of the Joseon Dynasty in the nineteenth century. Korea adopted modern legal system at the end of the nineteenth century and in the beginning of the twentieth century when it introduced the concepts of Western legal system such as separation of judicial functions from the executive power by enacting the Court Organization Act which established an independent court in 1895.

2.2 Period of Three Kingdoms

In the Period of Three Kingdoms (BC 57–AD 668), there were three kingdoms, which were called Goguryeo, Baekje and Silla. The Goguryeo located in the Northern region in the Korean Peninsula, the Baekje in the South Western region and the Silla South Eastern region.

The judicial functions of the three kingdoms were in the hands of tribal councils or the chief of a clan, respectively. The Kingdom of Goguryeo, the biggest and the strongest among the three kingdoms, had a conference of tribal leaders serving as the top judicial organization. In the Kingdom of Baekje, it is known that one of the royal ministers assumed the judicial authority. The Kingdom of Silla assigned the judicial authority to local heads of administration.

2.3 Goryeo Dynasty

In the Goryeo Dynasty (AD 918–1392), King Wang Geon, the first king of the dynasty, set up a central government court (Ui-Hyeong-Dae) that handled legal issues and trials. Even though the legal system of the Goryeo Dynasty was much influenced from the Song Dynasty of China, it had its unique legal tradition in many aspects such as family relations and land ownership system.

At the end of its history, local administrators who ruled its own territories by armed forces, began taking up judicial functions. The mayor of the capital city Gaeseong, took charge of all civil cases arising within the city, while the head of each local administration handled the cases within his jurisdiction. The king's emissaries or provincial governors acted as the chief of the appeals court.

2.4 Joseon Dynasty

The Joseon Dynasty or Yi Dynasty, the last dynasty in Korean history, which existed from 1392 to 1910, completed comprehensive codification of then existing codes and published “The Great Code for Governing the Country” (Gyeong-guk-dae-jeon in Korean) in 1484. This Code functioned as the fundamental framework of the legal system throughout the Joseon Dynasty. It also was influenced from “The Code of Great Ming” (Ta-Ming-Liu in Chinese) which was enacted during the Ming

Dynasty of China. Although The Joseon Dynasty adopted “The Code of Great Ming” (Ta-Ming-Liu) of China in the field of criminal law, the traditional social order of Joseon Dynasty was ruled by ingenious and traditional customs and codes.¹

The Joseon Dynasty had a sophisticated legal system, in which petty civil and criminal cases were handled by local chiefs of administration, while the governor of each province took care of the appeals cases and the first instance trials of serious criminal cases. Royal secret investigators, called Am-haeng-eo-sa in Korean, who were appointed and ordered directly by the King, sometimes took charge of local trials, serving as a kind of special circuit court. They investigated and people’s complaints on the corruption case of the local officials and punished them.

Citizens who lost an appellate case against a governor were able to appeal to the central government’s Ministry of Justice (Hyeong-Jo). The ministry acted as the final appeals court. The ministry handled civil and criminal trials and general legal affairs of the country. In addition, various government agencies carried out judicial functions. Sa-heon-bu rectified false charges. The City of Seoul (Han-seong-bu), the capital city of the Joseon Dynasty, took charge of trials relating to family or real estate registration. Eui-geum-bu handled crimes of treason and crimes by the royal family members.

The Office of Screening of King’s Decree (Geom-sang-jo-rye-sa) served the role as the present Ministry of Government Legislation during the Joseon Dynasty. The Office of Screening of King’s Decree (Geom-sang-jo-rye-sa) was in charge of government legislative affairs. Before the decree of the king was presented to the State Council of the Joseon Dynasty (Eui-jeong-bu), the decree had to go under close examination by The Office of Screening of King’s Decree (Geom-sang-jo-rye-sa). This system ensured that there would not be any inconsistencies or conflict during the execution of administrative affairs.

As we can tell from these historical facts, the concept of rule of law was by no means unfamiliar idea in Korean legal tradition. However, these laws differed from the Western laws in many ways. During the Joseon dynasty, the administration and the judiciary were not divided systematically. The organization that conducted trials also exercised prosecutorial power. The bureaucracy of the Joseon dynasty, which was controlled by the king, exercised all the powers: the legislative, the judicial and the executive power and there was no concept of separation of powers. Governmental bodies were in charge of judicial functions, including prosecution and punishment of criminals. Local officials exercised a certain limited judicial power over their respective jurisdictions.

2.5 Introduction and Development of Modern Legal System

The modern legal system of Korea began to take shape with the Reforms for Modernization (Gab-o-gyeong-jang) in 1894. The first modern written Constitution was

¹ Song (1996).

introduced in Korea in July 1894. The Office of Legal Affairs (Beob-mu-a-mun) was established in 1894 to administer legal affairs and to provide prosecution and court functions. The separation of judicial operations from the government administration was recognized as a major step towards the formulation of the modern legal system. In July 1894, the Office of National Affairs (Gun-guk-gi-mu-cheo), the key government agency during the Reforms for Modernization (Gab-o-gyeong-jang), proclaimed that punishment can be imposed only as a result of a trial by a specialist organ, and prohibited the arrest of suspects by government agencies except those who violated military laws. By this measure judicial affairs were separated from the administration. On December 12, 1894, King Gojong promulgated the 14 Articles of Legal norms (Hong-beom-sib-sa-jo) to declare the modern principle of the rule of law for the first time of Korean history.

The Court Organization Act was promulgated to set up courts and to grant complete separation of the Judiciary from the Executive on March 25, 1895. The modernized prosecutorial system and attorney system was established under the Public Prosecutor Organization Decree of the King. These two laws were made in the course of the modernization of the legal system of Joseon Dynasty and provided that public prosecutors should be members of a court but should exercise their duties independently. The authority and duties of public prosecutors were investigation of crimes, direction and supervision of the police, maintenance of prosecution, execution of sentence, supervision of the proper application of laws. Since the By the Eul-sa Treaty in 1905 between Korea and Japan, Korean government was put under Japanese government's supervision. Japan dispatched Japanese judges, prosecutors and other government officials to Korea to intervene in judicial and administrative affairs of Korea.

In 1910, Korea became a colony of Japan. During the colonial times between 1910 and 1945, Japanese legal system was applied to the Korea. Japanese laws and regulations, which had been influenced by the Western legal tradition, functioned as the primary source of law during the colonial times. Under the Japanese colonial rule, there were no institutional and procedural devices for separation of powers. The Japanese governor-general (Joseon-chong-dok) had the absolute administrative and legislative powers. The imperial Japanese Government tried to transplant its ruling system, including its legal system, to Korea. There was no chance of realization of constitutionalism in Korea during the Japanese colonial times.

Japanese colonial rule ended as a result of the Japanese defeat to the Allied Forces in World War II. After Korea gained independence in 1945 from Japan, Korean Peninsula was divided into two different political entities: the Republic of Korea in the South and the Democratic People's Republic of Korea in the North.

After Korea was liberated on August 15, 1945, U.S. military rule began in the Southern part of Korean Peninsula and Northern part was ruled by the Soviet Union. The American military regime in the South temporarily maintained the old legal and judicial systems, only changing the names of courts.

The Republic of Korea was formally established on August 15, 1948 after 3 years of U.S. military rule. A modern legal system institutionalized. The Constitution of Korea was promulgated on July 17, 1948. The separation of powers was

guaranteed by the Constitution. The Constitution was amended nine times to the present as of 2012, in response to political and social changes. The current Constitution is the outcome of the latest amendment in 1987 after the democratization movement. The present Constitution declares that the Republic of Korea is the only legitimate country in the Korean Peninsula and imposed a mission of reunification on State authorities and people of Korea. The Constitution declares that the constituent power lies in the people of Korea and describes the law making process in general. The form of government under the present Constitution is a presidential system which has been modified to incorporate some elements of a parliamentary system. Korea has adopted a presidential system since it made its first Constitution in 1948, except a brief period of parliamentary system in the early 1960s after the Student Revolution on April 19, 1960. The Constitution stipulates the separation of powers among branches: the National Assembly as the legislative, the Executive as the executive, the Courts as the ordinary judiciary and the Constitutional Court as a specialized adjudication authority on the Constitution. The President and the government are in charge of the administration, the National Assembly is responsible for the legislation, and the Courts interpret and apply laws by making decisions over legal disputes, the Constitutional Court deals and decides on the constitutionality of laws and constitutional petitions.

Korean legal system was deeply influenced by the tradition of continental law, thus resembling the modern European civil law or Japanese legal system at the beginning of its modernization. However, with the growing interchange and influence of other countries, especially of the U.S., various laws and regulations were made or revised modelling the Anglo-American laws. In addition, many Korean customary laws or legal tradition were reflected and codified in the Civil Law of Korea. In this regard, Korean modern legal system absorbed and modified the necessary features of the European civil law system, Anglo-American law system and Korean customary laws altogether.

3 Legal System and Institutions

3.1 *Legal System of Korea*²

3.1.1 Overview

Written laws and regulations are the primary sources of law in Korea. The Korean legislative system consists of the Constitution, Acts and subordinate statutes (Orders and Rules of Local Governments, etc.). According to the statistics of the

²This part of article is written and compiled on the basis of the material of “A Guide to the Legislative System and Procedure in the Republic of Korea” by the Ministry of Government Legislation in 2010.

Ministry of Government Legislation of Korea, about 1,329 acts, 1,750 Presidential Decree, 1,528 Ordinances of Prime Minister and Ministries are in effect as of March 31, 2012.

The Constitution is the paramount law in the hierarchy of the Korean legal system. Acts passed by the National Assembly are enacted or amended to realize the constitutional targets and ideals and to protect people's rights. Orders refer to administrative legislation issued by the President, Prime Minister and Ministers. Orders are enacted to implement the Acts properly and effectively. The categories of Orders are Presidential Decrees, Ordinances of the Prime Minister, Ministerial Ordinances and Administrative Rules. According to the Korean Constitution, Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law have the same effect as the domestic laws of Korea. The Acts and subordinate statutes form a certain hierarchy in terms of their effects. Subordinate statutes enacted under powers delegated by Acts or enacted for the purpose of enforcing Acts are not permitted to contain provisions in conflict with the Acts. Lower subordinate statutes that are enacted by the delegation of higher subordinate statutes or are enacted for the purpose of enforcing higher subordinate statutes are not permitted to contain provisions in conflict with the higher subordinate statutes.

The Supreme Court and the Constitutional Court are mandated to make judgment on the question of whether lower Acts and subordinate statutes are in conflict with higher Acts and subordinate statutes, which is raised in the course of enforcing and implementing such lower Acts and subordinate statutes.

In cases where the question of whether any order, any rule or any disposition is in violation of the Constitution or Acts is brought to court, the Supreme Court has the authority to make a final review of the question. There is no principle of *stare decisis* or precedent in the Korean legal system. However, as the lower courts tend to follow the legal interpretations ascertained by the Supreme Court in actual practice, the Supreme Court decisions are regarded as the secondary source of law. The question of whether any Act is in violation of the Constitution is decided by the adjudication on the constitutionality system and the constitutional petition system of the Constitutional Court.

3.1.2 Constitution

The Constitution is the paramount and the highest law in the Korean legal system. It stipulates fundamental matters concerning the rights and obligations of the people, fundamental structures of the Government, economic order, management of elections and local autonomy. The Constitution is the standard for legislation and amendment of Acts and subordinate statutes of Korea.

The First Constitution of Korea was enacted on July 17, 1948. There were nine amendments of Constitution so far. The latest amendment was made on October 29, 1987. The 1987 Constitution is presently in force.

The Constitution prescribes its fundamental principles, stipulates a guide to the legislative system and procedure and ensures that the sovereignty of Korea resides in the people and all authority comes out from the people. The Constitution also declares that Korea tries to maintain international peace, renounces all aggressive wars and observes international law.

The Constitution stipulates fundamental rights and duties of the people, declares that all the people are assured of human dignity and have the right to pursue happiness as human beings. The Constitution declares that all the people are equal before the law and there is no discrimination in political, economic, social and cultural life on grounds of gender, religion or social status. The Constitution also stipulates personal liberty, the right of access to courts, the guarantee of property rights, etc., and the duties of tax payment, national defense, education and work as the four fundamental duties of all the people. The Constitution stipulates the principle of *nulla poena sine lege* (no punishment without law), the principle of legislated taxation, requirements for the acquisition of Korean nationality, the expropriation and indemnification of property rights. The Constitution declares separation of powers. It establishes the Legislature, the Executive and the Judiciary and checks and balances among them. The economic order of is based on the market economy that values the economic freedom and creativeness of individuals and enterprises.

If an Act, Presidential Decree or Ministerial Ordinance is in violation of the Constitution, the Constitutional Court makes a decision on unconstitutionality of the relevant Act, Presidential Decree or Ministerial Ordinance by referring to the provisions of the Constitution and interpreting basic constitutional notions. The Supreme Court has the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a specific trial. The full text of the English translation of the Korean Constitution is provided at the KLRI website (<http://elaw.klri.re.kr/>).

3.1.3 Act

Acts are the forms of legal norms stipulated by the legislative principles of the National Assembly. Acts are voted on the National Assembly and promulgated by the President in accordance with the Constitution. Acts become the source of law next to the Constitution in its importance. Acts prescribe the principle of legality, principle of legislated taxation, requirements for the acquisition of Korean nationality, expropriation and indemnification of property rights, establishment of Ministries and categories of local governments and such.

Any of the rights and freedoms of the people may be restricted by Acts in cases where it is deemed necessary to do so for the purpose of safeguarding national security and maintaining public order or public welfare. Even if such rights and freedoms are restricted, essential elements of such rights and freedoms are protected from being infringed on.

For cases on whether a subordinate statute is in conflict with an Act, which are raised in the course of enforcing such Act, the Adjudication on the Constitutionality of Acts and the Constitutional Complaints of the Constitutional Court addresses on whether any Act is in violation of the Constitution. The Supreme Court holds the authority to make a final review as to whether any order, rule, or disposition is in violation of the Constitution or Acts.

3.1.4 International Treaties and Generally Recognized International Law

International treaties mean written agreements concluded among nations. Generally recognized International laws mean international agreements, the enforcement power of which is generally recognized by the international community even though Korea is not a signatory nation thereto (such as the UN Charter), and include international customary laws. The Constitution of Korea stipulates the observance of international law, and prescribes that treaties concluded and promulgated under the Constitution and international laws generally recognized have the same effect as those of domestic laws. “The same effect as those of domestic laws” refers to the fact that any treaties or international laws falling under any domestic Acts or subordinate statutes have the same effect as those of the relevant domestic Acts or subordinate statutes, respectively. When the government concludes any treaty in conflict with a domestic Act, the government is required to seek consent from the National Assembly in order to prevent such treaty from conflicting with domestic Acts. Some treaties require legislative measures for the enactment of domestic Acts in order to be properly implemented. Treaties and rules of international law are incorporated into the domestic legal system to form a hierarchy with relevant domestic laws.

3.1.5 Emergency Executive Order

Emergency executive orders and emergency financial/economic executive orders are issued by the President in the event of any national emergency. They can have the same effect of Acts only when the President obtains approval from the National Assembly. In the event of any national emergency, the President is empowered to issue an emergency executive order and an emergency financial/economic executive order, which have the same effect of an Act. The President is empowered to take a necessary minimum financial/economic disposition or to issue an emergency executive order that carries the effect of an Act to support such necessary minimum financial/economic disposition only at a time when he/she finds it necessary to take emergency measures to safeguard national security and to maintain public peace and order and he/she has no time to wait for the National Assembly to convene its emergency session following any domestic trouble and external threat, any natural disaster or any serious financial or economic crisis. The President is also empowered to issue an executive order that carries the effect of an Act only at a

time when the country is in a serious conflict with any other country that could put national security in jeopardy and he/she finds it necessary to take emergency measures to defend the country and it is impossible to call the National Assembly into an emergency session. When the President takes such disposition or issues such executive order, he/she is required to promptly report to the National Assembly in order to seek approval from the National Assembly. If he/she fails to obtain such approval from the National Assembly, the disposition or executive order shall immediately cease to have effect.

3.1.6 Order

Orders refer to all of subordinate statutes enacted and enforced by administrative power under the grant of statutes. They are also called as administrative legislation. Administrative affairs are complex and diverse and requires expertise and speedy legislative responses. The Constitution grants the Executive a certain scope of the rule-making power. Orders include Presidential Decrees, Ordinances of Prime Minister and Ministries, and administrative rules.

The Constitution provides that the President may issue Presidential Decrees concerning matters delegated to him/her by law with the scope specifically defined and also matters necessary to enforce laws. The Executive's rule-making powers are recognized in the Constitution. The Executive can make regulations according to directions and the scope of the statutes. The National Assembly can delegate rule-making power to the President with a specific scope.

In addition to the Presidential power to make Presidential Decrees in order to implement the statutes, the Prime Minister and other Ministers can also issue Ordinances to implement the statutes and Presidential Decrees. Presidential Decrees, Ordinances of the Prime Minister and Ministers prescribe matters mandated by Acts and other matters necessary to enforce Acts with the purpose of enforcing the Acts properly and effectively.

Presidential Decree

The President, the head of the Executive, is empowered to enact Presidential Decrees. Presidential Decrees consist of delegated orders and executive orders. Delegated orders deal with the matters that are delegated by Acts within the specific scope of such delegation. Executive orders deal with other matters necessary to enforce Acts. The jurisdiction of such orders extends over all administrative affairs under the jurisdiction of the Executive.

Ordinances of Prime Minister and Ministerial Ordinances

The Prime Minister and the heads of ministries of the Executive, *ex officio* or under the powers delegated by Acts or Presidential Decrees, are empowered to enact



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