1 *Introduction*

This book is a history of the courts in South Korea from 1945 to the contemporary period. It sets forth the evolution of the judicial process and jurisprudence in the context of the nation's constitutional changes and political vicissitudes. Modern Korean history has never had a dull moment. The nation's division following independence from Japanese colonial rule (1910–1945) erupted into the Korean War (1950–1953), and the confrontation between North and South Korea continues to this day, keeping the peninsula on a seemingly perpetual high alert. South Korea's rapid transformation from a war-torn former colony to a global economic powerhouse and, above all, its peaceful evolution from authoritarian rule in the 1970s and early 1980s to a vibrant democracy have brought much adulation from the outside world, as well as confidence and pride for Korean people. Behind all this attention, however, lies a source of profound national self-rumination. As the country evolves into a mature democracy, the challenge of evaluating its not-so-distant, less-than-liberal past has posed serious questions for scholars and the general public alike, often giving rise to deeply divided and ideologically tinged debate. Central to this discussion is the role of the courts in the nation's political transitions.

Since democratization in 1987, the Supreme Court of Korea (Taebŏpwŏn), the highest court from the birth of the Korean republic in 1948, and the ordinary courts it headed have been subject to criticism for their supposedly dismal record in protecting citizens' rights during the authoritarian years. The backlash against the judiciary is in line with the recent trend in historiography to draw a sharp line between the pre- and postdemocratization eras, contrasting the republic's early years under conservative rule with the subsequent years under more progressive rule. This demarcation has yielded a lopsided view of the judicial past, paying scant attention to the courts of the pre-1987 period while highlighting their post-1987 activities.

Historical writings on the judiciary seem reflective of a chasm running deep in Korean politics and society, something that the remarkable achievement of democratization has not blotted out; rather, the advent of liberal democracy may have exacerbated the problems by bringing them to light. The cold-war crisis in the postwar years not only resulted in the north–south divide but also created profound fissures among South Koreans. There exist two contending narratives of modern history, largely predicated on the appraisal of the governments that ruled Korea in its first several decades. Since the beginning of the republic, successive regimes devoted major efforts to fending off threats from the communist North and suppressed or sidelined political opposition that they perceived as a threat to national security. One current of historical discourses sees these early years of the republic as a period of existential struggle, which entailed certain coercive political practices that were dictated by the exigency of the nation's survival. The opposing narrative contends, in contrast, that provocation from North Korea was exaggerated by the regimes to maintain their grip on power. While the first view highlights economic developments in the 1960s continuing into the 1970s and the 1980s, the second view points out that South Korea's industrialization during this period was accompanied by tremendous suffering and sacrifices by workers.

This discursive divide, with acute sociopolitical underpinnings, can also be seen as a generational rift. The older generation expresses frustration at the younger folk's seeming indifference to the struggles it had undergone to ensure the nascent republic's survival and to pave the way for prosperity. In turn, the younger generation shows less tolerance for illiberal rule and beholds the democratization in 1987 as the renewal of the true ideals of the republic that allegedly had long been compromised and distorted by cold-war politics. These competing viewpoints have proved difficult to reconcile, as they sharply split public opinion and shaped rigid political contours of historiography. The history of the judiciary in its first forty years has mostly been written from the second perspective. General consensus among scholars and observers is that the governments before democratization effectively curbed the authority and power of the judiciary, which became a powerless bystander or, worse, a silent abettor of the repressive regimes.

The Supreme Court's record indeed appears a far cry from the remarkable stride made by the Constitutional Court of Korea (Hŏnpŏp Chaep'anso). The Constitutional Court, which opened its doors in 1988,

is arguably the most successful and pivotal institution in modern Korea. Free from baggage of the past, the constitutional tribunal has served as the symbol of a break in Korea's judicial as well as political past. The juxtaposition of the new and the old courts then raises a question why the ordinary courts were unable to exercise judicial muscles to protect individual rights as vigorously and effectively as their new constitutional counterpart. The Supreme Court has received little attention in recent scholarship. The disparity between the fecund and ever-increasing amount of literature on the Constitutional Court and the paucity of serious works on the Supreme Court attests to the general scholarly disenchantment with the latter. Scholars have so far tended to focus on the political ramifications of judicial activities, without adequate attention to their legal meanings. They often shied away from studying the courts under authoritarian rule in depth, apparently on the assumption that such an effort would amount to legitimizing the illiberal governments. But glossing over the period as a sort of lost era and writing off the courts as inevitable occurrences of autocratic rule contribute little to the understanding of the nation's modern history. This book undertakes an empirical study of the role of the ordinary courts in South Korea (hereinafter referred to simply as Korea) under particular legal orders with emphasis on judicial decision-making, considered in the broader theoretical contexts of the rule of law and judicial independence.

A brief outline of Korea's constitutional evolution is in order. The country's record of constitutional revision has often been contrasted with Japan's. Both countries adopted a liberal constitution after World War II under US aegis. While the Japanese Constitution, promulgated in 1946, has never been amended, the Korean Constitution of 1948, the first constitution following independence, has undergone as many as nine revisions.[1] The founding Constitution of the republic created an independent and professional judiciary under the solid principle of the separation of powers. The strong executive power under President Rhee Syngman (Yi Sŭng-Man) (1875–1965) during the First Republic (1948–1960) often dwarfed the judiciary, and the government undertook constitutional revisions in 1952 and 1954 to push through its political agenda, but the courts largely

[1] The Constitution of the Republic of Korea [Taehanminguk Hŏnpŏp] (July 17, 1948). The transliteration of Korean characters follows the McCune–Reischauer system.

maintained their autonomy.[2] The Rhee regime came to an abrupt end in April 1960 after democratic protests forced the president to step down. The Second Republic (1960–1962) adopted a parliamentary government system and envisioned progressive reforms such as the election of judges.[3] Within a year, however, the government was toppled in May 1961 by a military coup waged by General Park Chung Hee (Pak Chŏng-Hi) (1917–1979). A new constitution was issued in December 1962, marking the beginning of the Third Republic (1962–1972), and Park took office as president in October 1963.[4] Under this democratic Constitution, the Supreme Court exercised unencumbered judicial review power.

The political climate quickly changed in 1969 when President Park led the constitutional amendment to allow him a third presidential term.[5] In 1972, Park spearheaded the promulgation of a new constitution, ushering in the Fourth Republic (1972–1980).[6] This document, commonly known as the Yusin (revitalization) Constitution, concentrated power in the president's hands. Political opposition was suppressed by laws backed by the constitutional provisions that explicitly limited civil liberty and human rights. After seven years of heavy-handed rule, Park was assassinated in October 1979. The ensuing military coups brought General Chun Doo Hwan (Chŏn Tu-Hwan) to power, and the Fifth Republic (1980–1987) began.[7] Authoritarian rule continued until 1987, when it gave way to popular demands for democracy. The new liberal democratic Constitution that was promulgated in October of that year remains in force today.[8] The Sixth Republic has witnessed peaceful changes of power since (one president was removed by impeachment in 2017).

These checkered political trajectories, with all-too-frequent constitutional revisions in tow, have had serious repercussions on the judiciary. Of particular poignancy was the 1972 Constitution, under which provisions guaranteeing fundamental rights stood side by side with provisions stipulating the limitation of the same rights. The Constitution allowed for broad emergency powers, and President Park ruled with a series of

[2] Constitution (July 7, 1952); Constitution (November 29, 1954).
[3] Constitution (June 15, 1960); Constitution (November 29, 1960).
[4] Constitution (December 26, 1962).
[5] Constitution (October 21, 1969).
[6] Constitution (December 27, 1972).
[7] Constitution (October 27, 1980).
[8] Constitution (October 29, 1987).

draconian emergency decrees (*kingŭp choch'i*) that were placed outside judicial review power.[9] In comparison, the Constitution of 1980 was overall a democratic document, other than the method of electing the president by an electoral body, a holdover from the previous era. The legal orders during the Fourth and the Fifth Republics were thus qualitatively dissimilar, although authoritarian politics continued. The clashing narratives of modern Korean history center on the Fourth Republic. The following chapters focus mainly on the 1972 Constitution and the thorny problems it posed to the courts.

The State of Questions

The Yusin Constitution ushered in constitutional authoritarianism, in which government abuses were committed with constitutional authority. The problem with authoritarian legalism is obvious: an independent judiciary is a condition necessary for the operation of the rule of law, but a judiciary bound by an illiberal constitution and laws can impede the very ideal of the rule of law, which could effectively pit judges against justice. The courts and judges in authoritarian regimes have of late become a subject of increasing attention.[10] This development coincides with the recent tendency among legal theorists to take a more critical look at the coherency of the notion of the rule of law.[11] Traditional scholarship has equated the rule of law with political liberalism in a democratic regime, different from rule by law under which law is used by the government only to legitimize its illiberal policies. But studies have shown that the rule of law exists in

[9] Constitution (1972), Art. 53(4). For the Park presidency, see Byung-Kook Kim and Ezra F. Vogel (eds.), *The Park Chung Hee Era: The Transformation of South Korea* (Cambridge, MA: Harvard University Press, 2011); Hyung-A Kim and Clark W. Sorensen (eds.), *Reassessing the Park Chung Hee Era, 1961–1979: Development, Political Thought, Democracy, and Cultural Influence* (Seattle: The Center for Korean Studies, University of Washington Press, 2011).

[10] See, among others, Hans Petter Graver, *Judges against Justice: On Judges When the Rule of Law Is under Attack* (Heidelberg: Springer-Verlag, 2015).

[11] Joseph Raz, "The Rule of Law and Its Virtue," *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009, 1979), 210–229; Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart Publishing, 2000).

authoritarianism.[12] In an authoritarian rule of law, the regime in power resorts to an instrumental use of laws as it tries to engender a stable legal and economic environment. This insight is important because it provides a new frame of reference from which one can examine the role of courts and judges in relation to political power.

There is scholarly agreement that rational institutions of law facilitate and sustain economic growth. Max Weber wrote that formal rationality, with the presence of general and transparent laws, leads to a fair and predictable administration of justice.[13] According to Douglass C. North, protection of property rights and consistence in contract enforcement are critical for economic progress.[14] Authoritarian regimes thus have reason to adhere to legal procedures and comply with judicial decisions. They profess commitment to legality and allow judicial autonomy.[15] Yusin Korea was a paradigmatic example of this authoritarian rule of law, under which dictatorial and liberal elements were fused in law and the constitution. Court judgments, once rendered, were not resisted by the government.

When illiberal regimes observe strict legal procedures, however, judicial quandary can compound. If the basic rights of citizens are

[12] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018); Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge: Cambridge University Press, 2012). The notion of "*Rechtsstaat*" in the civil law tradition has a narrower scope than the notion of "rule of law" in the common law tradition: the *Rechtsstaat* equates to the formal or procedural conception of the rule of law.

[13] Max Weber, "Sociological Categories of Economic Action," in Guenther Roth and Claus Wittich (eds.), *Max Weber, Economy and Society: An Outline of Interpretive Sociology*, vol. 1 (Berkeley: University of California Press, 1978), 85–86. A formal approach to justice exists "where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied." Weber, "Economy and Law (The Sociology of Law)," ibid., vol. 2, 657.

[14] Douglass C. North, *Structure and Change in Economic History* (New York: Norton, 1981); Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990); Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History* 49 (1989), 803–832.

[15] Empowering the judiciary and boosting trust and confidence in the justice system are important for regimes to make up for their questionable legitimacy, or "legitimacy deficit." Ginsburg and Moustafa, "Introduction," in *Rule by Law*, 6.

endangered under a constitution and statutes, should judges refuse to implement them? Here arises a dilemma of unjust laws, an enduring question in legal philosophy. Judges face a dilemma when they are obligated to enforce a law they believe is wrong or repressive. Since judicial duty is to implement the law, rather than to create or modify it, they cannot refuse to apply the unjust law on the grounds of their disagreement. Yet, when they act in accordance with the judicial oath, they compromise their conscience, and injustice may result. Law – officially promulgated rules backed by the state authority – and justice – the principle of rendering to each person what he or she deserves – should ideally be one and the same thing, but in reality they can come into serious contention.

The complexity of judicial choice has long captivated legal theorists and philosophers. Historical examples abound. The intellectual anguish of judges in the antebellum United States, torn between judicial duty and personal conscience over slavery, was perceptively discussed by Robert Cover.[16] According to Cover, most abolitionist judges in the North enforced the notorious Fugitive Slave Act of 1850, not because they agreed with it but because they decided they had an obligation to uphold the existing law. In the twentieth century, a similar issue dramatically emerged when judicial complicity with oppressive power in Nazi Germany and occupied Europe during World War II gave rise to debates over the clash between legal positivism and natural law theories.[17] Legal positivism distinguishes the validity of a legal order from the consideration of morality, whereas natural law theory posits that a law which violates basic demands of morality and justice cannot be qualified as a genuine law. The conflict between the two tenets also reverberated in apartheid South Africa, where the formalistic and positivistic approach embraced by lawyers and judges was blamed for the repressive legal system.[18] In Korea, the government ruled with the supra-constitutional executive decrees and legislative enactments

[16] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

[17] See the classic Hart–Fuller debate: H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958), 593–629; Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958), 630–672.

[18] David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, 2nd ed. (Oxford: Oxford University Press, 2010).

railroaded by the ruling party in the National Assembly, and judges encountered a classic moral-legal dilemma.

Here it must be stressed that the Korean legal system, fraught as it was with political persecution and human rights violations, did not, by any stretch, amount to an immoral legal order mired in genocide, slavery, or racial discrimination. Nor did it demonstrate the kind of impunity of a military dictatorship in Latin America waging a so-called dirty war during which a massive number of people disappeared. The scope of state violence was grave but still limited in comparison with contemporary authoritarian countries elsewhere.[19] To point out the relatively low number of convictions and punishments on political charges in Korea is not to play down the egregious reality of illiberal rule. Under the emergency decrees, people were sent to jail for absurd charges that infringed upon their fundamental rights such as freedom of speech. One unjust imprisonment is one too many. Rampant police brutality and human rights violations were well recorded. The images of bleak military courtrooms in which civilians were declared guilty of the crime of criticizing the government forever haunt the national memory. While citizens' rights suffered, however, Korea was not a lawless wilderness.

The regime insisted on holding judicial trials, by military or civilian courts, even when political repression was at its peak. This is precisely what rendered the role of the law and courts all the more important. How many of these trials deserved to be cast aside as show trials and judicial travesty would hinge on the extent of the process we recognize as procedurally due and substantively just. It points to a question when a law can be called a law. This kind of inquiry would be necessary before one attempts sweeping assessment of the judiciary.[20]

[19] Despite Korean military dictatorships' reputation for repressiveness, executions or killings for antiregime activity between 1972 and 1987 were much fewer than those in Taiwan or the Philippines. Sheena Chestnut Greitens, *Dictators and Their Secret Police: Coercive Institutions and State Violence* (Cambridge: Cambridge University Press, 2016), 238–239.

[20] Examples of blanket, often less than accurate, portrayals: "there has not been one full acquittal in a political case since the Yushin Constitution came into effect in 1972," Adrian W. Dewind and John Woodhouse, *Persecution of Defence Lawyers in South Korea: Report of a Mission to South Korea in May 1979* (New Work: International Commission of Jurists, 1979), 36; "Torture, forced disappearances, extra-judicial killings and mass executions occurred with disturbing regularity in Korea from the end of World War II until the election of Kim Young-Sam in 1993," Paul Hanley, "Transitional Justice in

Korea featured a historically depoliticized professional judiciary. The main strength of the traditional East Asian legal order lay in the uniformity and comprehensiveness of law.[21] The deeply seated principle of deference to political authority during Korea's monarchical period was reinforced under colonial rule.[22] After independence, the dominant notion of legislative sovereignty – the general will of the Korean people – fostered judicial restraint. The partition and the ensuing standoff between North and South Korea further resulted in the judicial stance to heed broadly the doctrine of political question. Political leaders regularly tinkered with the constitution and manipulated laws, but judges did not view it as their essential task to impose judicial imprimatur on them. The beliefs that the making or amending of the constitution was a political act better not meddled with by the courts and that judicial duty was to apply the existing laws to particular cases, not making or correcting them, had been deeply entrenched, continuing into the late twentieth century.

Cover's insight – that the dilemma of the judge, caught between formal responsibility and a personal sense of justice, cannot be simply dismissed as a deficiency in moralism – has universal resonance. Whether in the nineteenth-century United States or twentieth-century Korea, the structural limitations of the constitution, the weight of judicial tradition steeped in formalism, and the narrow view of judicial duty together affected the ways in which judges decided the cases that came before them.[23] This of course does not mean judges are always sheltered behind the constitutional provisions. But their adherence to law can be as critical as their commitment to substantive justice and fundamental standards of morality. At issue in authoritarian legality is not so much the will of the judges as the institutional and

South Korea: One Country's Restless Search for Truth and Reconciliation," *University of Pennsylvania East Asia Law Review* 9 (2014), 140.

[21] William R. Shaw, *Legal Norms in a Confucian State* (Berkeley: Institute of East Asian Studies, University of California Berkeley, Center for Korean Studies, 1981).

[22] Marie Seong-Hak Kim, *Law and Custom in Korea: Comparative Legal History* (Cambridge: Cambridge University Press, 2012).

[23] A judicial dilemma is not an alien notion in Korea. In 1952, a judge professed in a series of essays the profound predicaments he faced in performing judicial duties. Yu Pyŏng-Chin, *Chaep'angwan ŭi komin: Yu Pyŏng-Chin pŏmnyul nonjip* [The Dilemmas of a Judge: A Collection of the Legal Writings of Yu Pyŏng-Chin], ed. Sin Tong-Un (Seoul: Pŏmmunsa, 2008). For Judge Yu, see Chapter 2, note 92.

constitutional frameworks in which they perform their duties. Scholars have pointed out that judicial disinclination to oppose emergency powers in many jurisdictions in the world evinced less the judges' desertion of duties than their disposition to exercise independent judgment in compliance with their professional ideals that required competent practice.[24] The Korean experience reminds one that the authority of the judiciary has little to do with the democratic or undemocratic nature of governmental institutions. In Korea, the gap between constitutional normalcy and emergency lay outside the realm of judicial resolution.

Some comparisons with other countries may be of help. Singapore has received much attention from scholars for its remarkable economic success and government efficiency. Recently, its political and economic trajectories have been portrayed as a hallmark of authoritarian legalism and an embodiment of Ernst Fraenkel's "dual state" thesis. Fraenkel (1898–1975), a German jurist who fled the Nazis to the United States, argued that two different kinds of states, the prerogative state and the normative state, stood side by side during the years 1933–1938.[25] While the governmental system (the prerogative state) exercised arbitrariness and violence in public law matters, the legal order in private law matters (the normative state) was safeguarded in statutes, court decisions, and administrative agency actions, with the basic principles of capitalism, such as private property and contracts, protected by the judiciary. Fraenkel's dual state has been regarded as the archetype of the modern authoritarian rule of law, and Singapore has been seen in light of the similar coexistence of the parallel and contending legal orders.[26] The government in Singapore has promoted

[24] Mark J. Osiel, "Dialogue with Dictators: Judicial Resistance in Argentina and Brazil," *Law and Social Inquiry* 20 (1995), 482. For judicial roles in various constitutional contexts, see Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2014); Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press, 2013).

[25] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. A. Shils, Edith Loewenstein, and Klaus Knorr (Oxford: Oxford University Press, 2017, 1941).

[26] Kanishka Jayasuriya, "The Exception Becomes the Norm: Law and Regimes of Exception in East Asia," *Asian-Pacific Law & Policy Journal* 2 (2001), 119–123; Rajah, *Authoritarian Rule of Law*, 42–43. The authoritarian government in Singapore attained its political interest by following the rules