

Congressional-Executive Commission on China Hearing

“Law in Political Transitions: Lessons from East Asia and the Road Ahead for China”

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I. Introduction

I have been involved with Northeast Asian legal issues in various ways since the mid-1980s, when I went to China to teach and then to study. I was an attorney in private practice in Seoul from 1990 to 1994, after which I went to Harvard Law School, where I focused on Northeast Asia in earning LL.M. and S.J.D. degrees. At the University of Wisconsin Law School I am Assistant Director of our East Asian Legal Studies Center, and I regularly teach and write on Northeast Asian legal issues. I just returned from three months as a visiting scholar in Japan, at the Nagoya University faculty of law.

Turning to the topic of this panel, in my view, the South Korean experience of law and democratic transition gives us only limited cause for optimism when we imagine China's future. I will provide the basis for my views, but first would like to present a very short overview of South Korean legal development, then describe the role of law in South Korean authoritarianism.

II. South Korean Law Overview

South Korea's modern legal system is closely related to the Japanese system, which was modeled primarily on German law. Japan imposed its legal system on South Korea during the colonial period, which lasted from roughly 1910 until 1945, and after independence South Korea did not radically reform the basic structure of its legal system. Unlike the U.S., South Korea has a single, bureaucratically organized judiciary, and a unitary legal system. Law is a popular undergraduate major in South Korean universities, but only a tiny percentage have been allowed to pass the national bar exam, and thus the practicing bar is very small. Unlike Japan, South Korea has a Constitutional Court as well as a Supreme Court, introduced in the democratic constitution of 1987.

III. Law in Authoritarian South Korea

South Korea was essentially authoritarian from 1948, when the U.S. military government handed back sovereignty, until 1987, when the first truly democratic elections were held, and the transition to full democracy began. South Korea's authoritarian governments, though stridently anti-communist and important U.S. allies during the Cold War, abused human rights in ways reminiscent of things one hears about in China today. While these abuses were certainly not of the scale that have taken place in China, the conditions and mechanisms under which they arose were sometimes strikingly similar.

For example, due to the institutional weakness of the South Korean courts, authoritarian South Korea's various constitutions functioned more like policy statements than as fundamental law defining and constraining political power. Administrative law hardly functioned for decades, meaning that government agencies were only very weakly constrained by judicial review in their dealings with citizens and private economic actors. Property rights were enshrined in the various constitutions, and were well-specified in the German-style codes inherited from Japan's colonial rule, but remained ultimately contingent upon maintaining political favor, as from time to time the government confiscated property from those whose support for the regime wavered, and who thus breached the implicit compact between the authoritarian state and its leading economic actors. The executive thus enjoyed enormous discretion when dealing with the private sector, and while such discretion was part of authoritarian control, administrative discretion was also at the heart of the interventionist industrial policy which South Korea practiced as it grew in to an economic superpower.

With respect to civil society, the South Korean government worked hard to neutralize organized labor by, among other things, demanding that unions belong to the single, government-dominated Federation of Korean Trade Unions (FKTU). This served the dual purposes of suppressing wages and of controlling the rise of an autonomous civil society. Other elements of civil society, such as religious groups or business interests, were also subjected to severe pressures not to challenge the government's basic monopoly on political authority. The South Korean CIA (KCIA), an enormous organization relative to South Korea's population, was a primary tool for this government penetration of civil society, insinuating itself into churches, unions, newspapers, student organizations and work places far beyond what we would understand as necessary, even given the extremely serious security threats posed by North Korea.

The criminal law was another important tool of authoritarian control. For example, in 1974 and 1975 President Park, Chung-hee issued a series of notorious Presidential Emergency Decrees which, among other things, made it a crime to criticize the constitution, to propose revision thereof, to "fabricate or disseminate false rumors," or to "defame" the Emergency Decrees themselves. Emergency Decree No. 1 dispensed with the warrant requirement for arrest, detention, search or seizure, with trials to be conducted by "Emergency Courts-Martial" established under Emergency Decree No. 2. Conviction under Emergency Decree No. 1 could result in a prison sentence of up to

fifteen years.¹ Many people were charged under these decrees, including a former President of South Korea, and a defense attorney who reportedly received a fifteen year sentence for criticizing the Emergency Courts-Martial in the closing argument he made in the course of defending a client.

Extra-legal means were also regularly used to silence the government's critics. Many will remember that in 1973 South Korean agents in Japan kidnapped Kim, Dae-jung, later the president of South Korea and a Nobel Peace Prize winner, and it was reportedly only intervention by the United States that kept them from murdering him. Less well remembered is Professor Choi, Jong-gil, of the prestigious Seoul National University law faculty, who died under very suspicious circumstances while in KCIA custody for his criticisms of the Park regime. Critics of the government were sometimes kept under house arrest or subjected to similar forms of control without legal basis. Furthermore, democracy activists who were arrested on dubious grounds were sometimes released if they would provide written promises not to continue their activities. Such statements could then be used by the authorities as justification for punishing those who returned to political activities. At times governments also reached beyond the political activists themselves to punish their family members.

President Park was assassinated by his own KCIA chief in 1979, but South Korea's poor human rights performance continued under General Chun, Doo-hwan until 1987, when massive civil unrest convinced General Chun to allow the creation of a new constitution and democratic elections. General Roh, Tae-woo won the 1987 election, so South Korea had to wait until 1992 to have a civilian president, the former opposition leader Kim, Young-sam. Regular elections followed in 1997 and 2002, and democracy is now firmly established.

IV. Lessons from South Korea's Past for China's Future

As I said at the outset, my reading of the South Korean experience suggests to me that reform in China is going to be a very long, slow process. I would like to now outline what I see as reasons for pessimism, then suggest reasons for optimism.

First of all, South Korea's poor human rights record continued despite the fact that the country had become an economic powerhouse with an essentially capitalist economy. This suggests that even a very successful market economy cannot be relied upon to automatically unleash social forces potent enough to bring about democracy or the Rule of Law. The South Korean case suggests instead that law can be kept under political control for a very long time, even after a country has become quite wealthy. South Korean business interests, for example, were unwilling or unable to exert significant demand for the Rule of Law, as some approaches to law and development suggest they would have. Big business was instead entwined in a corrupt, non-law based relationship with the executive and the ruling party, the legacy of which continues to this day. Nor is the technical development of law and legal institutions necessarily going to lead directly

¹ Presidential Emergency Decree No. 1, effective January 8, 1974.

to the sorts of legal and political reforms that many hope for in China. In authoritarian South Korea there was a technically complete, coherent system of law, many students majored in law at university, and the few who became judges, prosecutors, or private practitioners were well educated and very talented. At various times these talented, well-educated lawyers, judges, and prosecutors did resist the authoritarianism of the executive branch, but most chose instead to work within a system that rewarded them very well, but demanded obedience.

A further cause for concern is based upon structural differences between authoritarian South Korea and China today. In South Korea's case there were structural limits on the powers of the executive branch that are not present in the Chinese context, one of which was the relationship with the United States. While America's approach to South Korea was complex and sometimes contradictory – generally supporting the authoritarian governments for strategic reasons while specific individuals and institutions worked hard to support political and human rights reforms there – the pro-democracy, pro-human rights pressures being exerted from the United States enjoyed a degree of influence over South Korea that no outside force will ever again have over China. While the international climate may now be less tolerant of authoritarianism than it was during the Cold War, China is truly sovereign in a way that South Korea was not.

In addition, although South Korean dictators tried hard to suppress civil society and to organize it along corporatist lines, they faced obstacles that China doesn't face. South Korea's Christian churches, Catholic and Protestant, and often with support from churches in the United States, were pillars of resistance to human rights abuses that the governments were never able to control, though they certainly tried. The South Korean student movement as well was an active source of resistance for decades, drawing on a tradition of student activism dating back to the early 20th century. Labor unions also resisted repressive government labor policies, fighting to organize independent unions and maintaining consistent pressure for democratization. In China today such forces seem weaker than they were in South Korea even at the height of its authoritarianism. While religion is growing in importance in China, the churches don't yet appear to be significant actors in civil society, and the government is clearly committed to keeping them from playing such a role. Meanwhile, students in China today don't appear willing to take the risks necessary for collective political action, which Tiananmen Square showed could result in the ultimate sacrifice, and the government appears to have been quite successful in resisting the organization of independent labor groups. And while the press in China is certainly more vibrant and loosely controlled than it used to be, it seems still more subject to government control than the press was in authoritarian South Korea.

Finally, South Korea, arguably like the Soviet Union in its last days, was really led by one man, or a very small group of men, who had the power to bring the system to an end when the time finally came. Such concentrated authority was what made the system authoritarian in the first place, but perhaps paradoxically it may also have allowed for quite sudden political reform because there were fewer players whose interests had to be taken into account. Political authority in China today seems much more dispersed, which

could make the system more resistant to dramatic reform than the South Korean system was.

Despite these reasons for concern, there are also grounds for optimism. First, human rights in many areas can be improved within an authoritarian capitalist framework, which seeks to govern for the most part through law and order and bureaucratic regularity rather than uncontrolled bureaucratic discretion or Maoist ideological campaigns. Recent reforms to China's criminal and administrative law can be understood in this light, for example. But this legal regularity and bureaucratic normalcy may not extend to civil and political activities that challenge state power, and the state retains the discretion to define what constitutes such a challenge.

Second, globalization and new information technologies clearly make it much harder to control China's rising civil society than was the case in authoritarian South Korea, where the government could more successfully control cross-border and domestic information flows. Combined with the fact China is much bigger and more socially diverse than South Korea, this must increase the difficulty of maintaining stable authoritarian rule.

Third, the international economic order now seeks to place demands upon national legal systems that are more exacting than the demands placed upon authoritarian South Korea, and foreign direct investment plays a larger role in China's economy than it ever did in South Korea's. Although China employs many of the interventionist, highly discretionary industrial policy measures that South Korea did, there is considerable pressure for more law-based economic governance. And while the impact of international economic integration as a force for political liberalization or the Rule of Law is easily overstated, it probably does play some positive role.

Finally, and most important, there are many people in China today who reject the idea that they are not ready for democracy, the idea that as East Asians they value order and hierarchy over individual rights, or the idea that political liberalization must be postponed until China's economy attains some magical level of Gross Domestic Product per capita. The study of history does not provide us with "laws," and while South Korea's experience suggests that legal and political reform in China is likely to be a long, slow process, I believe the aspirations of the Chinese people make progress inevitable.

Thank You.