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LAW, CULTURE, AND THE POLITICS OF CONFUCIANISM

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I. INTRODUCTION

A paper that deals with law, culture, and Confucianism is perhaps doomed to be a collection of vague and general platitudes. This is because all three of these terms are notoriously plagued with definitional problems. Legal theorists continue to disagree about the nature and scope of the concept of law, while anthropologists and sociologists constantly argue about the utility of the concept of culture. Similarly, philosophers, historians, journalists, politicians—indeed, almost anyone with a voice—seem to have different ideas about what Confucianism means. One of the main reasons for such disagreements, in my opinion, is an all-too-human tendency to want neat and simple categories that can encompass, represent, and take the place of the messy and intractable realities of life. We are all too familiar with the problem that "law" in modern life encompasses vastly different norms and institutions which cannot be easily grouped under the same rubric without in some sense straining the usefulness of the term "law."[1] The same is true of "culture" and "Confucianism"—with each term, it is often difficult to engage in any discussion beyond the most preliminary stages without being forced to ask, "culture in what sense of the term?" or, "Confucianism according to whose interpretation?"[2] This shows that all these terms are very elastic and that different practices and ideas are often subsumed under the same concept, which in turn aggravates the lack of conceptual clarity.[3]

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[1] One need only think of provisions of the American Federal Constitution on the one hand and the Internal Revenue Code on the other to appreciate the difficulty inherent in subsuming all statutes under the same rubric. Perhaps the classic example of the problems arising from using the same concept "law" in different contexts can be found in anthropological writings, in which various authors debated the propriety of using that label to refer to norms found in "primitive" or stateless societies. *E.g.*, BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); A.R. RADCLIFFE-BROWN, *Primitive Law, in* STRUCTURE AND FUNCTION IN PRMITIVE SOCIETY (1952); E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN (1952). According to George Fletcher, in any society, there are three distinct sources for the idea of law which may pull in different directions. They are: the analogy between human laws and scientific laws which points in the direction of regularity and generality, the notion of higher law that brings in the dimension of moral rectitude, and the idea of law as the correct path on which the community must travel. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 28-40 (1996). As is well known, the problem is aggravated once we start discussing the idea of law in the East Asian context. Joseph Needham's treatise on the problems attending the use of "law" in relation to the Chinese intellectual tradition is still a classic. JOSEPH NEEDHAM, 2 SCIENCE AND CIVILISATION IN CHINA 518-83 (1965). Interestingly, Needham claims that the Chinese failed develop the idea of scientific laws, or "laws of nature," even though they had fairly sophisticated notions of human laws, and even what Needham describes as "natural law."

[2] Wm. Theodore de Bary writes that whenever he is confronted with the question—which is quite often—of what he thinks of Confucianism, he feels compelled to ask "Whose Confucianism are we talking about?" WM. THEODORE DE BARY, THE TROUBLE WITH CONFUCIANISM xi (1991).

[3] Regarding the term "culture," Raymond Williams expressed the point as follows:

In addition, there is the added problem of discursive politics. Beyond the desire to impose intellectual tidiness on disparate and disorderly human phenomena, there is the problem that all these terms are often at the center of highly politicized debates in which the discussants have agendas other than mere conceptual clarification. Sometimes these terms are proudly proclaimed as the cause of certain things generally regarded as an accomplishment, while at other times, they are held up and blamed as the source of some evil or failures. Such discussions rarely yield nuanced arguments that can advance our understanding.[4]

Despite these perils of thinking in terms of such vague ideas, however, this paper proposes to venture yet another analysis of how these three social phenomena intersect and influence one another. To the extent possible, it will seek to avoid those perils by eschewing grand theories or overarching generalizations.[5] The idea for this paper was in fact spurred by certain dissatisfactions with the conventional conceptual frameworks regarding culture in relation to law, and Confucianism in relation to East Asian societies. It will seek to stay away from the view that regards culture as a monolithic, inexorable force that determines the behavior and thinking of people. It will also refrain from demanding from culture an "explanation" for certain alleged characteristics of an entire society. As for Confucianism, this paper seeks to avoid identifying the ideas found in millennia-old classical books and other philosophical treatises on the one hand with the actual norms and practices of contemporary East Asian societies on the other.[6] It will also eschew the mistake of "defining"

> Culture is one of the two or three most complicated words in the English language. This is so partly because of its intricate historical development, in several European languages, but mainly because it has now come to be used for important concepts in several distinct intellectual disciplines and in several distinct and incompatible systems of thought.

RAYMOND WILLIAMS, KEYWORDS 87 (1976).

[4] A good example is the so-called Asian values debate. While the ostensible subject of the debate was the alleged advantages and disadvantages of certain cultural traits shared by Asian people, arguments on both sides were generally too polemical and politicized to yield any substantive and refined insights about the matter. Part of the reason was that the major participants were politicians interested more in defending their own political interests rather than in advancing scholarship. *See, e.g.*, Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar./Apr. 1994, at 109; Bilahari Kausikan, *Asia's Different Standard*, FOREIGN POL'Y, Fall 1993, at 24; CHRISTOPHER PATTEN, EAST AND WEST (1998).

[5] *Cf.*, William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986) (stressing the need for nuanced and textured appreciation of the Chinese legal history in order to understand the legal developments of modern China).

[6] The study of Confucian classics and their commentaries is a vital and necessary part of the overall task of understanding the Confucian tradition. However, one must keep in mind that the Confucian tradition practiced and lived out by East Asians today is not a precise reflection of the precepts and theories found in those classical texts. This is not unlike the case of Christianity where the practices and norms observed by the faithful may not necessarily correspond with the theological viewpoints of Thomas Aquinas or Augustine, or for that matter St. Paul or even Jesus himself.

Confucianism by selecting and hypostatizing certain doctrines or practices that happened to be salient at a given point in time (usually the late nineteenth century).

At the same time, this paper does not advocate, as some rational-choice theorists do, jettisoning all research and discussion on culture, especially in relation to East Asian societies.[7] Rather, it represents an attempt to articulate a more nuanced perspective on the place of culture in the operation of law, in a society heavily influenced by Confucian tradition. The premise of this paper is that not everything in law or people's behavior in relation to law can be explained in terms of institutional incentive structures or economic cost-benefit analysis. To be sure, such accounts have their place in the overall project of advancing our understanding of the law. Yet, they should not be taken as the only, or even the "best," account. This is not the place to expound on the relative strengths and weaknesses of institutionalism and culturalism.[8]

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[7] *E.g.*, J. MARK RAMSEYER & FRANCES ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 2-3 (1993). Interestingly, Ramseyer and Rosenbluth cite Clifford Geertz, the preeminent theorist of culture, for the proposition that cultural explanation is of limited value. Quoting Geertz's expression of dissatisfaction with the conventional approach to culture, they seem to assume that that spelled the end of the culturalist approach, without bothering to learn more about Geertz's own richer and more sophisticated conceptualizations of culture. *See also* Gerald L. Curtis, *A "Recipe" for Democratic Development, in* DEMOCRACY IN EAST ASIA 217 (Larry Diamond & Marc F. Plattner eds., 1998) (emphatically denying that the process of democratization in East Asia has anything to do with culture).

[8] There is a running debate in the social sciences concerning the methodological advantages of culturalism and institutionalism. Even after the classic study of political culture by Gabriel Almond and Sidney Verba was criticized from many directions for faulty measurements, reversing the direction of causality, and cultural "stereotyping," the notion of culture still seems to hold appeal for many political scientists. GABRIEL ALMOND & SIDNEY VERBA, THE CIVIC CULTURE (1963). For a representative criticism of political culture as an explanatory concept, see David J. Elkin & Richard E.B. Simeon, *A Cause in Search of Its Effect, or What Does Political Culture Explain?*, 11 COMP. POL. 127 (1979). For continued works on political culture, see Ronald Inglehart, *The Renaissance of Political Culture*, 82 AM. POL. SCI. REV. 1203 (1988); Harry Eckstein, *A Culturalist Theory of Political Change*, 82 AM. POL. SCI. REV. 789 (1988); THE CIVIC CULTURE REVISITED (Gabriel Almond & Sidney Verba eds., 1980). For a critique on the usefulness of culture from an anthropological point of view, see ADAM KUPER, CULTURE: THE ANTHROPOLOGISTS' ACCOUNT (1999). For a critical survey of the uses of "Chinese culture," see Andrew J. Nathan, *Is Chinese Culture Distinctive?: A Review Article*, 52 J. ASIAN STUD. 923 (1993). On the recent scholarly interest in institutionalism, see Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics, in* STRUCTURING POLITICS 1 (Sven Steinmo et al. eds., 1992); Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996); Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC'Y 5 (1998). For a sampling of institutionalist perspectives on law, see THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999). For a piece that professes to take an institutionalist approach to East Asian law and politics, see Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values* 11 HARV. HUM. RTS. J. 109 (1998). A critique of the institutionalists' conception of the rule of law as a tool for economic development in East Asia can be found in John K.M. Ohnesorge, *The Rule of Law, Economic Development and the*

Suffice it to say that the recent scholarship on social norms and social meaning can be understood as an effort on the part of the institutionalist camp, which had hitherto focused on narrow conceptions of economic cost, to recognize and incorporate the culturalist insight regarding the necessity to attend to the realm of signification and interpretation.[9] Indeed, this paper takes encouragement from the fact that the boundary line between the two camps may be becoming increasingly blurred.[10]

In the following, I analyze the newly emerging constitutional discourse in Korea[11] from a perspective that takes culture seriously and yet does not fall into the trap of reifying culture as some inscrutable unitary force. The case of Korea is particularly instructive for studying the interaction between law, culture and Confucianism because the Korean culture is generally regarded as the most Confucian of all Asian cultures.[12] It will be seen that while Confucianism in contemporary Korea is still strong, it is surprisingly a very under-articulated part of its culture. The concept of culture here is taken to mean not so much overarching values or belief systems, but the vocabulary and idioms for articulating people's viewpoints and expressing their judgments on others and events that make up their everyday life.[13] Confucian culture provides the tools with which Koreans interpret and give order to the world around them.[14] On this view, the law is also a part of the culture, for to be

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Developmental States of Northeast Asia, *in* LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA (Christoph Antons ed., forthcoming 2003).

[9] Social norms scholarship and rational choice theory do not overlap precisely. Yet they can be seen as sharing many of the basic assumptions and methodological tools. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998). For a sampling of the recent works on social norms and social meaning, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); ERIC POSNER, LAW AND SOCIAL NORMS (2000). For a critical assessment, see Mark Tushnet, *"Everything Old is New Again:" Early Reflections on the "New Chicago School,"* 1998 WIS. L. REV. 579.

[10] *See, e.g.*, Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157 (2000) (attempting to bring together the cultural and economic approaches under the rubric of "socioeconomics.").

[11] Throughout this paper, "Korea" is used to refer to the Republic of Korea, i.e., South Korea.

[12] For example, the Confucian scholar Tu Wei-ming states that "South Korea today is more Confucian than her East Asian neighbors in cultural orientation, social structure, political ideology, and economic strategy." Tu Wei-ming, *The Search for Roots in Industrial East Asia: The Case of the Confucian Revival*, *in* FUNDAMENTALISMS OBSERVED 740, 761 (Martin Marty & R. Scott Appleby eds., 1991).

[13] This way of conceiving culture is thus more interpretive than behaviorist. From this perspective, Michael Davis's attack on the so-called cultural approach, while persuasive, is a bit beside the point. This is because he continues to conceptualize culture in deterministic and behaviorist terms, i.e., as a "cause" of behavior. Michael C. Davis, *supra* note 8, at 120-24. For an argument against cultural determinism in the context of studying Korean law, see DAE KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 27-37 (1990).

[14] This way of conceptualizing culture is largely based on Clifford Geertz's interpretive approach to culture. *See generally* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973). At one

meaningful to the people it regulates, law must partake of the resources within culture.[15] To that extent, Confucian culture may influence the legal and constitutional discourse. Legal meaning is dependent on the cultural signs and narrative.[16] At the same time, the aspect of variability and contestability of culture will be underscored.[17] Although Confucian culture may appear to delimit or define the range of people's actions, words, and imagination, the place of Confucianism in Korean culture is constantly being renegotiated and readjusted. It is this process of renegotiation and readjustment, and the place of law in it, that this paper will focus on.

Toward that end, this paper draws attention to the fact that the discourse on Confucianism is itself a highly politicized phenomenon. It must be understood that the concept of Confucianism is a discursive construct, a product of the cultural and political discourse on how to view or define modern Korean identity. Therefore, in order fully to understand how Confucianism intersects with law in Korea, one must understand the politics of Confucianism, i.e., what sort of cultural meanings are associated with Confucianism, and how those meanings get reproduced, reinforced, and reconfigured through various processes. This paper is concerned with the question of how law participates in that process.[18] It

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point Geertz defines culture as: "the fabric of meaning in terms of which human beings interpret their experience and guide their action." *Id.* at 145.

[15] *See* Sally E. Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 578 (1998).

[16] *See generally* Robert Cover, *The Supreme Court 1982 Term–Forward:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 353 (Michel Rosenfeld ed., 1994). The point is well conveyed in James Boyd White's description of Edmund Burke's basic intentions:

> And his first object is to bring us to see that behind all the theoretical talk of government and legitimacy, behind the system and projects, behind even the forms of government itself, there is a culture, a living organization of mankind, upon which all the talk of system and mechanism depends, both for its intelligibility and for its effects. . . .

JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 226-27 (1984).

[17] For a short review of recent theories of culture among anthropologists which emphasize this contested, conflictual, and contingent aspects of culture, see Sally E. Merry, *Law, Culture, and Cultural Appropriation*, *supra* note 15, at 582-85. Similar perspective on culture can also be found among historians. *See, e.g.*, E.P. THOMPSON, CUSTOMS IN COMMON 6 (1991) (describing culture as "an arena of conflictual elements," and warning that an overly consensual view of culture "may serve to distract attention from social and cultural contradictions, from the fractures and oppositions within the whole").

[18] By focusing on the process of cultural contestation and renegotiation, I do not mean to suggest that law is by contrast a coherent and stable system of rules. While this is a familiar theme for lawyers due to the works of American Realists and scholars in the Critical Legal Studies camp, we can also find similar insights among anthropological writings. *E.g.*, SALLY F. MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (1978); JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES (1981). *Cf.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (the thesis that the legal system masks a "fundamental

will explore the ways in which various actors in this political process are invoking the authority of the constitution and Korea's newly established Constitutional Court, and thereby "constitutionalizing" the debate on Confucianism and its place in modern Korean identity.[19]

Perhaps this is a bit ironic since, according to the conventional view of Confucianism, "law" was the least preferred means for settling disputes or governing a state. And yet, here we see the cultural meaning of Confucianism being adjudicated in courts of law and subjected to "legal" judgments.[20] In a sense, this is a reflection of the degree to which Korean cultural discourse is becoming a hybrid of traditional Confucian signs, symbol, and narratives on the one hand, and a newer set of idioms and references provided by the ideal of rule of law. For some time already, terms like liberty, equality, individual rights, and pursuit of happiness have become a regular part of the modern Korean cultural vernacular, and it is perhaps inevitable that the language of rule of law is informing the debate on cultural identity. Indeed, at least in the legal and

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contradiction" inherent in liberalism); KARL LLEWELLYN, THE COMMON LAW TRADITION (1960) (the pairing of mutually contradictory maxims of statutory interpretation, designed to show the unfeasibility of the formalist approach).

[19] To the extent that institutional arrangements for constitutional adjudication preceded the more serious reflection on the place of culture in Korean law, on which I elaborate below, this tends to support the perspective that views institutional development and change matter more than any change in culture. However, it is also arguable that the change in the institutional structure to allow for more robust constitutional litigations were initially brought about by the more diffuse change in the culture, i.e., the people's increased appetite for more democracy and diminished tolerance for authoritarian politics. *See infra* Part I.

[20] Of course, the usual contrast drawn between Confucians who oppose using the law and "Westerners" who celebrate the rule of law needs to be refined considerably. As a historical matter, Confucian regimes of both Korea and China were not at all reluctant to use the law (or legal codes) in ordering the society and even in disseminating Confucian values. CH'U T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA (Hyperion Press, Inc. 1961) (the "Confucianization of Law" thesis); William Shaw, *Traditional Korean Law and Its Relation to China*, *in* ESSAYS ON CHINA'S LEGAL TRADITION 302 (Jerome Cohen et al. eds., 1980) (arguing that an intimate knowledge of the law and precedents were required of Confucian bureaucrats of the Chosŏn dynasty and that citing statutes and other rules were a regular part of Korean government discourse). More importantly, the conventional view that Confucianism is opposed to the rule of law is based on a misunderstanding regarding the way "law" is used. This view is a product of combining several mutually reinforcing notions, some of which are found in classical texts such as the *Analects*. First, there is the idea that Confucians primarily understood law in penal terms. Next, there is the idea that a good ruler should not govern by meting out punishments, but rather should try to educate the people to be moral. Then, there is the remark by Confucius to the effect that the point of litigation is to ensure that no litigation arises in the first place. The important thing to note here is that even if these were all accurate portrayals of the Confucian perspective on law, they tell us absolutely nothing about the Confucian attitude toward the ideal of rule of law. Whatever rule of law is, it is not an ideology of rule by punishment. As with Confucianism, rule of law does not view punishment as the primary means of governance. Nor is rule of law a celebration of litigation as an end in itself. No one in a rule of law society wishes or expects that most disputes will be settled through litigation. The Confucian aversion toward punishment and litigation can in fact be quite compatible with the theory of rule of law.

political realm, it may be fair to say that the imported language has become the dominant mode of discourse such that it is next to impossible to find any arguments made in explicitly Confucian terms.

In relation to Korean law, Confucianism is most often discussed for its influence on the laws of the pre-modern period.[21] When it is discussed for its relevance for contemporary Korean law, it is usually pointed to as a force that is holding back democratic progress in the legal system.[22] Yet, the impression conveyed by these writings is one of Korean culture that is still benighted by the unenlightened, "feudal" ideology of Confucianism, which in turn is usually defined in a simplistic and reductionist manner. As will be argued, however, Confucianism is a site of cultural contestation in contemporary Korea. What Confucianism stands for in Korea is by no means unambiguous. The principal purpose of this paper is therefore to suggest a more nuanced way of understanding this Confucian factor in Korean law and culture.

By way of describing the institutional setting as well as the recent historical context of this cultural debate, I will start in Part II by briefly noting how the Constitutional Court was established in the last constitutional revision, and then proceed in Part III by describing the problem of locating Confucianism in modern Korean culture. Next, in Part IV, I will propose a way of looking at the relationship between law and the Confucian culture in Korea. Part V will then engage in an analysis of a couple of Constitutional Court cases to explore the details of the interaction between law and Confucian culture. I will conclude with some thoughts on the issue of nationalism in relation to the politics of Confucianism and Korean constitutionalism.

II. ACCIDENTAL CONSTITUTIONALISM

In 1988, Korea created for the first time in its history a separate court for adjudicating constitutional matters.[23] This was a result of the re-

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[21] *E.g.*, Byung Ho Park, *Traditional Korean Society and Law*, *in* KOREAN LAW IN THE GLOBAL ECONOMY 1 (Sang-Hyun Song ed., 1996); BONG-DUCK CHUN ET AL., TRADITIONAL KOREAN LEGAL ATTITUDES (1980).

[22] *E.g.*, Erin Cho, *Caught in Confucius' Shadow: The Struggle for Women's Legal Equality in South Korea*, 12 COLUM. J. ASIAN. L. 125 (1998) (presenting Confucianism as the source of gender inequality institutionalized in Korean family law); Dai-kwon Choi, *Western Law in a Traditional Society: Korea*, 8 KOREAN J. COMP. L. 177 (1980) (outlining five antinomies around which tensions between imported Western law and Confucian social structure evolve); Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL'Y J. 1 (2000) (describing the gap between the subjective realm of values and attitudes influenced by the Confucian tradition and the rapidly changing social and economic reality of Korea).

[23] Hŏnpŏp Chaep'anso Pŏp [Constitutional Court Act] (1988). The Korean constitution of 1960 also provided for the establishment of a constitutional court, but plans to create the court were cut

drafting of the Constitution that took place in 1987,[24] in the aftermath of a massive protest on the part of the students, laborers, teachers, small businessmen, professionals, and even some law enforcement officers, demanding the revision of the constitution to allow for the election of the president through direct popular vote.[25] This was also the first time that the Korean constitution was revised through a democratic process involving the cooperation and coordination of diverse interests, or at least the interests of the opposition political parties. Previously, whenever the constitution was revised, it was for the purpose of either formalizing or enhancing the power of whoever was in power at the time. In 1987, by contrast, a special committee made up of members from the ruling party and the three opposition parties[26] was created in the National Assembly to negotiate the details of a more democratic constitution.

It would then seem that the idea of creating an independent Constitutional Court was the natural outcome of the transition to democracy. It might be seen as the institutional expression of the desire on the part of the drafters of the new constitution to strengthen democracy by ensuring that the powers of the government were restrained and disciplined under the rule of law.[27] In reality, however, of the four different drafts (representing the four political parties) submitted to the special committee, the ruling party's draft was the only one that provided for a separate constitutional court. All of the drafts proposed by the opposition parties intended to make the Supreme Court the highest judicial organ of the state, with the powers to review the constitutionality

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short the next year when General Park Chung-hee staged his coup d'etat and revised the constitution again.

[24] HŎNPŎP [Constitution] arts. 111-113. This was the ninth time that the Korean constitution was being revised since the first "modern" Western-style constitution was adopted in 1948, following the end of the Japanese occupation in 1945 and the three-year period of American military government. For a history of constitutional revision in modern Korea and the changes in the constitutional adjudication system, see YOON, *supra* note 13, at 150-69.

[25] For background on the events leading up to the June Democracy Movement of 1987, and its aftermath, see CARTER ECKERT ET AL., KOREA OLD AND NEW 375-87 (1990); JOHN KIE-CHIANG OH, KOREAN POLITICS: THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT 87-107 (1999). For more detailed and contemporary account from the lawyers' perspective, see James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 HARV. HUM. RTS. J. 135 (1988).

[26] At the time, the number of seats in the National Assembly held by members of the three opposition parties outnumbered that of the ruling party of the ex-generals Chun Doo Hwan and Roh Tae Woo.

[27] It is easy to get this impression because, in the post-Soviet era, many countries of Eastern and Central Europe and other regions have established constitutional courts as part of their transition toward democracy. *See generally* RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE (1996). It must be remembered, however, that at the time Korea adopted its new constitution, the Berlin Wall was still standing strong and that the idea of a separate constitutional court did not all appear natural for the drafters.

of statutes, to dissolve unconstitutional political parties, and to decide on impeachment proceedings instituted by the National Assembly.

This can be explained as a response to the experience under the previous constitution, which nominally provided for a separate Constitutional Committee for adjudicating constitutional disputes. In order for this body to meet and decide on the constitutionality of a statute, the Supreme Court had to refer the specific issue of constitutionality to it.[28] Yet, in reality, the Supreme Court, fearing political reprisal, never found any uncertainty about constitutionality and never referred any cases to the Constitutional Committee. As a result, the Constitutional Committee never exercised any of its powers.[29] The opposition parties' idea was therefore to abolish this useless agency that existed on paper only, and to revamp the Supreme Court to be truly independent and powerful enough to make decisions of constitutionality without being influenced by the executive branch. By contrast, the ruling party's argument was that having the Supreme Court decide constitutional disputes would improperly implicate the judiciary in political matters, which would be further detrimental to its independence.

More important perhaps for understanding the provenance of the Constitutional Court is the fact that this issue of who should have the power to decide constitutional disputes was not a very important issue for many people, including the parties represented in the revision committee. For one thing, the foremost question that occupied the minds of everyone at the time was which form of government should be adopted: a parliamentary system or a presidential one? And if the presidential system was to be adopted, the next question was how long the term of the presidency should be, and whether the same person should be allowed to serve two or more consecutive terms.[30] In light of the fact that previous presidents ended up dictators by extending their terms through various means, both lawful and unlawful, it was understandable that most

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[28] Constitution of 1980, arts. 108 & 112.

[29] In fact, all of the past constitutions of Korea provided for nominal organs in charge of deciding constitutional issues. Under the Constitution of 1961, the Supreme Court was designated as the responsible organ, while under the Constitutions of 1972 and 1980, a special Constitutional Committee was created for the task. However, due to political reasons as well as structural problems, these bodies rarely exercised their powers. Once during the Park Chung Hee administration, the Supreme Court did hold a statute unconstitutional, but when the Justices came up for reappointment, none of the Justices who voted for striking the law down got reappointed. Subsequently, Park revised the constitution in 1972 and gave the power to review constitutional disputes to a Constitutional Committee, which existed only in name. Since then, until 1987, not one constitutional case has been referred to that organ for resolution. *See* DAE KYU YOON, *supra* note 13, at 150-99.

[30] The drafters ultimately settled on a single five-year term presidency. Article 70 of the current Constitution specifically prohibits the President from seeking reelection.

attention would be focused on the problem of preventing the presidency from turning into a lifetime office.[31] Other more urgent issues included the range of individual rights to be enumerated in the constitution, the extent of the National Assembly's power of oversight with regard to the executive branch, and the scope of the President's emergency powers. Besides, as mentioned, under past constitutions, constitutional issues were seldom, if ever, litigated at a forum of any kind. So, it was quite natural for people to give little thought to the issue of who should decide constitutional questions.

Particularly, the ruling party appears to have thought that they could follow the previous pattern on this issue.[32] They probably thought that they could have a nominal constitutional court, one existing only on paper. During the negotiations, however, a member of the opposition party, acting on the advice of a human rights advocacy group, suggested that they might agree to the creation of a separate constitutional court, if that court were to be allowed to hear and decide on "constitutional petitions" (*hŏnpŏp sowŏn*) brought by individuals. This system of constitutional petitions, or constitutional complaints, instituted by individual citizens is actually a well-established one in Germany,[33] and therefore quite familiar to Korean lawyers and constitutional scholars. Yet, despite the heavy German influence on the Korean legal system in general, the past authoritarian rulers of Korea had always prevented this particular system from being included in the constitutional adjudication system.

The opposition apparently thought that including the constitutional petitions in its jurisdiction would make the Constitutional Court into a truly independent organ, and this seems to have had more appeal than the idea of empowering the Supreme Court to behave more independently. Thus, in a sense, the idea of a separate constitutional court was discussed only as an afterthought when the issue of whether or not to adopt a system of constitutional petition became an agenda for negotiation. In the end, all parties agreed to the idea, and a separate

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[31] Syngman Rhee, who was in office from 1948 to 1960, revised the constitution twice (in 1952 and 1954), each time with grave procedural irregularities, to ensure reelection for himself. Park Chung Hee (in office from 1961 to 1979) also tinkered with the constitution and ultimately created a system in which his reelection was virtually guaranteed. Rhee was forced resign due to a nationwide popular protest and Park was assassinated by his own chief of intelligence.

[32] HŎNPŎP CHAEP'ANSO SHIMNYŎNSA [THE FIRST TEN YEARS OF THE CONSTITUTIONAL COURT] 72-73 (1998). An English translation of this publication is available at the Constitutional Court's website, http://www.ccourt.go.kr/english/decision03.htm.

[33] The petition is called *verfassungsbeschwerde* in Germany and is specifically provided for in the Basic Law (*Grundgesetz*), their constitution. § 93(1)[4a] GG. On the jurisdiction and powers of the German Federal Constitutional Court, see generally DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 10-15 (2d ed. 1997).

constitutional court was created with the powers to: i) review the constitutionality of statutes, ii) dissolve unconstitutional political parties, iii) decide impeachment cases, iv) adjudicate disputes of competence between state agencies, and v) decide constitutional petitions.[34] The Court is composed of nine Justices, six of whom must concur in order to reach a decision of unconstitutionality.[35]

It was then understandable that a court thusly created almost as an accident would be viewed with some skepticism regarding its ability to command any authority.[36] For political reasons, the ruling party certainly did not wish it to become an institution of any significance. From a theoretical standpoint, the idea of grafting an independent constitutional court modeled after the German Federal Constitutional Court (*Bundesverfassungsgericht*) onto a system of government essentially based on the American model was also met with some resistance. One issue that continues to cause problems today is the status of the Constitutional Court relative to the Supreme Court. Due to institutional shortcoming and political reasons, the Korean Constitutional Court, unlike its German counterpart, has been unable to secure for itself the place of unquestioned authority in the hierarchy of the national court system.[37]

Despite such skepticism and structural problems, however, the Court has managed over the last fourteen years to become a very important force in the legal and political life of Koreans. It has taken a very proactive, and sometimes quite progressive, approach to upholding the Constitution.[38] By frequently pronouncing legislations and executive

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[34] HŎNPŎP art. 111(1).

[35] HŎNPŎP art. 113.

[36] *E.g.*, West & Baker, *supra* note 25, at 165.

[37] This is in part due to the Constitution itself which envisions a "division of labor" between the Constitutional Court and the Supreme Court for reviewing the constitutionality of legal norms. While the former is empowered to review the constitutionality of statutes passed by the national legislature, the latter is entrusted with the power to review the constitutionality of "lesser" legal norms, e.g., administrative regulations, presidential decrees, etc. HŎNPŎP arts. 107 & 111. This has the practical effect of preventing the Constitutional Court from assuming the position of final and authoritative arbiter of constitutional meaning for the whole the nation.

[38] To a certain extent, this interpretive approach was the result of a conscious decision on the part of the first group of Justices appointed to the Court. According to Yi Shi-yun, a former Constitutional Court Justice, faced with such skepticism as well as the ignorance of the general populace regarding the Court's functions, they conscientiously cultivated, if not solicited, their "business" by delivering decisions designed to show people that their grievances would be given careful, individualized attention. Yi Shi-yun, *Hŏnpŏp Chaep'an 10 nyŏn-ŭi Hoego-wa Chŏnmang* [*A Retrospective on the Ten Years of Constitutional Adjudication*], KONGPŎP YŎN'GU vol. 27, no. 3 (1999), at 107. Chan-Jin Kim attributes this to the independence and activist spirit of the first President of the Constitutional Court, Justice Cho Kyu-Kwang. Chan Jin Kim, *supra* note 22, at 43-44.

measures unconstitutional,[39] it has forced the government to think twice about the constitutionality of its actions. In some ways, by providing an arena in which political issues could be framed and disputed by reference to the Constitution, it has succeeded in disciplining the conduct of political discourse and making the Constitution relevant to the ordinary people of Korea.[40] It has succeeded in introducing a form of constitutional politics and constitutional discourse to the Korean society.[41]

For the purpose of this paper, the interesting aspect of this emerging constitutionalism is that Koreans are using the Constitution not just to restrain the government's power but also to renegotiate the terms of social discourse. For example, certain aspects of family relationship, commonly seen as heavily influenced by Confucian tradition, are being adjudicated under the Constitution.[42] Cultural norms that occur in interactions among private citizens are also undergoing transformation through the invocation of the Constitution. Yet, before we discuss this constitutional involvement in the debate over the Confucian cultural tradition, we need to gain an understanding of the place of Confucianism in contemporary Korean culture.

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[39] As of May 31, 2002, the total number of cases the Constitutional Court had been asked to adjudicate (since it began operation) amounted to 7,848 and it has given a disposition in one form or another for 7,338 of those cases. Of the 7,338 cases disposed, 3,516 were dismissed for failure to meet certain formal or procedural requirements. Of the remaining 3,822 cases that were actually decided on the merits, the Court has in 507 cases held that a statute or some (non)exercise of government power was either unconstitutional or otherwise constitutionally deficient. In other words, in more than 13% of all cases received, the Court has found some constitutional infirmity with the actions of the state.

[40] For some recent assessments of the activities of the Constitutional Court, see Dae Kyu Yoon, *The Constitutional Court System of Korea*, J. KOREAN L. vol. 1., no. 2 (2001), at 1; Jongcheol Kim, *Some Problems with the Korean Constitutional Adjudication System*, J. KOREAN L. vol. 1., no. 2 (2001), at 17; Kun Yang, *The Constitutional Court and Democratization*, *in* RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 33 (Dae Kyu Yoon ed., 2000).

[41] Needless to say, the institutional change embodied in the new Constitution to allow individuals to initiate adjudication of a constitutional issue must be counted as an important cause of this phenomenon. Yet, beyond such institutional factors, change in the outlook of the society and more particularly of the legal profession should not be ignored. For example, Kun Yang writes that, while Korea's active constitutional adjudication is firstly to be attributed to the "people's heightened consciousness of rights," the four factors of an active judiciary outlined by Lawrence Friedman are also met in the case of the Korean Constitutional Court: i) an activist legal profession; ii) activist judges; iii) a genuine social movement in favor of democracy; and iv) acceptance of the results of disruptive litigation by the power holders. Kun Yang, *Judicial Review and Social Change in the Korean Democratizing Process*, 41 AM. J. COMP. L. 1, 4-6 (1993) (citing LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 278 (1975)).

[42] *See infra* Part IV.

III. LOCATING CONFUCIANISM IN KOREAN CULTURE

At the beginning of the last century, the famous Chinese author and critic Lu Xun denounced the Confucian tradition as a "man-eating" religion.[43] For him, as well as for many generations of East Asians, Confucianism represented everything that was wrong with East Asian culture and society. Confucianism was identified with inequality, irrationality, oppression, and bondage. It was something that needed to be cast off as soon as possible if East Asians were to survive and prosper in the modern world. Korea was no exception to this trend. Many Koreans adopted, consciously or unconsciously, an anti-Confucian stance as a necessary step toward shedding the shackles of traditional political, economic, social and cultural values and institutions.[44] Criticism of Confucianism in Korea became especially severe because many Koreans blamed the moribund Confucian formalism and ritualism for the loss of national sovereignty to Japanese colonial powers in 1910.[45]

Almost a century later, Confucianism is once again being blamed for similar vices—crony capitalism, corruption, and authoritarianism. One fall-out of the financial crisis that hit many countries of Asia in late 1997 was the resuscitation once again of the negative assessment and critical rhetoric towards traditional Asian culture, a large part of which is considered to be Confucian.[46] Of course, it is true that during the intervening years, there had been a remarkable turnaround in terms of people's attitude toward Confucianism and Asian tradition in general. The so-called East Asian economic miracle had occasioned a positive re-interpretation of the Confucian legacy, which was further bolstered more recently by proud espousals of "Asian values" by certain politicians of the

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[43] This expression appears in his short story *Kuangren Riji* (Diary of a Madman), which was first published in 1918.

[44] Key members of the *kaehwa* ("enlightenment") faction of late nineteenth century Korea were educated in United States and Japan where they became enamored with Western technology, military power, and political system. Some of them, such as Yun Ch'i-ho (1865-1945), Sŏ Jae-p'il (1864-1951), and Yi Sŭngman (Syngman Rhee 1875-1965) even converted to Christianity and regarded Confucianism as essentially a relic of the past, irrelevant for a civilized and "enlightened" Korean nation. Their anti-Confucian perspective was reinforced by the fact that their political opponents were the diehard traditionalist Confucians whose ostensive goal was to "defend orthodoxy and reject heterodoxy." *See generally* CARTER J. ECKERT ET AL., *supra* note 25, at 203-214, 231-236, 249.

[45] During the colonial period many representative Korean intellectuals, such as Yi Kwang-su (1892-?), Chŏng In-bo (1893-?), and Ch'oe Nam-sŏn (1890-1957), wrote scathing criticisms of Confucian as the primary culprit for the demise of Chosŏn dynasty. *See* Jang Sukman, *The Formation of Antiritualism in Modern Korea: Modernity and Its Critique of Confucian Ritual*, KOREA JOURNAL, vol. 41, no. 1 (Spring 2001), at 93, 95-101 (Spring 2001).

[46] *E.g.*, Paul Krugman, *Asia's Miracle is Alive and Well? Wrong, It Never Existed*, TIME (Sept. 29, 1997), at 37; Mortimer B. Zuckerman, *Japan Inc. unravels*, U.S. NEWS AND WORLD REPORT (Aug. 17, 1998), at 77.

region.[47] Contrary to the assertions of Max Weber,[48] Confucianism was argued to be not only compatible with, but also positively advantageous for, economic development.[49] In the realm of politics, it was argued that Confucian societies had their own political ideals and values, which were not necessarily the same as those of the liberal democratic West.[50] In the case of Korea, while the government did not actively support the idea of Asian values,[51] there is no doubt that the self-confidence obtained from economic performance was being transferred to the realm of cultural heritage. With the onset of the financial crisis, however, such positive attitudes have once again become unpopular and unfashionable.[52]

Of course, neither harsh vilification nor abject adulation will be conducive to advancing our understanding of the Confucian legacy in East Asian countries. What these exchanges do show, however, is that Confucianism can be made to stand for many different things. They also show that after more than a century of repudiation, reinterpretation, and occasional restoration, Confucianism is still a subject of contestation among East Asians, an issue to be grappled with whether they like it or not. Much to the chagrin of many "modernizers," Confucianism is still pointed to as one of the defining characteristics of East Asian countries.

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[47] It is important to remember that "Asian values" do not necessarily refer to values derived from Confucianism. One of the most vocal advocates of Asian values was Mahathir Mohamad, the prime minister of Malaysia, who is no defender of the Confucian tradition. Thus not all comments regarding Asian values are necessarily relevant to the Confucian tradition. As noted by Amartya Sen, the very fact that Asia is such vast region with so much cultural diversity militates against finding or formulating a single set of values shared by all Asians. Amartya Sen, *Human Rights and Asian Values*, THE NEW REPUBLIC, July 14 & 21, 1997, at 34.

[48] As a way of showing why the Protestant ethic was the primary force behind the development of capitalism in the West, Weber wrote about the religious traditions of Asia, which he argued were responsible for that region's failure to achieve such developments. With regard to Confucianism, he argued that while it promoted a form of rational and this-worldly outlook, it tended to produce conservative and traditionalist attitudes which encouraged an ethos of "adjustment to the world" and which made it impossible for people to develop progressive, economic rationality necessary for capitalist development. *See generally* MAX WEBER, THE RELIGION OF CHINA (Hans H. Gerth trans., 1951).

[49] *E.g.*, EZRA F. VOGEL, THE FOUR LITTLE DRAGONS: THE SPREAD OF INDUSTRIALIZATION IN EAST ASIA (1991); THE WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (1993).

[50] *E.g.*, Fareed Zakaria, *supra* note 4.

[51] Before the former president of Korea, Kim Dae-jung, was elected to office, he actually wrote a rebuttal to Lee Kuan Yew's promotion of Asian values. Kim Dae-jung, *Is Culture Destiny?*, FOREIGN AFF., Nov./Dec. 1994, at 191. Yet, at the beginning of his term, he too appeared to have joined the celebration of Confucianism as a national heritage to be cherished, and even as a source of inspiration for promoting democracy. Kim Dae-jung, *Ch'unghyo Sasang kwa 21 Segi Hanguk [Philosophy of Loyalty and Filial Piety and Korea in the 21st Century]*, SHINDONGA, May 1999, at 226 (arguing that despite their emphasis by previous authoritarian rulers, such Confucian virtues as loyalty and filial piety may be reinterpreted to support modern democratic life).

[52] For a more balanced view on the so-called Asian values, see Francis Fukuyama, *Asian Values and the Asian Crisis*, COMMENTARY, Feb. 1998, at 27. *See also* Mark R. Thompson, *Whatever Happened to 'Asian Values'?*, J. DEMOCRACY, Oct. 2001, at 154.

Yet, in contrast to the general agreement that Confucianism is still very much a part of East Asian societies, there is very little agreement as to what Confucianism means or which elements of East Asian culture is attributable to Confucianism. For one thing, when discussed at a sufficiently high level of generality, many things commonly counted as part of the Confucian legacy (e.g., family-centered ethics, respect for elders, group loyalty, hard work, meritocracy, etc.) can all be described with equal plausibility as attributes of many other cultures in different areas of the world and in different historical periods. This shows, among other things, the near futility of trying to isolate or identify in abstract terms the so-called uniquely Confucian features of East Asian culture. Of course, it may be argued that, while similar cultural attributes can be found in other places, the way in which they are combined to form a distinct "package" reveals the uniquely Confucian color of East Asian culture. Yet, I believe any attempt to draw up a comprehensive list of abstract character traits that go into defining Confucian culture will be ultimately unrewarding and uninteresting.

Given the enormous diversity—intellectual, geographical, and historical—found within the Confucian tradition itself,[53] we must start with smaller agendas. At a minimum, discussions of Confucianism should be country-specific, for we cannot expect Confucianism to have the same (or even similar) status, function, or value among the people of China, Korea, Japan, and Vietnam. Add to the list Taiwan, Hong Kong, and Singapore, and the variation becomes even more pronounced.[54] Even within one country, we must be mindful of the fact that Confucianism (at least certain aspects of Confucianism) is stronger or more respected in some regions than others.[55] Also, discussions of Confucianism must be issue-specific. The same Confucian influence can work in different ways depending on the concrete issues. It is therefore unhelpful to speak in general terms about Confucian political culture or legal culture.[56]

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[53] For example, Gilbert Rozman proposes that we distinguish among five different layers or strands within Confucianism, even when we are dealing only with the period since the late nineteenth century. Gilbert Rozman, *Comparisons of Modern Confucian Values in China and Japan, in* THE EAST ASIAN REGION: CONFUCIAN HERITAGE AND ITS MODERN ADAPTATION 157, 160-69 (Gilbert Rozman ed., 1991).

[54] Concerning the different manifestations of Confucianism in the various East Asian societies of today, see CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY (Tu Wei-ming ed., 1996).

[55] Confucianism is generally perceived to be relatively stronger in the rural areas than in the urban areas. In Korea, the people of the southeastern city of Andong and the surrounding region pride themselves as being the preservers of the "essence" of Confucian culture and learning. *See* Kim Kwang-ok, The Reproduction of Confucian Culture in Contemporary Korea: An Anthropological Study, in CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY 202, 207-08 (Tu Wei-ming ed., 1996).

[56] For an influential example of this approach, see LUCIAN PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY (1985).

Whatever Confucian elements that persist in East Asian culture can only be captured in richer and more nuanced accounts of the signs, symbols, and idioms used by East Asians to interpret and construct their social worlds, and the narratives and events that operate as their reference points in the interpretation and construction.

Another difficulty in talking about Confucianism in contemporary East Asian societies is that at least on the official and conscious level, some East Asians themselves no longer count, or wish to count, Confucianism as a defining characteristic of their own societies.[57] In the case of Korea, Confucianism is no longer the "official" political ideology of the nation. People no longer study Confucian classics as part of their formal education.[58] Political discourse is no longer conducted in terms of Confucian ideals such as benevolence or ritual propriety. Foreign policy is no longer formulated with reference to the principle of "serving the greater nation" (*sa-dae*).[59] Even as a philosophical or religious pursuit, Confucianism nowadays has to vie for the allegiance of Korean people with other intellectual and spiritual traditions of the world.

In place of Confucian values like filial piety or ritual propriety, Koreans nowadays prefer to speak in terms of individual rights and describe their country as a "liberal democracy." While the Korean Constitution makes no reference to Confucianism or Confucian values, it has plenty of provisions protecting individual rights and "free and democratic basic order."[60] Similarly, the average Korean probably knows

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[57] This no doubt is a legacy of the anti-Confucian sentiments that emerged at the beginning of the last century. While Confucianism was never subjected in Korea to a government-led criticism campaign as in China, it has definitely fallen from its previous status as the dominant worldview. This leads Choi Dai-kwon to doubt whether "Confucian" is an appropriate label to describe contemporary Korean culture. Choi Dai-kwon, *Sŏnhan Sahoe-ŭi Chokŏn: Pŏpch'ijuŭi-rŭl wihan Shiron* [Conditions for a Good Society: Preliminary Discussion for the Rule of Law], PŎPHAK vol. 40, No.. 3, at 62 (1999).

[58] The civil service examination, through which generations of government officials were recruited based on their command of the Confucian classics, used to determine the goal and content of formal education in pre-modern Korea. This recruitment system was abolished in 1894 as part of the Kabo Reforms in which many time-honored practices and principles of government and social organizations were abandoned overnight in the name of modernization. ECKERT ET AL., *supra* note 25, at 113-14, 222-30.

[59] The Chosŏn dynasty (1392-1910 A.D.) considered itself a "kingdom" in relation to the "empire" that existed in China, and thus "voluntarily" recognized the superior status of the regime in Beijing. This was justified in part by Confucian theory according to which the world of diplomacy was also a hierarchically-ordered realm where the smaller nations had to defer and pay tribute to the greater nation ruled by the Son of Heaven. Despite this relationship, Chosŏn enjoyed all the trappings of a sovereign nation, and China never regarded Korea as its colony or part of its territory. Yet, at the end of the nineteenth century, Korea rejected even this nominal "tributary" relationship with China and proclaimed herself an empire on a par with all the other nations of the world. ECKERT ET AL., *supra* note 25, at 122, 225.

[60] "Free and democratic basic order" is the translation of *chayu minjujŏk kibonjilsŏ*, a term which is enshrined in the Preamble of the Constitution as well as a few other articles, and which is held out

more about what Kant or Marx said than what Confucius or Mencius taught, while Christianity and Buddhism are by far the more visible religions of modern Korea.

Yet, as mentioned above, the persistence of the Confucian tradition is often noted as an important factor in describing or explaining contemporary Korean society. Confucianism apparently has an invisible grip on the people's everyday life and behavior. Even with no formal voice to defend it, Confucianism seems to inform the way people interact with one another, and the way they make sense of the world around them. Indeed, it may be that because Confucianism exists in a less visible and more diffuse state, it is exerting an unconscious and therefore more powerful influence on the their lives.

One consequence of this is that many Koreans find Confucianism a subject difficult to discuss or interrogate on a conscious level and in a rational, logical manner. Discussions of Confucianism become distorted with mutual misunderstanding and/or ulterior political agendas. On those rare occasions when it is raised to the level of consciousness, Confucianism is more apt to become the subject of emotionally charged polemics and apologetics. An instance of this is the recent fuss surrounding the publication of a book called *Confucius Must Die If the Nation is to Live.*[61] At other times, Confucianism remains an unspoken and unnoticed part of the Korean culture, even though many things that

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by most Korean constitutional law scholars as one of the fundamental principles of Korean constitutionalism. The concept is actually a direct import from German constitutional jurisprudence in which the idea of *freiheitliche demokratische Grundordnung* operates as a litmus test or standard for gauging the limits of one's freedom under the German Basic Law. A political party may be disbanded if it is found to have actively violated that principle, and even an individual may have his or her basic rights forfeited when those rights are exercised in contravention of the same principle. §18, 21 GG. It is the constitutional expression of the idea of a "militant democracy" (*streibare Demokratie*), a notion borne in response to the deplorable inability of the "liberal" Weimar constitution to prevent the destruction of democracy by the ostensibly legal activities of the National Socialist (Nazi) party. KOMMERS, *supra* note 33, at 37-38. The interesting thing is that the Korean term can also be rendered "liberal democratic" basic order, when in fact the values underlying the term may be described as rather intolerant and perhaps illiberal. This is an unfortunate result of using the same Korean word *chayu* to translate both "freedom" and "liberty." Many Korean scholars therefore make the unwitting mistake of concluding that with the enshrinement of "free and democratic basic order" as a constitutional principle, Korea is also striving to be a "liberal democracy" as that term is used in American or European political and legal discourse. Moreover, according one commentator, this confusion has served to legitimate the repressive practices of military regimes in Korea. Kuk Sun-ok, *Chayu Minjujŏk Kibonjilsŏ-ran Muŏsin'ga?* [*What is Free and Democratic Basic Order?*], *in* HŎNPŎP HAESŎK-KWA HŎNPŎP SHILCH'ŎN [CONSTITUTIONAL INTERPRETATION AND CONSTITUTIONAL PRACTICE] 32 (Minjujuŭi Pŏphak Yŏn'guhoe ed., 1997).

[61] KIM KYŎNG-IL, KONGJAGA CHUGŎYA NARAGA SANDA (Seoul: Pada Ch'ulp'ansa 1999). A collection of journalistic essays on diverse issues facing Korean society, this book provoked quite a stir in the media from various positions. In defense of Confucianism, one writer even published a "rebuttal" entitled *Confucius Must Live if the Nation is to Live.* CH'OE PYŎNG-CH'ŎL, KONGJAGA SARAYA NARAGA SANDA (Seoul: Shiya Ch'ulp'ansa 1999).

Koreans do or are taught to do (e.g., being filial to one's parents and respectful to one's elders, or performing ancestral rites) are of Confucian origin. For most people, these things are what any decent human being should do, and to use the label "Confucianism" to describe them feels rather awkward.

Nevertheless, it is beyond doubt that many of the terms, idioms, and rhetorical devices that make up social discourse in Korea are derived from Confucianism. While Koreans may not articulate them in such explicitly Confucian terms as the Five Cardinal Relationships, they still interpret and evaluate behavior according to norms embodied in them. More importantly, while their actual practice may not always conform to those Confucian norms, the language and grammar of social interaction is permeated with Confucian signs and symbols. For example, in interpersonal relationship, the word used for describing a courteous and well-mannered person is *yeŭi barŭda*, whose literal meaning is "to be straight about ritual propriety." Similarly, the word describing a rude person is *murye hada*, which means literally "lacking in ritual propriety." Koreans still expect their political leaders to have such classic Confucian virtues as *ch'ŏngbin*, which could be rendered "honorably poor," the idea being that an honest government official should never use his position to enrich himself. Likewise, the ideal or at least the rhetoric of "extinguish selfishness and serve public good" (*myŏlsa bonggong*) still resonates with many Koreans.[62] In other words, Confucian presence (or subsistence, depending on one's view) in Korean society can be noted in the first instance in the rhetorical signs and symbols utilized by modern Koreans who are often not even conscious of their Confucian origins. Confucianism informs the language—the categories, narratives and rhetoric[63]—that Koreans employ when interacting with one another.

It is in this sense that Confucianism can be regarded as part of Korean culture. It provides the people with the signs, symbols, and

[62] Again, this is not to say that Koreans always adhere to these ideals in practice. Particularly in today's capitalist society, where pursuit of self-interest and accumulation of wealth are, if not glorified, at least legitimized, modern Koreans seem to show a degree of ambivalence toward these Confucian rhetoric. In the words of one Korean legal scholar: "The vestiges of the old perspective toward wealth are prompting the contemporary Koreans to swing between the two extremes of either belittling the specialization in wealth or idolizing it as the quintessence of modernity." HAHM PYONG-CHOON, KOREAN JURISPRUDENCE, POLITICS, AND CULTURE 281 (1986). Yet, the continued currency of the old Confucian rhetoric and symbols can be seen in the fact that every year the Korean government selects and honors certain government officials by conferring on them the "honorably poor official award" (*ch'ŏngbaekrisang*).

[63] For an approach to law and legal discourse in the United States which emphasizes these three dimensions of culture, see ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

strategies—the tools with which to negotiate the world around them.[64] Thus, "culture" in this paper is used to refer not so much to the overarching values or belief systems of Koreans which determine their actions, but to the vocabulary and idioms they use for articulating their viewpoints and expressing their judgments on people and events that they encounter in their daily life.[65]

This is not to say that these symbols and signs are universally shared or that there is a fixed and unvarying set of such signs and symbols. As is the case in any society, modern or pre-modern, Korean culture is a composite of a truly dizzying multiplicity of elements, and as such it is reasonable to expect different sub-cultures, or even counter-cultures, to coexist with one another. Some Koreans will feel more at home than others in talking in and about this language—in utilizing and "manipulating" Confucian signs and symbols. Similarly, some Confucian rhetoric will have more persuasive power for some groups than for others.[66] At the same time, as with any other culture, this Confucian culture is always in a state of flux.[67] Some Confucian signs and symbols are being reinterpreted to mean something different, while others are in the process of losing their currency altogether. In other words, the place of

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[64] This conception of culture is inspired by the "toolkit" conception of culture proposed by sociologist Ann Swidler. In her seminal article, Swidler writes that culture is not a monolithic external force that determines behavior. She proposes "an image of culture as a 'tool kit' of symbols, stories, rituals, and world-views, which people may use in varying configurations to solve different kinds of problems." Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986).

[65] This is not unlike saying that liberalism informs American culture. Liberalism provides Americans with the vocabulary through they interpret and evaluate the world around them. They speak in terms of freedom, autonomy, and individual rights without necessarily being knowledgeable about the political theories of John Locke or Immanuel Kant. They may not even know any of the seminal liberal thinkers, and yet have no problem expressing their desire for more freedom or condemning others for violating their rights. Americans know instinctively when to invoke their First Amendment rights without ever having read Milton's *Areopagitica*, and they are able to talk in terms of separation of powers without ever having heard of Montesquieu's *The Spirit of the Laws*. These idioms and expressions are part of the language that they use to articulate their viewpoints and to criticize the actions of others. They are part of their culture.

[66] Likewise, some Americans are more adept than others in the language of rights, liberty, and autonomy, and some will find that language more persuasive or compelling than others.

[67] Contrary to the conventional view, this is not a result of modernization or the encounter with the Western impact. Historians teach us that in the Chosŏn dynasty, the political and social elites carried out a very conscious effort to transform along Confucian lines the very vocabulary and practices that structure the everyday lives of ordinary people. Indeed, the Confucian signs, symbols and strategies that modern Koreans utilize so naturally became part of their general culture only in the eighteenth century. *See generally* MARTINA DEUCHLER, THE CONFUCIAN TRANSFORMATION OF KOREA (1992). We might then say that Korean culture has been in a state of flux since at least the late fourteenth century when the ruling class began to "Confucianize" the whole country. We might also say that many aspects of what people take to be traditional culture are actually of recent vintage. *See generally* THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., 1983).

Confucianism is itself constantly being contested and renegotiated in Korean culture.

IV. LAW AND CONFUCIAN CULTURE IN KOREA

One of the benefits of working with such a conception of culture and the place of Confucianism in it is that it allows us to sidestep the difficult and perhaps interminable discussion of what "Korean legal culture" looks like.[68] It enables us to eschew the notion (admittedly still powerful) of a unified and coherent Confucian culture that defines the overall value system of Koreans and predisposes them to act or think in certain ways with regard to law. We no longer have to conceive of the relationship between law and culture as one in which the Confucian culture supposedly molds the behavior of Koreans to refrain from litigating and to opt for so-called more conciliatory means of dispute resolution.[69] Rather than arguing over whether Koreans really have such a loathing for litigation,[70] or whether that could really be attributed to Confucianism,[71] we are now in a position to study the much more

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[68] *See* Kun Yang, *Law and Society Studies in Korea: Beyond the Hahm Theses*, 23 LAW & SOC'Y REV. 891 (1989); Chulwoo Lee, *Talking About Korean Legal Culture: A Critical Review of the Discursive Production of Legal Culture in Korea*, KOREA J. vol. 38, No. 3, at 45 (1998); Kim Jeong-Oh, *Shimin ŭi Pŏpmunhwa (I): Pŏpmunhwa ŭi Saeroun Inshik* [*Legal Culture of Citizens (I): A New Perspective on Legal Culture*], 8 PŎPHAK YŎN'GU 149 (1998). On the concept of legal culture itself, there is a huge literature and an ongoing discussion among scholars, which I am not competent to summarize here. The works of Lawrence Friedman include probably the most representative articulation of the concept of legal culture. *See* Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29 (1969); *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117 (1994). Suffice it to say that I believe the discussion could be further enriched by attending to the interpretive and discursive aspect of culture, as well as its potential for internal conflict and transformation. *See generally* Sally E. Merry, *Law, Culture, and Cultural Appropriation*, *supra* note 15. For a review and a powerful critique of the usefulness of the concept of legal culture itself, see Roger Cotterrell, *The Concept of Legal Culture, in* COMPARING LEGAL CULTURES 13 (David Nelken ed., 1997); For a defense, see Lawrence M. Friedman, *The Concept of Legal Culture: A Reply, in id.* at 33.

[69] The favorite "textual" evidence for this alleged aversion toward litigation was the passage in the *Analects* in which Confucius says: "In hearing cases, I am the same as anyone. What we must strive to do is to rid the courts of cases altogether." THE ANALECTS OF CONFUCIUS 157 (Roger T. Ames & Henry Rosemont, Jr. trans., 1998).

[70] According to one scholar, Korea is undergoing a "litigation explosion." Jeong-Oh Kim, *The Changing Landscape of Civil Litigation, in* RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY, *supra* note 40, at 321. Kim states that while the absolute number of litigations per capita is still small compared to countries like the United States, the annual rate of growth of litigation has exceeded that of America. Also, when compared to Japan and a few Western European countries, Korea already has higher number of per capita civil litigation.

[71] In a parallel discussion regarding the supposed Japanese aversion for litigation, many scholars have seriously undermined the conventional view which used to ascribe such behavior to their (Confucian) culture. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978); Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC'Y REV. 219 (1987).

interesting issue of how law interacts with the cultural vocabulary informed with Confucian signs and symbols. For under the conception of culture used here, culture may influence the law, but only indirectly. It does not directly determine the value choices made through legislations or legal decisions. Culture is inflected in the terms that inform the legal discourse, and in the way that law is represented and given meaning in the political and social discourse of the people.

This way of thinking about culture and law also allows us to move away from other "cultural" stereotypes regarding Korean law. One is the view that due to their culture, which includes, in addition to Confucianism, elements of Buddhism and shamanism, Koreans generally view law as an unimportant, if not irrelevant, part of the overall mechanism that enable their society to function.[72] According to this view, the fact that law does not figure prominently in Korean social ordering is reflected in the historical fact that rule of law has never been a positive ideal for Koreans. Of course, the common "explanation" for this has been that, again due to their culture, Koreans tended to equate law with punishment and therefore developed a relatively low esteem for law in general. The focus of conventional views on Korean law and culture has thus been on either the cultural irrelevance of law or the negative connotations associated with law.[73]

Yet, if we conceptualize culture not as substantive value systems or beliefs that dictate the actions of people, but as a range of conceptual

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[72] Referring to the difficulties of fitting Japanese legal studies into the mainstream American comparative legal scholarship, Frank Upham suggests that many Japanese law scholars have had to reject the cultural approach to their research because that implied admitting the irrelevance of law in Japanese society. Upham also writes that this was a reaction to the mainstream comparativists' (erroneous) assumption that taking culture seriously in Japan would necessarily mean that law was insignificant in Japan and that there was not much to study in terms of Japanese law. Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639. While he labels the mainstream comparativists' approach "cultural," what he is really reacting to is their assumption that to be attentive to the natives' viewpoints on law, one must look only at their legal theories in isolation from the rest of the society. For Upham, this can only generate vapid formalist generalities. Thus, he is actually reacting against their particular and peculiar conception of culture and the cultural approach (which he himself notes as verging on self-contradiction). Indeed, in light of his work on law and litigation in post-war Japan, I don't think his approach entirely rejects the importance of culture (understood here as the signs, symbols, and narratives used to construct meaning) in Japanese legal studies. For example, he writes:

> To understand the significance of Japanese law, therefore, it is not enough to understand its role in social and political struggles; we must also understand the stories it tells, the symbols it deploys, the visions it projects, and how the Japanese use all of these to give meaning to their social life.

FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 205 (1987). In other words, he is merely rejecting the view of culture as an inescapable force that determines, or overpowers, the operation of law.

[73] *E.g.*, HAHM PYONG-CHOON, *supra* note 62, at 7, 174 (describing traditional Korean legal culture as *alegalistic* and noting the identification of law with punishment by Koreans).

tools available for classifying persons and events, or as the stock of symbols and narrative strategies from which to draw on in telling a story, then we will be free from the pressure to "explain" some phenomenon by "attributing" it to some culture. We will be able to start recognizing and analyzing the more textured (and more interesting) process of law and culture influencing and even transforming one another.

Another "cultural" view on Korean law and culture, widely held by Koreans themselves though seldom expressed, emphasizes also the relative insignificance of Korean law but in a different way. This is the view that law in Korea is largely based on Japanese law, which was transplanted during the colonial occupation and left basically unchanged after Korea regained her independence. The implication is that, since Korean law is essentially a copy of Japanese law, which in turn was largely based on the laws of Germany, there is not much interesting or original activities or trends in Korean law that merit our study. Whatever "friction" caused by the difference between the local culture and the German-based legal system has been already observed and dealt with in the Japanese context. The alleged low rate of litigation or the preference for informal justice mechanism can all be traced back to the Japanese influence, which may or may not have reinforced an already existing tendency within Korean culture.

Again, approaching culture in terms of the categories, narratives, and rhetoric that serve as the frame of reference in the construction of legal meaning allows us to refute this view. While it is true that Japanese law has influenced Korean law to a considerable extent, it should be obvious that the "cultural meaning" of law will be different for a society where it was imported and imposed as a tool for colonial occupation rather than voluntarily adopted.[74] Moreover, the narrative of Korea's post-independence history (e.g., division into North and South, military dictatorship, and recent transition to democracy) will inevitably inform the construction of legal meaning in Korea, and this itself should be enough to create a significant difference from the Japanese case.[75]

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[74] I am not suggesting that law during the colonial period was unambiguously perceived as an instrument of imperialist evil. Many Koreans made use of the legal system and participated in its operation in various capacities, and not all of them were criticized as "collaborators." For an enlightening study of the Japanese colonial legal system in Korea during occupation, *see* Chulwoo Lee, *Modernity, Legality, and Power in Korea Under Japanese Rule*, *in* COLONIAL MODERNITY IN KOREA 21 (Gi-Wook Shin & Michael Robinson eds., 1999). It is probably not a coincidence that many of the more interesting works on culture and law are being done in the context of legal pluralism created as a consequence of colonial rule. *E.g.*, M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975); Sally E. Merry, *Legal Pluralism*, 22 L. & SOC. REV. 869 (1988).

[75] For example, Yang Seung-Doo claims that the following historic moments must be taken into account as important milestones, or "breaks," in any narrative on Korean legal culture: i) the

At any rate, even without adopting the conception of culture espoused here, the difficulties involved in trying to identify just one element, out of many that make up Korean culture, as *the* characteristic that defines the workings of the law in Korea should be apparent. Neither Confucian tradition nor the experience of Japanese occupation can be picked out as the most dominant element of modern Korean culture. As is the case in virtually all countries of the world, Korea's culture today is a mixture of an enormous variety of elements, derived from all sorts of sources, and is already a "hybrid" culture. Moreover, it is constantly contested and through such contestation, it is being transformed. And, as noted above, one of the ongoing contests is precisely the proper place of Confucianism in the construction of modern Korean identity.

One aspect of the contest that must be noted here is that the concept of Confucianism itself is a social construct, a product of the discursive practices surrounding the issue of modern Korean identity. We must therefore take notice of the politics of Confucianism revolving around the question of who gets to define what Confucianism is, and who gets to use it for what purposes.[76] At issue is the cultural meaning of Confucianism in Korea.

As alluded to above, over the last century, Confucianism has been made to stand for many different things. In Korea today, Confucianism is still associated with many things, and therefore has many different cultural meanings.[77] On the historical side, Confucianism is of course associated with the teachings of Confucius, Mencius, and their followers found in the famous Four Books and Three Classics.[78] For some

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founding of Chosŏn dynasty; ii) period of opening up to the outside world in late nineteenth century; iii) Japanese colonialism; iv) American military government; v) founding of the Republic of Korea; vi) establishment of military regimes; and vii) restoration of civilian government. Yang Seung-Doo, *Hanguk Pŏpmunhwa Shiron* [*Preliminary Discussions on Korean Legal Culture*], 8 PŎPHAK YŎN'GU 15 (1998); *Hanguk ŭi Yŏksajŏk Tanjŏl-kwa Pŏpmunhwa* [*Breaks in Korea's History and Its Legal Culture*], 9&10 PŎPHAK YŎN'GU 13 (2000); *Hanguk Pŏpmunhwa Shiron (III)* [*Preliminary Discussions on Korean Legal Culture (III)*], 11 PŎPHAK YŎN'GU 1 (2001).

[76] Of course, this is a part of a larger East Asian debate on the relevance of Confucianism for the modern world, in which even non-East Asians occasionally participate as passionate interlocutors. The recent Asian Values debate is to my mind a prime example of this. Beyond the issue of whether Confucianism or other Asian values make democracy and human rights unsuitable for East Asians, the more insidious aspect of the debate that is seldom assayed is the question of why we should accept Lee Kuan Yew's definition or characterization of Confucianism as authoritative at all.

[77] For a more detailed study of the fortunes of Confucianism in modern Korea, see Michael Robinson, *Perceptions of Confucianism in Twentieth-century Korea*, *in* THE EAST ASIAN REGION, *supra* note 53, at 204.

[78] These refer to the basic Confucian texts. The Four Books are the *Analects*, *Great Learning*, *Doctrine of the Mean*, and *Mencius*, and they represent the orthodoxy established by the Cheng-Zhu school during the twelfth and thirteenth century, which was adopted by Koreans during Chosŏn dynasty. The Three Classics are the *Book of Poetry*, *Book of Documents*, and the *Book of Changes*, whose relative importance diminished with the ascendancy of the Four Books. Although it has always been recognized that the three were originally part of the Five Classics (the two others being

Koreans, Confucianism might also evoke the famous "ritual controversy" (*yesong*) of the seventeenth century, in which Confucian scholar-officials were allegedly consumed in a wasteful squabble over which funerary attire was ritually correct.[79] The most common inference drawn from these images of Confucianism is probably one of utter irrelevance insofar as life in modern day "democratic" Korea is concerned. Of course, there is the opposite, if somewhat more diffuse, image of Confucianism as a valuable national heritage. For example, two famous Confucian scholars of the Chosŏn period are depicted on two of the bank notes, a spot usually reserved for national heroes.

If we look for more contemporary reference points for Confucianism, the situation is equally ambivalent. That is, the images, or cultural meanings, associated with Confucianism in more recent Korean history are also quite complicated. On the positive side, as alluded to above, Confucianism is often held up as one of the cultural resources that made possible Korea's economic development. Also, the relatively low incidence of violent crime is sometimes attributed to the influence of Confucianism. Yet, on the negative side, because the most visible defenders of Confucianism in contemporary Korea happen to be the *yurim*, the archconservative traditionalists who still exert influence through the institution of *Sŏnggyun'gwan*,[80] Confucianism is sometimes considered a reactionary ideology. Alternatively, the term Confucianism might conjure up memories of the unpleasant experiences under past military regimes which attempted to create docile and submissive citizens through an ideology of "loyalty and filial piety" (*ch'unghyo*).[81] Again,

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the *Spring and Autumn Annals* and *Book of Rituals*), in modern Korea, the term *sasŏ samgyŏng* has become the idiomatic expression.

[79] For a reinterpretation of the significance of ritual propriety as a constitutional norm of a Confucian state, and of the ritual controversy as a debate of constitutional significance, see Chaihark Hahm, *Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?* J. KOREAN L., vol. 1, No. 2, at 151 (2001).

[80] Originally, *Sŏnggyun'gwan* was the name of the national college of the Chosŏn dynasty. Upon passing the lower level civil service examinations, the students, or the "licentiates" as they were called, entered the *Sŏnggyun'gwan* where they would study for the highest level examination, success in which qualified them for a position in the national bureaucracy. ECKERT ET AL., *supra* note 25, at 113-15. In modern Korea, *Sŏnggyun'gwan* survives as part of a modern university, but has no function in the recruitment of civil servants. Rather, it primarily serves as a power-base for the socially conservative, diehard Confucians who are able to organize themselves through this "voluntary association" into an interest group with nationwide membership, the *yurim* (literally, the "Confucian forest"). Thus, despite its numerical minority, the *yurim* continues to exert considerable influence over the conduct of Korean politics today. *See* Kim Kwang-ok, *supra* note 55, at 205, 216-18.

[81] For example, President Park Chung-hee established in 1968 the Academy of Korean Studies, whose mandate was to study, among other things, Confucianism as Korea's valuable "spiritual culture." For some progressive segments of Korean society, the mere fact that Park tried to promote Confucianism is reason enough for concluding that Confucianism is an anti-democratic ideology.

these are not things to which most people would attach positive values. In the former case, Confucianism is associated with anachronistic nuisances, and in the latter, with a positive evil. In both instances, Confucianism is associated with things blocking the progress toward a more democratic and humane society.

Needless to say, these cultural meanings are by no means stable. They are subject to change in response to the shifting social and political climate. And, in turn, the contest for the cultural meaning of Confucianism may become the stuff of political and social conflicts. The politics of Confucianism therefore involves all the usual processes and resources utilized in other contested, "political" issues.

One important such process or resource is the law—the power of the courts, both symbolic and physical, and the legal discourse surrounding the interpretation of the Constitution and other laws. Legal proceedings are being initiated with increasing frequency in which the courts must base their decision on some finding on the meaning and relevance of Confucianism in contemporary Korea. Of course, the technical legal issues involved in such cases will usually be whether or not someone's rights have been infringed upon. Yet, the underlying cultural issue is often whether or not pre-existing social norms derived from the Confucian tradition should be maintained or modified through the legal apparatus. For example, in a 1998 case, the Korean Supreme Court held that the owner of an apartment unit could not evict the tenants for failure to pay rent, where the tenants were the owner's own elderly father and ailing brother who were unable to find employment due to their poor health. The court suggested that as a matter of contract law, there might be no defect in the owner's argument, and yet went on to hold that to enforce such a right in this case would contravene the moral principles widely accepted by Koreans, and thus would constitute an abuse of the right.[82]

In this case, although no mention was made of the Confucian basis of that moral principle, it was inevitably read through the prism of the Confucian virtue of filial piety.[83] Initially, it may be tempting to

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Association with authoritarian rulers apparently precludes any possibility of its reinterpretation as a source or inspiration for democratic practices.

[82] Decision of June 12, 1998 (96Da52670).

[83] To be sure, the same decision might have been reached and justified through a law and economics approach in which the social cost of allowing children to evict their parents was calculated as outweighing any purported benefit of maintaining the integrity of contractual relationships. Yet, it should be noted that the court did not speak in those terms. More importantly, the case was not received or given meaning in those terms. *See, e.g., Pŏp-poda Illyun-i Usŏn [Human Morality Takes Precedence Over Law]*, CHOSUN ILBO [CHOSUN DAILY], June 13, 1998, *available at* http://www.chosun.com/w21data/html/news/199806/199806130143.html.

interpret this as a case in which the law was circumvented through the invocation of extra-legal, "cultural" values.[84] It might be seen as a classic instance of culture influencing the way in which law is applied. The power of culture is dictating the construction of legal meaning, thereby distorting the legal order. On this account, law is a passive medium at the receiving end of culture's influence. Yet, to stop there would be to miss the other half of the story of law's interaction with culture. For, the case can also be seen as one in which law was the active agent. Law is giving its recognition to Confucian tradition (at least the virtue of filial piety) as a still meaningful and valuable part of modern Korean identity. Law is actually reinforcing a norm derived from a cultural tradition whose relevance is being questioned increasingly. On this account, law and the authority of the courts are being enlisted to bear upon the process of negotiating the cultural meaning of Confucianism. Law and the courts are being implicated in the larger, ongoing cultural contest regarding what should count as a legitimate part of Korean identity and who should get to decide it.

In sum, the relationship between Korean law and Confucian culture can be described as a mutually constitutive one.[85] While law must operate in a cultural context and is influenced by the culture, that culture is in turn affected by the operation of law. This is not to say that most of Korean law deals with the issue of Confucianism in Korean culture; nor is it to say that cultural contest is only, or even primarily, carried out through law. Obviously, a considerable percentage of the laws have very little to do with expressly cultural issues, and numerous sites of contesting the cultural meaning of Confucianism surely exist outside the legal system.[86] Rather, this is just another way of saying that culture, which supposedly influences how law operates, should not be seen as static or seamless, and should be understood from a perspective that also allows for its own transformation through the operation of law. Obviously, this mutually constitutive relationship is not unique to Korea—it is probably a universal phenomenon. Yet, even if it were a universal phenomenon, the concrete manner in which law and culture are mutually constitutive will surely be different from country to country. In the Korean context, the

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[84] Of course, the decision itself was not based on extra-legal grounds. The theory of abuse of rights is a well-established part of the legal order itself, especially in civil law jurisdictions. Yet, there is no denying that the parameters of that doctrine are notoriously vague.

[85] On the mutually constitutive relationship between law and culture in the American context, see Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

[86] Spurred by the Asian values debate as well as the recent Asian financial crisis, some Korean intellectuals are beginning to articulate theories of "Confucian democracy" as an alternative to liberal democracy or social democracy. *See, e.g.*, CONFUCIAN DEMOCRACY: WHY & HOW? (Hahm Chaibong et al. eds., 2000).

Confucian signs, symbols, and rhetoric happen to occupy an important place in that process of mutual constitution.

V. CONSTITUTIONAL COURT AS ARBITER OF CULTURAL MEANING?

The creation in 1988 of the Constitutional Court introduced to Korean society an avenue for contesting certain long-standing practices whose normative meanings are supported by Confucian concepts, rhetoric, and symbols.[87] While a decided minority in terms of the total number of cases presented to the Constitutional Court for resolution, these cases merit our attention because they allow us a glimpse into the workings of the law within the politics of Confucianism in modern Korea. In the following, I shall introduce two such decisions rendered by the Constitutional Court, each of which involved in different ways a cultural contest concerning the relevance of Confucianism for the modern world.

A. The Place of Family Rituals in Modern Korea

One of the enduring aspects of the Confucian tradition in modern Korea is the practice of family rituals that can be traced straight back to the Song dynasty Master, Zhu Xi.[88] The term *kwan-hon-sang-je* (capping, wedding, funeral, and ancestor rite) in Korea still signifies the most important moments, or transitions, in a person's life. To be sure, the

[87] In this connection, Korea may be seen as an instantiation of Michael Davis's basic thesis that in East Asian countries, "constitutionalism" should provide the venue for discussions on cultural values. Michael C. Davis, *supra* note 8, at 131. His use of the word "constitutionalism," however, may be misleading to the extent that the term implies an already established form of political arrangement. Whatever "constitutionalism" may be found in East Asia is surely in the process of development, and one cannot simply assume that constitutionalism will be a better venue for cultural value discussions without keeping in mind that adjudication of issues relating to cultural values will inevitably have an effect on the development of constitutionalism itself. And whether such effects will be positive or negative, it is impossible to know *a priori*.

[88] Zhu Xi (1130-1200) is generally regarded as the great synthesizer of what is commonly called Neo-Confucianism, which was a Confucian revivalism that took place in China during the Song dynasty. Although his views were temporarily banned during his own lifetime, Zhu Xi's commentaries on the Confucian classics were ultimately given state sanction, when they were proclaimed as the basis for the civil service examination, and his interpretations became the basis of the orthodoxy for the following dynasties in China. For a study of the socio-political as well as the intellectual dimensions of the process by which Zhu Xi's interpretation of the Confucian tradition became the orthodoxy, see HOYT C. TILLMAN, CONFUCIAN DISCOURSE AND CHU HSI'S ASCENDANCY (1992). Zhu Xi was also revered by Korean Confucians during the Chosŏn dynasty, perhaps to a greater degree than by their Chinese counterparts. Whereas later Chinese scholars felt freer to dispute Zhu Xi's interpretations, Koreans exhibited a relatively more rigid tendency toward Master Zhu. In the 17th century, a number of Korean Confucian scholars who dared to suggest that Zhu Xi may have misunderstood the classics were branded as "heretics" and ostracized from the scholarly community.

ways in which they are performed today depart significantly from the prescriptions included in Zhu Xi's book *Jiali* (Family Rituals).[89] The "capping ceremony," the ritual celebrated to mark a person's coming of age, is rarely performed these days. Even the ancestor rites are performed less and less, with the society becoming more industrialized and urbanized. And when they are performed, they are done in a very simplified way to fit modern lifestyles.[90] While weddings and funerals are still observed (for the simple reason that people are still getting married and still dying), the "time, place, and manner" of these rituals differ markedly from the olden times.

Nevertheless, the term *kwan-hon-sang-je* still persists, and the idea that these occasions are a time for the family, friends, and neighbors to get together to share in the celebration, grief, and remembrance is a strong part of the culture. As such, there is a "cultural" code of conduct regulating the behavior of not only the person in whose honor these rituals are observed, but also the friends and family who participate in them. Particularly, in the case of weddings and funerals, where guests are to be expected, they are not merely "family" affairs for they also have an important "social" dimension. They provide one of the most important venues for social intercourse in Korea. They constitute the focal points in social life, at which the social bonds between people—between family members, friends, and even business partners—can be strengthened and renewed.

Given such important social dimensions of these occasions, it is not surprising then that under Confucian regimes they would have been subject to detailed regulation. In addition, given the importance of ritual propriety (*li* in Chinese, *ye* in Korean) for Confucianism in general,[91] these family rituals were naturally matters requiring the utmost care by not only the family but also the community and the state. Thus, in the

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[89] The *Jiali* was a practical handbook compiled by Zhu Xi, for performing the four basic family rituals. For the significance of the book and its historical background, see Patricia Ebrey, INTRODUCTION TO CHU HSI'S FAMILY RITUALS xiii (Patricia Ebrey trans., 1991). The book was widely adopted as the definitive articulation of the Confucian teaching on those rituals, and was utilized by Chosŏn Confucian scholar-officials as a tool for "Confucianizing" the Korean society. *See generally* MARTINA DEUCHLER, *supra* note 67, at 112-13; KO YŎNGJIN, CHOSŎN CHUNGGI YEHAK SASANGSA [INTELLECTUAL HISTORY OF RITUAL LEARNING DURING MID-CHOSŎN] 38-45 (1995).

[90] *See* Lee Kwang-Kyu, *The Practice of Traditional Family Rituals in Contemporary Urban Korea*, J. RITUAL STUD., vol. 1, No. 2, at 167 (1989). Nevertheless, at least twice a year, on *Sŏllal* (Lunar New Year) and *Ch'usŏk* (Mid-Autumn Festival), the majority of Koreans visit their family in their hometowns, causing nationwide traffic jams that turn all the highways into virtual parking lots. And one important part of these gatherings is the performance of the ancestor rite.

[91] *See generally* TU WEI-MING, HUMANITY AND SELF-CULTIVATION 5-34 (1978); For an elucidation of the Confucian concept of ritual propriety as a legal category, *see* Chaihark Hahm, *supra* note 79, at 169-79.

past, these were heavily regulated by the state.[92] Starting from what to say at each step of the ritual, to the duration of the ceremony, to the amount and kinds of food that could be served, and the dishes to be used, to the color and the fabric of clothes to be worn, every aspect of these family rituals was regulated. In pre-modern times, the prescriptions differed according to one's class status.[93] From the socioeconomic perspective, such regulations can be seen as a form of "sumptuary law," which is the technical jargon for regulations that prescribe what, and how much, to consume.[94] According to social historians, the usual purpose of these sumptuary laws, which could be found not just in Confucian societies but also all over the world, was to maintain and reinforce class distinctions (and perhaps to protect the manufacturers of the goods being consumed).

Until very recently, a form of Confucian sumptuary law regarding the family rituals was still in force in Korea.[95] Of course, given that Korea is a democratic country, the purpose of this law was not to maintain class distinctions.[96] On the contrary, this law was actually aimed at obliterating or minimizing any class distinctions. That is, it limited—across the board, as it were—the amount people could spend on food and drinks at family rituals, so that no one could indulge himself by

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[92] The Chosŏn dynasty compiled a ritual code called *Kukcho Oryeŭi* [*Standards of the Five Rituals of Our Dynasty*] in 1474, which specified the rituals to be observed by the royal family, the government, as well as ordinary people. The administrative code of Chosŏn, *Kyŏngguk Taejŏn* [*Great Canons for Governance of the State*], also included many provisions regarding the correct performance of ritual.

[93] For example, the administrative code, *Kyŏngguk Taejŏn*, provided that officials of the sixth rank and higher shall sacrifice to three generations of ancestors; officials of the seventh rank and lower shall sacrifice to two generations of ancestors; and commoners shall sacrifice only to parents. HANGUK PŎPCHE YŎN'GUWŎN, TAEJŎN HOET'ONG YŎN'GU [A STUDY OF *TAEJŎN HOET'ONG*] 208 (1994) [hereinafter TAEJŎN HOET'ONG YŎN'GU]. On the other hand, despite such distinctions made according to class in the law code (which in fact were based on the Confucian classics), the *Jiali* by Zhu Xi in many instances abolished class distinctions and prescribed the same ritual for everyone. Thus, toward the latter half of the Chosŏn dynasty, all literati and even some commoners began sacrificing to four generation of ancestors. In other words, the teachings of Zhu Xi enjoyed in certain instances equal, if not higher, status and authority than the official law codes.

[94] On the history of sumptuary laws, see generally ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW (1996).

[95] *Kajŏng Uirye-e Kwanhan Pŏmnyul* (*Law Concerning Family Rituals*), Law No. 4637. [repealed] [hereinafter Law Concerning Family Rituals]. Although this particular statute was promulgated in 1993 (and amended in 1997), the first government regulation concerning family rituals was introduced in 1969, which was later revised and strengthened in 1973. During the Japanese occupation, the colonial government also passed a ritual code (*Uirye Chunch'ik*) in 1934, which is seen by some as Korea's first "modern" regulation on Confucian family rituals. *See* Jang Sukman, *supra* note 45.

[96] The first sentence of the first article of the Korean Constitution proclaims that Korea is a democratic republic. Article 11 also states that no privileged caste or hereditary class shall be recognized.

turning these occasions into lavish and ostentatious extravaganzas.[97] Encouraging thrift and modesty, another set of Confucian virtues, was the law's objective.[98] In striving to diminish the possibility of any feelings of resentment between the rich and the poor, it was a very egalitarian piece of legislation in its inspiration.

Yet, in 1998, the Constitutional Court held parts of this law unconstitutional.[99] The relevant parts prohibited and prescribed punishments for the practice of serving "unreasonably" large amounts of food and drinks at weddings and other family rites. After initially banning all service of meals and alcoholic beverages during such occasions where guests are expected,[100] this law allowed an exception for food and drinks that were "reasonable in light of the true meaning of family ritual and ceremony."[101] The law also prescribed penal sanctions for violations.[102]

In its decision, the Constitutional Court started out by describing the practice of serving food and drinks on such occasions as part of an individual's "general freedom of action," which is protected, according to the Court, under the provision on the right to pursue happiness.[103] It then

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[97] For an interesting study of the cultural dimensions of consumption in relation to economic development in Korea, see DENNIS HART, FROM TRADITION TO CONSUMPTION: CONSTRUCTION OF A CAPITALIST CULTURE IN SOUTH KOREA (2001).

[98] Article 1 of the Law Concerning Family Rituals provided: "The objective of this law is to eliminate all empty formalities and ostentation, and to make more reasonable the ceremonial procedures, thereby curbing wastefulness and promoting wholesome social values." I am not denying the obvious economic purpose of the law. Excessive consumption was seen as detrimental to what used to be the paramount goal of the entire nation, economic development, and therefore was discouraged by the government. Similar motivations lay behind tax codes that imposed higher rates on consumer goods categorized as "luxury items." Yet, in both cases, the Confucian rhetoric of thrift and modesty could be brought into play to support the economic dimension.

[99] Judgment of Oct. 15, 1998 (98 Hŏn-Ma 168); 10-2 HŎNPŎP CHAEP'ANSO P'ALLYEJIP [KOREAN CONSTITUTIONAL COURT REPORTER] 586 [hereinafter KCCR]. The case was initiated by a constitutional petition brought by a prospective bridegroom who claimed that the law violated his right to serve food and drinks at his upcoming wedding reception.

[100] Law Concerning Family Rituals, art. 4(1)(vii). The same article also banned other practices such as the use of printed invitations to guests, distribution of presents to guests, the wearing of traditional mourning attire made of sackcloth, etc.

[101] The Law then delegated to the President the authority to define the precise scope of the exception. *Id.*

[102] Law Concerning Family Rituals, art. 15(1). The nature of the sanction was economic in that violators were subject to a fine of up to 200 million won. A larger fine was prescribed for operators of commercial establishments which rented wedding halls for a fee. *Id.* art. 14. The first government regulation on family rituals passed in 1969 did not prescribe punishments for violations and was therefore an "advisory" legislation. The sanctions were included with the 1973 revision.

[103] 10-2 KCCR at 596. The Korean Constitution contains an express provision guaranteeing the right to happiness. HŎNPŎP, art. 10. There is an ongoing debate among scholars about the exact nature and contours of this right. Some regard the provision as a mere declaration of a general principle or a guide for interpreting other more specific rights. Others argue that it should be read as an independent source of justiciable rights, i.e., of rights not enumerated in the already fairly extensive bill of rights part of the Constitution.

noted that the law is impossible to observe because it is not clear what "the true meaning of family ritual and ceremony" is and also because it is not at all obvious what constitutes a "reasonable" amount of food and drinks.[104] One of the requirements of the principle of *nulla poena sine lege* is that all elements of a crime must be clear and understandable beforehand.[105] This law violated this principle because it imposed criminal sanctions without clearly specifying what constituted a crime.[106]

The Court said that the government itself as good as conceded its vagueness when it constantly changed and amended the regulations and guidelines passed under that law.[107] In defending the law, the government tried to argue that the very fact that this law was passed is evidence of a general consensus among Koreans as to what constitutes "the true meaning of family rituals and ceremonies." But the Court retorted that every person has his or her own ideas about this and there is no consensus at all on this issue.

The case is obviously correctly decided insofar as the stated reason is concerned. What is interesting is that, here, we have a case where traditional customs and practices are being protected and justified through the invocation of highly individualistic, and arguably Western, principles. The right to pursue happiness is famously associated with Thomas Jefferson and the American Declaration of Independence.[108] This right to pursue happiness and the individual's "general freedom of

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[104] 10-2 KCCR at 597.

[105] In Korea, article 13 of the Constitution is interpreted as embodying this principle. It provides that no one shall be punished for acts that did not constitute a crime at the time they were committed. It also prohibits double jeopardy and retroactive restrictions on individual rights.

[106] In actuality, the punishments were rarely, if ever, enforced. A survey done in 1997 on excessive spending on weddings indicates that during the previous ten years punishments prescribed in the Law had never been imposed, and that while over 94% of the people surveyed knew of the existence of the Law, only 3.6% knew of its contents. Yi Kang-hyŏn, *Uri Nara Hollye Sobimunhwa-ŭi Munje-wa Kŏnjŏnhwa Pangan* [*Problems of Korean Culture of Consumption at Weddings and Proposals for Improvement*], *at* Hanguk Sobija Tanch'e Hyŏbŭihoe [Korea National Council of Consumer Organizations]: http://www.consumernet.or.kr/report/961203_2.html.

[107] The Court noted that the three implementing regulations (presidential decrees) promulgated in 1973, 1981, and 1994 varied the scope of exceptions allowed under the Law, and stated that such frequent changes make it impossible for citizens to know in advance what constitutes a criminal offense. 10-2 KCCR at 598.

[108] In legal documents, the right to pursue happiness was also proclaimed in the 1776 Virginia Declaration of Rights, passed just a month before the Declaration of Independence. As is well known, in the United States Constitution, no mention is made of the pursuit of happiness, and the Supreme Court's decisions rarely refer to that phrase except as explanations of the concept of "liberty" contained in the Fourteenth Amendment. *E.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (defining liberty to include, among other things, the right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

action" are being invoked in this case in the service of traditional family rituals and ceremonies that have their roots in the Confucian tradition.

The noteworthy aspect of this decision for our purposes is the inability of the Court to frame the issue in terms of the social meaning or cultural significance of the practice of serving food and drinks at such occasions. As mentioned, weddings and funerals have a social dimension that requires notice. Norms on how to hold such events define how to relate to others in a civilized manner. Proper observance of those norms is therefore a reflection of one's proper relationship with one's friends and neighbors. While using these occasions to show off one's wealth is to be frowned upon, not serving any refreshments to guests may also impair the "ritually correct" interaction with the community. Similarly, not knowing what constituted "reasonable amounts" improperly constrained one's ability to interact with the community.

Although included in the published decision of the Court was the petitioner's argument that traditional family rituals like weddings and funerals are part of the nation's traditional cultural heritage, which the state has a duty to sustain and develop,[109] this was never made an integral part of the Court's own reasoning. The petitioner also criticized the government for trying to regulate by law matters that are best left to social custom. In its response, the government also recognized that family rituals represent the most important aspects of national culture. Nevertheless, it argued that because the state has a duty to sustain and develop those cultural traditions, it was only fitting that the government should regulate them.[110] Such a paternalistic view of the role of the state is often regarded as a very Confucian perspective. By declining to comment on any of these claims, however, the Constitutional Court passed up a chance to engage in a much-needed discussion of the significance of Confucian-inspired legislation in modern Korea. The Court may be legally justified in having decided the case on the narrowest possible grounds, but it may still be faulted for raising these issues by including the claims of the petitioner and respondent in the decision, only to leave them untouched in its own reasoning.

This case is also interesting because it seems to highlight the complex and perhaps confused nature of the very discourse regarding the place of the Confucian tradition in contemporary Korean society. The Court clearly recognizes the importance of traditional Confucian family rituals, which still figure very prominently in the everyday lives of Korean people. Yet, the only tool with which they are equipped to

[109] HŎNPŎP art. 9.
[110] 10-2 KCCR at 593-94.

protect those rituals is a constitutional language that has its intellectual roots in the more modern, relatively individualistic Western political thought. It thereby substitutes an individualistic rationale for these family rituals in place of the more traditional communal or communitarian justification. The Court seems to be saying that Confucianism may have a place in modern Korea as long as it is consistent with the individualist premise of the rule of law rhetoric. Thus, although it is affirming Confucian culture, it is at the same time significantly weakening the cultural meaning of the specific Confucian practices at issue.

To make matters more confusing, at one point in the decision, the Court declares that by their very nature, family rituals and ceremonies cannot be understood or regulated in terms of "reasonableness" (*hamnisŏng*) because, according to the Court, reasonableness is basically a "Western" concept.[111] This commentary appears to be intended to express some nationalistic pride, by implying that proficiency in Confucian rituals requires a faculty much more subtle and complex than the instrumental and calculating faculty of reason. Yet, it does so at the expense of characterizing the Confucian culture as essentially "unreasonable." Aside from the hints of an orientalist attitude, this perspective is problematic because it is oblivious to the fact that the meaning of reasonableness is ultimately dependent on the cultural context.[112] If we recall that Korean culture is undergoing constant transformation and hybridization, we should also be mindful of the fact that what constitutes reasonableness itself cannot be immune from such change and renegotiation. To a certain extent, this case was an instance of that renegotiation. Yet, the Court seemed to assume that reasonableness had a stable core meaning, the content of which was "Western."

As a result of this decision, the government repealed the entire law, even though only the articles concerning service of food and drinks, and those prescribing punishments, were held unconstitutional. In its stead it promulgated a set of "guidelines," without the prescription of

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[111] 10-2 KCCR at 597.

[112] *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988) (for an influential philosophical statement of the proposition that the content and coherence of rationality are necessarily dependent on the specific intellectual tradition within which that particular conception of rationality operates). MacIntyre's way of understanding an ethical tradition, however, appears overly stringent insofar as it seems to assume that different traditions are necessarily incommensurable with each other. He seems to leave little room for the possibility of "hybrid" traditions. Instead, he envisions the present situation as a condition in which all great traditions of the past have lost their internal consistency, but people continue to live and use moral fragments (i.e., terms, ideals, and narratives) that used to belong to the various traditions—a condition which necessarily precludes the possibility of coherent moral arguments or of closure to moral disagreements. *See generally* ALASDAIR MACINTYRE, AFTER VIRTUE (1981).

punishments, designed to promote thrift and discourage excessive consumption.[113] According to one commentator, this was an instance of a case in which a legal norm promulgated by the state conflicted with the received norms of morality of the society (or its *mores*), and therefore failed to achieve its intended effect.[114] Yet, it is also important to note that, while the statute may have been a "failure" in the sense that it could not change people's behavior, the Confucian culture was nevertheless influenced, if not transformed, by the legal system. The importance of Confucian family rituals was reaffirmed by the Constitutional Court's decision, and despite the ruling that government cannot prohibit excessive spending, the cultural norm, which causes people to frown upon ostentatious shows of wealth on such occasions, persists. If nothing else, the case provided an occasion to rethink the place of Confucianism in modern Korean society.

B. Redefining the Concept of Marriage and Family

On July 16, 1997, the Constitutional Court decided another case directly reflecting this transformation of the Korean cultural context.[115] This decision dealt more explicitly with the issue of the place and the cultural meaning of Confucianism in modern Korea. The Constitutional Court held that an article in the family law section of the Civil Code was incompatible with the constitution. The article in question was a prohibition of marriages between persons who have the same surname and the same "ancestral seat."[116] In addition to prohibiting marriages between certain close relatives, which laws of most countries of the world do, the Korean Civil Code forbade marriages between anyone who had the same surname and the same ancestral seat.

The notion of "ancestral seat," or *pon'gwan* in Korean, is something unique to Korea, and it refers to a place, that is a geographical location, where a given surname is supposed to have originated from.[117]

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[113] *Kŏnjŏn Kajŏng Uirye-ŭi Chŏngch'ak mit Chiwŏn-e Kwanhan Pŏmnyul* [*Law Concerning the Establishment and Promotion of Sound Family Rituals*], Law No. 5837 (Feb. 8, 1999). Even before the Court's decision, there were discussions within the government that the previous law for all practical purposes had become a dead letter. *See, e.g.*, *Kajŏng Uiryepŏp Shilhyo-ŏpsŏ P'yeji* [*Family Ritual Law to be Abolished for Lack of Efficacy*], CHOSUN ILBO [CHOSUN DAILY], July 15, 1998.

[114] Choi Dai-kwon, *supra* note 57, at 79.

[115] Judgment of July 16, 1997 (95 Hŏn-Ga 6-13); 9-2 KCCR 1.

[116] MINPŎP [CIVIL CODE], art. 809(1).

[117] The Chinese name system is commonly believed to have been the model for that of Korea. Although precious little is known with any certainty, the Chinese custom of using surnames and given names appears to have been brought in with the introduction of the use of Chinese characters to Korea around the beginning of the common era. Therefore, the practice of distinguishing within

The idea is that if two persons share the same surname and the same ancestral seat, then they are descended from the same ancestor, and hence are members of the same family, or clan. For example, the most common surname in Korea is Kim, but even among the Kims, there are more than 280 different ancestral seats. This means that although two people might be both named Kim, as long as their ancestral seats are different, they are not considered "relatives," and are therefore free to marry each other.

The other side of the story, however, is that even though there are more than 280 different Kims, certain Kims from certain ancestral seats are so numerous that for example, the number of Kims from a place called Kimhae is currently almost 4 million.[118] This means that those 4 million people can never marry among themselves. Now, in a country of a little over 47 million people, it is easy to see that this is not an insignificant restriction on one's choice of marriage partners.

From the foregoing account, it might appear that this is such an absurd provision that it should have been a fairly easy case to hold unconstitutional. Yet, one must understand the place of this marriage prohibition within Korean cultural tradition. One must know that because it has been a part of Korean culture for such a long time, it still carries an enormous normative force among ordinary Koreans.[119] It has been taught for ages that this constitutes the backbone of proper family ethics. That is, people were taught to think that to marry someone with the same surname and same ancestral seat is the height of moral depravity, because that is essentially marrying within the "family," in other words, committing incest.[120] Anyone arguing against this prohibition therefore

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the same surnames according to ancestral origins may have also been a Chinese custom. In Chinese society (in both the People's Republic and Taiwan), however, the notion of an ancestral seat remains only as part of history or folk custom. By contrast, in Korea, it forms an integral part of a person's legal identity. It is not only that all Koreans know where their ancestral seats are, but also that it has become a legal concept. For example, a system of household registration known as *hojŏk* (family registry) is maintained by the government, and this is classified according to the surname and the ancestral seat. Also, many public records and official documents contain the ancestral seat as part of a person's basic identification information.

[118] 9-2 KCCR at 15. Citing a statistic from 1985, the Court noted that there were 3,892,342 Kims from Kimhae.

[119] As will be discussed below, there is disagreement regarding how long this practice has been a part of the Korean family system. Yet, even by a conservative estimate, it appears to have been a part of the Korean culture for at least a couple of centuries.

[120] Moreover, it must be noted that this prohibition was a "modified" version of the original, broader, and more stringent, prohibition found in the Confucian classics, according to which any two persons sharing a common surname (i.e., even with different ancestral seats) were forbidden from marrying each other. For example, in the *Book of Ritual*, the following instruction is found: "But there was that original surname tying all the members together without distinction, and the maintenance of the connexion by means of the common feast;---while there were these conditions, there could be no intermarriage, even after a hundred generations." 2 LI CHI: BOOK OF RITES 63 (James Legge trans., University Books reprint, 1967).

was seen as someone inciting people to commit immoral acts. This made it all the more difficult to advocate for the repeal or revision of the provision.[121] Marrying someone with the same surname and ancestral seat was simply not done—it defined the parameters of the people's conception of what a proper marriage in a civilized society should look like.

That is why it took so long before this marriage prohibition could be challenged in the Constitutional Court, as well as why the Court's decision was not unanimous.[122] Questioning the constitutionality of this prohibition therefore signified a contestation over the very definition of a civilized marriage, and by extension civilized family.[123] If we look at the Court's decision, and look at how the Justices disagreed with one another, we can actually see a clash between two opposing narratives, or perspectives, regarding the definition of family and marriage, and more generally the place of Confucianism in contemporary Korean society.[124]

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[121] There had been several attempts to have this provision of the Civil Code revised or repealed. The issue was seriously debated during the drafting of the new code after Korea regained independence from Japanese colonial rule. Yet, each time, the movement for revision was defeated by the organized effort on the part of the conservative Confucian group, *yurim*, who decried any proposal for revision as a proposal designed to corrupt the people's moral sensibilities and destroy the sanctity of marriage.

[122] 9-2 KCCR at 21. Seven of the Justices thought the prohibition was unconstitutional, while the remaining two wished to preserve it. Yet, even among the seven who agreed to the unconstitutionality, only five thought the provision should be voided outright. Two were of the opinion that, while unconstitutional, the provision should remain in force for the time being until the National Assembly could remedy the constitutional infirmity. Because the Constitution required a majority of six votes before a law could be held unconstitutional, the Court had to render a "modified" judgment of "incompatible with the Constitution" (*hŏnpŏp pulhapch'i*), with instructions to the National Assembly to revise or repeal the provision by the end of the following calendar year. If the National Assembly does not comply by that deadline, the provision will then automatically lose validity from that point on.

[123] The case that reached the Constitutional Court therefore had the character of what is often called impact litigation in that it was deliberately crafted by attorneys who actively sought out couples with same surname and same ancestral seats. These couples had tried to register their marriage (equivalent of obtaining a marriage license) with the local county office, but were unsuccessful because the local county official refused to register their marriage on the grounds that the law did not recognize theirs as a lawful matrimony. This could be easily policed because every married couple must write on the registration form not only their full names but also their ancestral seats. The couples then brought suit in the Seoul Family Court to seek a cancellation of the decision to deny registration and claimed that the underlying provision in the Civil Code was unconstitutional. The issue was then referred by court to the Constitutional Court.

[124] Most Korean commentators welcomed the decision as a breakthrough in a decades-long legal and political impasse. *See, e.g.*, Yi Hŭi-bae, *Tongsŏng Tongbon Pulhon-esŏ Kŭnch'inhon Kŭmji-roŭi Kaejŏng* [Revision of the Same-Name-Same-Ancestral Seat Marriage Prohibition Toward Prohibition of Marriage Between Close Relatives], KAJOKPŎP YŎN'GU [Studies in Family Law], vol. 12 (1998), at 215; Yun Yong-sŏp, *Tongsŏng Tongbon Kŭmhon Jedo-ŭi Wihŏn Yŏbu* [Constitutionality of the Same-Name-Same-Ancestral Seat Marriage Prohibition], *in* CHAEP'AN-ŬI HAN GIL: KIM YONG-JUN HŎNPŎP CHAEP'ANSOJANG HWAGAP KINYŎM NONMUNJIP [One Road Toward Adjudication: Festschrift for President of the Constitutional Court Kim Yong-jun on his Sixtieth Birthday] 208 (1998). Some, while generally agreeing with the outcome, criticized the

First of all, there was a clash at the level of national history, with regard to the provenance of this marriage prohibition. The majority who were in favor of abolishing the prohibition said that this rule was originally imported from China,[125] with Confucian teachings on the *zongfa* (family lineage system), and became part of Korean legal tradition only with the adoption of the Ming Code of China as Korea's penal code in the early 15th century.[126] Moreover, the majority states that the rule became firmly established only in the late seventeenth century.[127] The implied argument is that it was not a part of the "native" Korean marriage customs, and is therefore not worthy of preservation or respect. The dissenting Justices, on the other hand, defended the prohibition by describing it as a part of the national heritage from the time of Tan'gun, the mythical founder of Korean nation.[128] They also referred obliquely to

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Court's reasoning. *See, e.g.*, Chong Jong-sup, *Tongsŏng Tongbon Kŭmhon Kyujŏng-e Daehan Hŏnpŏp Pulhapch'I Kyŏlchŏng* [Decision of Incompatibility with Constitution Regarding the Same-Name-Same-Ancestral Seat Marriage Prohibition], *in* 1 HŎNPŎP PALLYE YŎN'GU [Studies on Constitutional Cases] 23 (Korean Association for Constitutional Cases ed., 1999); Kim Chi-su, *Hŏnpŏpchaep'anso-ŭi "Tongsŏng Tongbon Kŭmhon" Kyujŏng-e Daehan "Hŏnpŏp Pulhapch'i" Kyŏlchŏng-ŭi Non'gŏ-e K'ŏdaran Uimun-i Itta* [Serious Problems with the Constitutional Court's Reasoning in its Decision of "Incompatibility" on the Marriage Prohibition Case], SABŎP HAENGJŎNG [Justice and Administration], June 1998, at 48. For a reflection on this case which compares the different conceptions of the family in the Confucian and Western traditions, see Hahm Chaibong, *The Confucian Family as Civil Society?*, *in* CONFUCIANISM FOR THE MODERN WORLD (Daniel A. Bell & Hahm Chaibong eds.).

[125] Interestingly, according to Ch'u T'ung-tsu, although traditional Chinese law always had a general, broader prohibition against marriage between people of the same surname, this was seldom enforced in actuality. CH'U T'UNG-TSU, *supra* note 20, at 90-94. Geoffrey MacCormack also describes this as an instance of traditional legal rules which served symbolic rather than practical functions. GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 13, 47 (1996). In contemporary China, the laws of neither PRC nor Taiwan retain such prohibitions.

[126] Chosŏn Korea translated and "localized" the Ming Code and published its own "version," *Tae Myŏngnyul Chikhae* [*Direct Explanations of the Great Ming Code*]. It should be noted, however, that this contained the original, broader prohibition of marriages between couples of the same surname, which was to be punished with sixty blows and annulment of the marriage. TAE MYŎNGNYUL CHIKHAE 218 (Pŏpchech'ŏ ed., 1964). Even with the adoption of the Ming Code, Koreans apparently felt the prohibition contained therein was too broad, and observed the prohibition only among persons with the same surname and same ancestral seats. The official history of the Chosŏn dynasty records that even in the late 17th century, people with same surnames but different ancestral seats were marrying one another. HYŎNJONG SHILLOK [VERITABLE RECORDS OF THE REIGN OF KING HYŎNJONG] vol. 16, 10/01/04 (*musul*) (containing a complaint by the Confucian scholar-official Song Shi-yŏl that people are not following the broader prohibition). Perhaps in response to this, a later law code, *Soktaejŏn*, compiled in mid 18th century, included a provision that specifically pointed out, "Even where ancestral seats are different, if the surnames are written the same way, people shall not marry." 2 TAEJŎN HOET'ONG YŎN'GU, *supra* note 93, at 214. It appears, however, that this broader prohibition failed to be widely observed. In the code, *Hyŏngpŏp Taejŏn*, promulgated in 1905, during the last days of Chosŏn dynasty, the scope of the prohibition was narrowed to those with the same surname and same ancestral seat. Han Pok-ryong, *Hanguk Honinpŏp-ŭi Sachŏk Kich'o* [*Historical Foundations of Korean Marriage Law*], PŎPSAHAK YŎN'GU, vol. 11 (1990), at 49, 52-53.

[127] 9-2 KCCR at 11-13.

[128] 9-2 KCCR at 23.

a record in a Chinese history book, *Sanguozhi* (History of the Three Kingdoms), which includes, under a chapter on "Eastern Barbarians" (*Dongyi*), a description of the marriage customs of the *Ye* (*Wei* in Chinese pronunciation) people who lived to the east of China and who did not marry among people with same surnames.[129] For the dissenters, this custom was not a foreign import, as it predated the importation of the Confucian family lineage system by at least a thousand years. Alternatively, they argued, even if it had been imported, it had nevertheless been part of Korean traditional culture for almost 600 years, and was worthy of respect as "our own."[130]

Second, there was a clash between two views on the status, or the intrinsic worth, of the prohibition. The majority attached only an instrumental value to the rule. They regarded it as a tool for maintaining social order during the Confucian era—an era that, according to them, was defined by hereditary monarchy, patriarchy, hierarchical class distinction, and a self-sufficient agrarian economy.[131] Defenders of the rule, on the other hand, regarded it as a valuable norm in itself. For them, it was something that reflected the ethical value judgments underlying the customs and attitudes of even contemporary Koreans.[132] It is an intrinsic part of Korean tradition, custom, and culture, which continue to influence people's lives and whose legitimacy is recognized even today.

Third, and perhaps more importantly, there was a clash between two different readings of contemporary Korean society. The majority stated that with the recent industrialization, urbanization, other socio-economic transformations, Korea had undergone such a profound change that the prohibition lacked any ongoing social basis for its existence. People no longer thought of marriage in terms of a relationship between whole families, but in terms of a conjoining of two individual lives, based on their own free will.[133] Defenders countered that, despite all the momentous social transformations, there were no real visible signs of such rapid change in the people's attitude toward marriage.[134] They

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[129] *Id.* The majority opinion also noted this record, but dismissed it by declaring that there was insufficient evidence to equate this custom with the marriage prohibition that was at issue in this case. *Id.* at 12. *Sanguozhi* was a book compiled in 289 A.D. by Chen Shou (233-297 A.D.) of the Western Qin, and it chronicles the history of the Three Kingdoms period in China (220-288 A.D.). In accordance with the conventions of traditional Chinese historigraphy, it also contains chapters on China's neighboring peoples. As such, the chapter on the "Eastern Barbarians" includes much valuable information regarding the people who at that time inhabited Korean peninsula and Manchuria, and is consulted regularly by historians of Korea.

[130] 9-2 KCCR at 24.

[131] *Id.* at 13.

[132] *Id.* at 25-26.

[133] *Id.* at 14.

[134] *Id.* at 24-25.

observed that things like marriage customs are especially slow to change.[135]

Fourth, on a more "legal" level, there was a clash between different readings of the recent legislative debates regarding the revision or repeal of this prohibition. More specifically, the Justices disagreed about the nature of certain "special provisional laws" that were passed as stop-gap measures to deal with the reality of thousands of couples with the same surname and same ancestral seat who were already living together, had borne children, and considered themselves stable families.[136] Because they were not legally recognized as married couples, these "families" suffered many social, economic, and legal hardships, and the temporary laws were intended to alleviate some of these hardships. For example, their children were considered illegitimate, because they were born out of wedlock, and these families could not receive insurance benefits even though they had lived together for years with no intention of parting. Similarly, tax exemptions enjoyed by other families were unavailable to them because the law did not recognize them as "families." Given the rare instances in Korea of—and the negative social meaning attached to—unmarried couples living together, such couples had to live with the stigma that they were somehow morally deficient people. The special laws were designed to "redeem" such families by allowing them to register their marriage with the county office, and gain legal and social recognition as legitimate families.

According to the majority of the Justices, this itself was indirect evidence of the state's acknowledgement of the fact that the marriage prohibition had lost all normative power among Korean people.[137] Why would the state redeem such marriages if it were really serious about enforcing the rule? Defenders of the rule, on the other hand, claimed that such special laws had nothing to do with any change in the attitudes of the vast majority of Korean people regarding proper marriage.[138] The fact that the state chose to respond in a humanitarian manner to the hardships produced by unlawful acts did not render those acts lawful. The dissenters also pointed to the fact that the prohibition itself was never amended or repealed by the National Assembly despite so many attempts to do so, as evidence of the fact that people's attitude has not changed.

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[135] *Id.* at 22.

[136] At three different times, a law called *Honin-e kwanhan Tŭngnyepŏp* [*Special Law Regarding Marriage*] was passed (1977, 1987, and 1995), and as a result 44,827 couples were allowed for a limited period of time to register same-surname-same-ancestral seat marriages.

[137] 9-2 KCCR at 15.

[138] *Id.* at 26.

As expected, these disagreements were also reflected in the way that each side utilized and mobilized various constitutional principles and rhetorical symbols. The primary bases for holding this provision unconstitutional were the principle of human dignity and the right to pursue happiness, both of which are specifically provided for in the Constitution.[139] The majority stated that these rights presuppose the right to self-determination, which includes the right to sexual self-determination, the freedom to marry, and the freedom to choose one's partner in marriage.[140] Again, note the very individualistic orientation in this mode of argumentation. That is, the majority opinion chose to approach the issue of marriage law, and by extension the issue of cultural tradition, from a decidedly individualistic perspective.

By contrast, the dissenting Justices preferred to emphasize another principle enshrined in the constitution: the duty of the state to preserve and develop traditional national culture. For them, the pursuit of happiness itself could be allowed only the parameters of this national culture.[141] In addition, they criticized the majority for basing its decision on the so-called right to pursue happiness, a right whose precise nature, content, and contours are extremely vague and indeterminate.[142]

In striking down the marriage prohibition as unconstitutional, the majority at first glance appeared more enlightened and open-minded. Yet, interestingly, and perhaps unfortunately, they summon some problematic arguments to support their conclusion. First of all, the argument about the rule being a foreign import seems dangerously xenophobic and chauvinistic.[143] The nativist idea that a practice or custom is not worthy of our approval and respect if it is foreign, if taken to its extreme, would ultimately undermine the majority's own position insofar as the whole language of rights and freedom is a product of

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[139] HŎNPŎP art. 10.

[140] 9-2 KCCR at 16-17. In addition, the majority invoked Article 11(1) of the Constitution, which guarantees the equality of all citizens, and Article 36(1), which proclaims the principles of individual dignity and of equality between the sexes as the bases of all marriages and families. It reasoned that these provisions require that an individual be free to decide whether to marry or not, whom to marry, as well as when to marry. Furthermore, it argued that by prohibiting only marriages among paternal "relatives" (since a person's surname is determined by the father), and not among maternal relatives (since by definition maternal relatives would have different surnames), this was discrimination according to sex. *Id.* at 17-18. This part of the Court's reasoning has been criticized by many including those who agree with the outcome, for the people who are actually disadvantaged by the marriage prohibition are both men *and* women. The mere fact that the disadvantaged group is identified by reference to paternal, as opposed to maternal, relatives does not by itself constitute sex discrimination. Chong Jong-sup, *supra* note 124, at 44-46; Yun Yong-sŏp, *supra* note 124, at 218.

[141] *Id.* at 29.

[142] *Id.* at 29-30.

[143] Kim Chi-su, *supra* note 124, at 49.

Western modernity. More troubling is the assumption 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 "our culture" and "theirs." This is unfortunate because in some ways the very significance of the case lay in the fact that it encapsulated a moment in the ongoing process of hybridization between various cultural elements and renegotiation of cultural boundaries.[144]

As a result of this decision, the National Assembly was given the choice of either narrowing the marriage prohibition to a constitutionally permissible scope, or repealing it altogether.[145] It had until the end of 1998 to do so. As of this writing, it has done neither. Consequently, article 809 of the Civil Code is still on the books but without any force since January 1, 1999. Couples with the same surname and same ancestral seat can now lawfully register their marriage.[146] The main reason that the National Assembly has not taken any action is because the legislators do not wish to put their political careers in jeopardy. Especially for those National Assembly members from the rural areas where the opinion of the traditionalist *yurim* can influence election outcomes, the risk of losing their constituents' votes is very real if they

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[144] Among other problematic arguments made by the majority is the claim that modern Koreans no longer regard marriage as a link between two families but rather as a meeting of two independent, individual minds. This image may accord with the individualistic, rights-oriented, legal universe that lawyers were taught to imagine and perhaps even to inhabit. Yet, as a description of social reality in modern Korea, that cannot be true. While marriages arranged by families are becoming less prevalent than before, and while the role of the individual is assuredly increasing, it would be an exaggeration to say that Koreans today have generally adopted an individualistic view of marriage in which the families play only a marginal role. Even for couples who meet without the help of their families, the approval of their respective parents is still of paramount importance if they wish to get married. Especially for the parents' generation, the notion that a marriage is something in which the family must play a vital role is still very widespread. Yi Hyŏn-song, *Paeuja Sŏnt'aek Kwajŏng-ŭi Pyŏnhwa-wa Kyŏlchŏng Yoin* [*Changes in the Process of Selecting Spouses and its Causes*], KAJOKHAK NONJIP [FAMILY STUDIES], vol. 9 (1997), at 3.

[145] The Civil Code has separate provisions that forbid marriages within a certain degree of relatives, which includes maternal, as well as paternal, relatives, and certain in-laws. This means that even without the broader marriage prohibition, marriage within a fairly extended family is still not allowed.

[146] Even before January 1, 1999, such couples could actually register because of another irregular feature of the Constitutional Court's decision. While the Court merely found the prohibition "incompatible with the Constitution," rather than voiding the prohibition as unconstitutional, it also ordered the lower courts to suspend the application of the marriage prohibition provision. As such, it allowed for the registration of marriages although technically it did not strike down the prohibition. Critics thus charge the Court, I think rightly, for being disingenuous. It did not want to appear to go against a long-standing custom, and therefore could not declare it unconstitutional *simpliciter*, but then proceeded to nullify the effect of the prohibition while formally maintaining it. For the purpose of this paper, this may be seen as a reflection of the power of the cultural meaning attached to the marriage prohibition. Even though the Court agreed that it was time to let go of the prohibition, it did not want the stigma of allegedly corrupting the morals and destroying the sanctity of marriage.

appear to be tinkering with, to say nothing of repealing, the age-old marriage prohibition. Thus, even after the pronouncement of the Constitutional Court, the debate still rages on with regard to what should be the proper scope of marriage prohibition.[147] Despite the Court's position as the final arbiter of constitutional interpretation, it is not able to terminate the larger cultural debate.

However, not everything remains unchanged in the discourse on the cultural meaning of Confucianism. One effect of the Court's decision in this case has been a reconfiguration of the balance of rhetorical power. Although difficult to gauge, this change is not insignificant. Previously, despite the seeming absurdity and the very human hardship caused by the marriage prohibition, defenders of this rule could always invoke the rhetoric of morality. They appeared to occupy the moral high ground, and they were able to paint their critics as some radical social misfits bent on destroying the norms of decency. As long as the marriage prohibition was regarded as the backbone of family ethics, this was inevitable. With the Constitutional Court's pronouncement that this rule is unconstitutional, however, the critics of the prohibition can now invoke the authority—political and symbolic—of the Constitution as well as the highest court of the land to their advantage.[148] The decision lends respectability to the argument in favor of abolishing the rule. It is a legitimate argument that demands serious consideration rather than a crazy or immoral idea cooked up by some radicals.

The proponents of this argument are actually acting out a deep concern and sympathy for the families who have been suffering because of the prohibition. Their desire is to preserve the family, rather than to destroy the family. Thus, the *yurim* cannot, especially after this decision, accuse them of trying to desecrate the institution of family. What is really at stake is the very definition of the family. From one view, a family based on same surname-same ancestral seat marriage was no family at all; it was an abomination. According to the other view, any family based on the love and trust of the couple—as long as it is not incestuous or

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[147] While liberals would like to adopt a law prohibiting anyone within eight degrees of relations from marrying, conservatives argue that the prohibition should extend to ten or even sixteen degrees. Some ultra-conservatives even claim that the National Assembly should pass the same provision that was held unconstitutional by the Constitutional Court.

[148] As mentioned, the status of the Constitutional Court relative to the Supreme Court is still an issue requiring an institutional resolution. Nonetheless, among the populace, the Constitutional Court does enjoy some rhetorical surplus because it has created a reputation of being more sympathetic to the cause of democracy. The Supreme Court, on the other hand, still suffers from the image problem of being seen as part of the government bureaucracy dependent upon the goodwill of the executive branch.

homosexual[149]—is entitled to recognition as a legitimate family.[150] Another way to frame the issue might be to see it as a debate on how to reinterpret Confucianism. If one of the characteristics of Confucianism is the emphasis on family, then any argument about redefining the family can be seen as necessarily involved with reinterpreting Confucianism. Obviously, most people who advocated abolishing the marriage prohibition will recoil at the thought of being associated with Confucianism in any way. However, if they are about to redefine family, a core institution of Confucianism, they are inevitably involved in a deeply Confucian project.[151] The Constitutional Court's decision is thus situated right at the center of this deeply Confucian project of trying to redefine the family.

VI. CONCLUSION

The Constitutional Court is increasingly becoming involved in the politics of Confucianism in Korean society. While the decisions that it renders usually turn on narrowly defined legal issues, the Court is inevitably being drawn into the cultural debate concerning the relevance of Confucianism in modern Korea. It is becoming, willy-nilly, an interlocutor in the larger, ongoing discourse about Korean identity. As was seen in the two cases discussed above, the politics of Confucianism and law is made all the more complex due to the question of nationalism.[152] In the family ritual case, the Confucian tradition was

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[149] Those advocating the abolition of the prohibition usually do not go so far as to advocate same-sex marriage. As there is no strong gay and lesbian movement in Korea at this time, it is hard to know what the prospects are for recognizing same-sex marriage. However, in light of the fact that Article 36(1) of the Constitution provides that marriage and family life shall be based on the equality of the sexes, the assumption seems to be that a marriage should be between the different sexes.

[150] According to Choi Dai-kwon, this case is an example of how gradual changes in a society's ethical norms can bring about a change in the legal norms. For him, the very fact that the marriage prohibition was held unconstitutional seems to signify a transformation of in the general social norms regarding family morality. Choi Dai-kwon, *supra* note 57, at 80, 85.

[151] It bears noting that even Zhu Xi's own views on the family embodied in his book *Jiali*, and accepted as authoritative by generations of Koreans, were a product of a process of redefinition which involved renegotiation between the norms and practices of his own times and those of antiquity found in the Confucian classics. *See generally* PATRICIA B. EBREY, CONFUCIANISM AND FAMILY RITUALS IN IMPERIAL CHINA (1991). Indeed, as a living tradition, Confucianism has always undergone revisions and transformations through reinterpreting the classical texts in light of changed social and intellectual circumstances.

[152] The issue of nation or nationalism in the Korean context is too big a topic to be broached in this paper. Suffice it to say that while Koreans have had a unified state for over a millennium (in a sense, formed a "nation-state" long before its rise in the European context), Korean nationalism itself is a rather recent phenomenon. The question of whether the people of, say, the Koryŏ dynasty (918-1392 A.D.) considered themselves members of Korean nation in the same sense that modern Koreans understand that term is extremely difficult to answer. According to historian JaHyun Kim

defended against government regulation at least partially in nationalistic terms, while in the marriage prohibition case, the majority regarded it as an alien cultural imposition.

This of course is not surprising given the still ambivalent value of Confucianism for modern Koreans.[153] Depending on the issue at hand or the political ends sought to be achieved, Confucianism can be presented as part of a proud national heritage or it can be distanced and diminished as either an alien culture or a negligible part of the native culture. Doubtless, this ambivalence is due to the historical fact that even though Confucianism originated from China, during the Chosŏn dynasty, Korea managed to become the most thoroughly Confucian society in the history of the world.[154] Thus, when Confucianism is discussed for its positive role, say, in achieving economic development, Koreans can take some nationalistic pride in being the most Confucian society on earth, but when Confucianism is cast as a bane or a burden, Koreans can always point out that it was not a native tradition. Another way to put it is to say that when nationalism is triggered in opposition to a certain perceived imposition of "Western" standards, values, or practices, the national culture is usually defined in a manner capacious enough to include the Confucian tradition. Yet, when there is a need to narrowly define Korean culture for the purpose of identifying some purported national "essence," which distinguishes Korea from even her East Asian neighbors, Confucianism is

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Haboush, the *problematique* of Confucianism and Korean national identity actually began to be discussed in earnest in the seventeenth century when the "barbarian" Manchus conquered China and established the Qing dynasty, leaving Korea as the only "island" of civilization (i.e., Confucian culture) in the world. JaHyun K. Haboush, *Constructing the Center: The Ritual Controversy and the Search for a New Identity in Seventeenth-Century Korea*, *in* CULTURE AND THE STATE IN LATE CHOSŎN KOREA 46 (JaHyun K. Haboush & Martina Deuchler eds., 1999). *See generally* CHŎNG OK-JA, CHOSŎN HUGI CHOSŎN CHUNGHWA SASANG YŎN'GU [A STUDY OF THE KOREAN *ZHONGHUA* THOUGHT IN THE LATE CHOSŎN PERIOD] (1998). Yet, other scholars claim that the idea of a Korean nation was invented much later. Henry E. Em, Minjok *as a Modern and Democratic Construct: Sin Ch'aeho's Historiography*, *in* COLONIAL MODERNITY IN KOREA 336 (Gi-Wook Shin & Michael Robinson eds., 1999). What is clear is that with the experience of the Japanese occupation in the early part of the twentieth century, nationalism has become one of the defining frameworks for understanding modern Korean identity. What is equally clear is that Koreans nowadays simply assume that they have been a single, homogeneous "nation" from time immemorial. To that extent, the Korean case appears to be another instance of Benedict Anderson's observation that there is a curious disjunction between the "objective modernity of nations in the historians' eye vs. their subjective antiquity in the eyes of nationalists." BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 5 (2d ed. 1991).

[153] *See supra* notes 77-81, and accompanying text.

[154] There is general agreement on this among historians of East Asia and scholars of Confucianism. *See, e.g.*, EDWIN O. REISCHAUER & JOHN K. FAIRBANK, EAST ASIA: THE GREAT TRADITION (1960) (describing Yi (Chosŏn) dynasty Korea as the "model Confucian society"); Tu Wei-ming, *Confucianism*, *in* OUR RELIGIONS 139, 180 (Arvind Sharma ed., 1993) ("Among all the dynasties, Chinese and foreign, the long-lived Chosŏn (Yi) in Korea (1392-1910) was undoubtedly the most thoroughly Confucianized.").

liable to be categorized as a foreign import. By and large, this "nativist" strategy has unfortunately been the more salient one in Korean nationalist discourse, such that the more exclusivist a conception of national culture one has, the better one's nationalist credentials are understood to be.

Another point that merits mentioning here is that nationalism in Korea has been for the better part of the last century, a major ally of the forces of democracy. In other words, whereas in some other parts of the world, nationalism is often regarded with suspicion as an ideology of bigotry, xenophobia, fascism, and other anti-democratic values,[155] in the Korean context nationalism has often been regarded as the enemy of oppression and dictatorship. This no doubt stems from the experience of Japanese colonialism, when Korean nationalists were naturally perceived as freedom fighters. Even after independence, however, due to the fact that Korea was governed by a succession of repressive regimes, who were often seen as either insufficiently thorough in refuting the Japanese colonial past or too eager in coveting the support of the American "imperialist" interests,[156] people fighting for democracy could readily invoke the rhetoric of nationalism. In this political ideological landscape, ideals of democracy could easily be fused with nationalism. Moreover, it should not be surprising that this stripe of nationalism tended more toward the "nativist" conception in which the Confucian heritage still found in Korean society had no legitimate space. According to this conception, Confucianism represented hierarchy, feudalism, elitism, and male domination, and an enlightened, democratic, and progressive Korean nation had no use for such things.

This is why the Constitutional Court's majority in the marriage prohibition case could invoke this exclusivist and reified conception of Korean national tradition in support of a purportedly enlightened and democratic outcome. The very ease with which it could do so indicates the powerful legitimating force of nationalism as rhetoric and value in

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[155] Hitler's Nazi party and the ideology of purity of the Aryan nation is perhaps the best example of this tendency of nationalism. More recently, the public's response to the perceived popularity of Jean-Marie Le Pen during the last presidential election in France attests to the common association made between nationalism, xenophobia, and disrespect for democratic values. *Jean-Marie Le Pen: Superfascist*, THE ECONOMIST, Apr. 25, 2002, *available at* http://www.economist.com/displayStory.cfm?Story_ID=1098800.

[156] For example, Syngman Rhee has often been criticized for having retained the law enforcement apparatus left by the Japanese colonialists, and cutting short the effort by the first National Assembly to punish those who had collaborated with the Japanese. Similarly, Park Chung Hee's personal training at a Japanese military academy as well as his decision to normalize relationship with Japan in 1965 made him a target for the "nationalists." Chun Doo Hwan's regime was also "tainted" from the nationalist perspective because his coup and the Kwangju massacre was widely seen by many Koreans as having taken place under the blessing of the U.S. government and its military.

contemporary Korea. While the Korean Constitution itself includes relatively few references to nationalist ideals,[157] there is no doubt that the political phenomena that it is intended to regulate are suffused with the discourse of nationalism.[158] The problem is that, as is often the case with Confucianism, this notion of the Korean nation is actually a reified, essentialist construct that ignores many fluid and disparate elements. With the memory of Japanese colonialism still fresh in their collective memory, and faced with the imperative of national unification, Koreans are apt to forget the crucial fact that the idea of a nation, and more specifically, nation-state, is a very recent invention in the history of humanity, and to hypostatize it as a paramount value.[159]

In a sense, the politics of Confucianism is a reflection of the politics of nationalism. Just recently, the Court handed down a decision on the constitutionality of the provisions in the Criminal Code, which prescribed more severe punishments for crimes where the victim was one of the assailant's (i.e., defendant's) "lineal ascendants" (i.e., parents, grandparents, great grandparents, etc.).[160] Of course, as the Court noted, this is not a peculiarly Confucian or Asian phenomenon, for many countries of the West used to have similar provisions. Nevertheless, it was inevitable that in Korea the issue was read through the filter of Confucian virtue of filial piety. The Court also stated that the gravity of a crime and the severity of the punishment are matters that must accord with the society's values and "legal sentiments" (*pŏpkamjŏng*). After noting that similar provisions have been held unconstitutional in most European countries as well as in Japan, the Court went on to conclude that, in Korea, the prevalent legal sentiments still support such provisions. It was, as it were, making an assertion regarding the nationality of constitutional norms. The Court also argued that the severity of a

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[157] According to Choi Dai-kwon, the reference in the Preamble to the March 1st Independence Movement of 1919, the article on national territorial integrity (Art. 3), the article proclaiming the national goal of unification (Art. 4), as well as the principle of "liberal democratic basic order" are all constitutional expressions of nationalist ideals. Choi also astutely points out that for many countries that gained or regained independence in the post-WWII era, the very act of promulgating a written constitution can be seen as an expression of a nationalistic resolve to establish and secure the well-being of the nation. Choi Dai-kwon, *Minjokjuŭi-wa Hŏnpŏp* [*Nationalism and the Constitution*], PŎPHAK, vol. 25, no. 1 (1984).

[158] *See* Hahm Chaibong and Kim Seog-gun, *Remembering Japan and North Korea: The Politics of Memory in South Korea*, *in* MEMORY AND HISTORY IN EAST AND SOUTHEAST ASIA (Gerrit W. Gong ed., 2001).

[159] *See generally* BENEDICT ANDERSON, *supra* note 152; ERNEST GELLNER, NATIONS AND NATIONALISM (1983).

[160] Judgment of Mar. 28, 2002 (2000 Hŏnba 53). The same provisions in the criminal code had been the target of continuing criticism from liberal and progressive writers. *See, e.g.*, Cho Kuk, *Chonsok Salhaejoe-ŭi Chŏnje-wa Kŭn'gŏ-e Daehan Jaegŏmt'o* [*A Reexamination of the Assumptions and Foundations of the Provision on Murder of Lineal Ascendants*], HYŎNGSAPŎP YŎN'GU [STUDIES IN CRIMINAL LAW], vol. 16, Special Issue (2001).

punishment are matters of policy in crime prevention and that the aggravated punishments for crimes against one's lineal ascendants served legitimate criminal policy goals in Korea. The clear implication was that such policy matters should reflect the specific cultural and historical context of the nation, and that at least this particular element of the Confucian tradition was a part of the national culture.[161]

For the purpose of this paper, the decision also illustrated the most common attitude toward law and culture. The law is a reflection of the culture's norms and values, and in order for law to be effective or valid, it must accurately reflect those norms and values. On this view, cultural change, and ambiguities, contradictions, and gaps within culture, are not in the foreground. Perhaps they are not categorically denied, yet neither are they made the focus of inquiry. Equally neglected is the dimension of the law's agency in the process of cultural change. Law is merely a passive instrument whose operation can be either promoted or impeded by the culture. There is no room for the law's participation in the creation or transformation of cultural meaning.

In this paper, I have attempted to formulate an approach that avoids these shortfalls. I wished to emphasize the dynamic aspect of culture and highlight the law's entanglement in the process of cultural negotiation and adaptation. I tried to illustrate the approach through a couple of case studies. As noted above, the Korean Constitutional Court is being asked to adjudicate matters in which the cultural meaning of a given practice or institution must be identified, affirmed and/or changed. That it is not particularly well prepared for the role is perhaps obvious. The unfortunate thing is that the primary tool with which it can fulfill that role is the text of the Constitution that does not really accord any space for culture or Confucianism. The fact that the constitutional adjudication system was addressed and created almost as an afterthought in the drafting process does not help either.

Nevertheless, it may be that in modern Korea, the constitutional adjudication system is one of the very few venues through which people can engage in a cultural debate on the relevance of the Confucian tradition for modern Korean identity.[162] For one thing, constitutional litigation forces the competing parties to articulate their positions and to refine their arguments. Constitutional adjudication is also a site at which

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[161] At the same time, the Court denied that the purpose of the provision is to enforce by law the Confucian virtue of filial piety. Yet, it did argue that given the Confucian-based traditional culture of Korea, respect for one's parents and ancestors is still an integral part of the social ethic of modern Korea, and not merely an irrelevant relic of the feudal past.

[162] In relation to nationalism, Choi Dai-kwon similarly argues that the Constitution must operate as the framework for promoting nationalism as well as checking its potentially destructive tendencies. Choi Dai-kwon, *supra* note 157.

the newer language of rule of law and individual rights becomes intermingled with the older language informed with Confucian signs and symbols. In that sense, it provides a particularly good opportunity and arena for exploring the interface between law, culture, and Confucianism. The eminent anthropologist Clifford Geertz once said that the law is a system of meaning, and a way of "imagining the real."[163] By enabling the process of renegotiation of Confucianism's cultural meaning, perhaps the Korean Constitutional Court will one day allow us to imagine a new reality expressed through a new "Confucian" rule of law language that can also address the question of national identity in modern Korea.

[163] CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 184 (1983).