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**Constitutionalism, Democracy, Intellectual Property Rights and  
Civil Society: Understanding Contemporary South Korea from a  
Confucian Perspective**

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그럼에도 여전히 가끔은  
삶에게 지는 날들도 있겠지  
또다시 헤매일지라도 돌아오는 길을 알아  
*IU, My Sea*

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## **Ordering of Korean, Chinese, Vietnamese, and other East Asian Origins Names**

The footnotes of this work contain the names of Asian authors, primarily of Korean, Chinese, and Vietnamese origin, arranged in the conventional format of first name followed by last name. The reference list is arranged alphabetically based on the author's last name, followed by their first name. Both are structured in this manner to facilitate easy navigation through references. Nevertheless, inside the dissertation text, authors' full names may appear either in Western or Korean style in accordance with the author's preference or the format employed in a specific research work mentioned in this dissertation. Furthermore, in some cases, the names adhere to the sequence commonly found in most other references that discuss the particular works of the stated scholar.

# INTRODUCTION

## An Overview and a Series of Considerations

### *I. Research Gap and State of the Art*

East Asia is a fascinating region of the globe that can be explored from various viewpoints and disciplines. However, when researching this part of the world as a Western scholar, two significant concerns might arise: a lack of attention to specific issues and a lack of awareness and comprehension of those issues. This area of the world is more significant than ever in the global arena; for example, the emergence of phenomena such as K-pop – and, more generally, the *Hallyu* (or Korean Wave)<sup>1</sup> – has contributed to elevating South Korea to the position of one of the world’s most intriguing cases of soft power and public diplomacy strategies. While these issues are frequently studied and examined – even in the West – certain other important topics relating to this nation are less explored around the world, particularly in Italy, where, for example, legal scholars with expertise in Korean law are rare. Furthermore, while reading many works on legal developments and civil society written by Asian authors, it is extremely simple to identify a *leitmotif*.<sup>2</sup> This recurring pattern resides in Western scholars’ lack of understanding when explaining phenomena observed in East Asian countries, ranging from constitutional developments and democratic transition to the country’s extraordinary economic growth.

South Korea in particular is an understudied site, and it has received little attention from Western scholars in law and society. However, when analysing this country’s evolution, they generally do it through a Western-centric lens. Thus, this study strives to reconceptualise the framework within which East Asian countries are viewed and researched, integrating and blending Western methods with an East Asian approach that incorporates those countries’ history, culture, and philosophy.

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<sup>1</sup> See Jungsoo Kim, “Success without Design: Hallyu (Korean Wave) and Its Implications for Cultural Policy”, *The Korean Journal of Policy Studies*, Vol. 31, No. 3, 2016, pp. 101-118: The Korean Wave, often known as *Hallyu*, refers to the significant increase in global recognition of South Korean popular culture from the 1990s. Many academics think that this phenomenon was not a deliberate strategy but rather a cultural version of South Korea’s economic growth following the Korean War, widely known as the “Miracle on the Han River.”

<sup>2</sup> In opera, it is a recurring melody representing a character, a situation, or an emotion. In this context, the musical term is borrowed to indicate a recurring idea among scholars about a specific subject matter.

A very limited number of Western scholars who observed South Korea as non-Koreans have previously raised this concern. Geir Helgesen, for instance, has acknowledged that this type of cross-cultural analysis is unmistakably conducted through “the looking-glass of another culture.”<sup>3</sup> Even though a foreign academic will never have the same depth of understanding regarding a particular culture as a native scholar, this may prove to be a strength in disguise. An external scholar’s viewpoint, devoid of Western-centric bias, can potentially identify nuances or elements overlooked or inadvertently disregarded by those deeply immersed in their own culture.

Confucianism, the subject of this study, is a religion-oriented philosophy that has profoundly impacted East Asia for thousands of years. However, it has not been the sole cultural contribution to East Asian countries’ development throughout history. Various cultural characteristics could be considered to gain a more thorough comprehension of tradition-based contexts in contemporary times, with Confucianism and Neo-Confucianism being just one of the potential analysis points.

On this matter, it is also possible to notice the beginning of a general change of direction and a renewed need to carefully evaluate the subject matter, knowing the particular context and circumstances that used to characterise or still characterise Asia. It is crucial to note, for example, that, lately, the study of East Asian-specific constitutionalism has been attracting interest all over the world, with new research in religion and public law, for example, on the impact of Buddhist actors in shaping local constitutional politics.<sup>4</sup>

The rising interest in context-specific, philosophical and religious characteristics proves that, to remove the bias typical of the Western approach, it is fundamental to focus on the characteristics of the culture that Western authors have heard of but are unfamiliar with. From this perspective, examining Confucian and Neo-Confucian concepts in relation to contemporary Korea can be valuable for furthering existing legal studies and uncovering novel explanations.

For example, it is essential to analyse Confucianism’s role in shaping and influencing different spheres of South Korea’s life. This kind of work can be carried out focusing on the legal domain, including the role of the Constitutional Court and different branches of

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<sup>3</sup> Geir Helgesen, *Democracy and Authority in Korea: The Cultural Dimension in Korean Politics*, Routledge, New York, 1998, p. 9.

<sup>4</sup> See Tom Ginsburg and Benjamin Schonthal (eds.), *Buddhism and Comparative Constitutional Law*, Comparative Constitutional Law and Policy, Cambridge University Press, 2022.

law, and the political arena, including the role of civil society. On this topic, Marie Seong-Hak Kim has made significant and innovative contributions to the study of filial piety in constitutional jurisprudence and the role and development of the courts in the country. Additionally, Chaihark Hahm and Tom Ginsburg have extensively researched constitutional review in East Asia, specifically focusing on South Korea.

From an alternative viewpoint, Confucianism emerges as a noteworthy cultural characteristic due to its impact on intellectual property law. In that case, rather than permitting the codification of Confucian-inspired laws in modern texts, it completely delayed and pushed back the establishment of an intellectual property legal framework for protecting the rights of authors, writers, and other individuals.

There has been a modest debate in the last decade over intellectual property rights and cultural heritage in respect to Confucianism, but there appears to be no significant follow-up. Because of recent breakthroughs in the field, it is now increasingly important to examine the East Asian environment. Only a few scholars have covered Confucianism's role in intellectual property, including Peter Yu in his interesting work titled "Intellectual Property and Confucianism". Except for these limited cases, most authors have only provided a cursory overview of the topic within broader studies on economic and industrial advancements in South Korea or other countries of the region sharing a Confucian heritage.

Moreover, it is essential to underscore the significant contribution of civil society in both the process of constitutional changes and the promotion of intellectual property rights. Kim Sungmoon's contributions regarding the role of South Korean civil society are of the utmost importance, as he has extensively discussed the function of the Confucian democratic civil society, focusing, among other events, on the protests before the impeachment of President Park Geun-hye (in office from 2013 to 2017). From this perspective, it would be interesting to investigate the applicability of the recognition of such a society to different scenarios and its impact on past and future electoral processes, as well as other circumstances.

In order to prevent any misunderstandings regarding this matter, it is essential to make clear that the distinction between the "West" and the "East" is not intended to emphasise a broad and significant dichotomy between these two regions of the world in the present. South Korea is clearly heading towards a democratic and institutional convergence with Western countries. However, this convergence is characterised by historical and philosophical distinctions that require global analysis and comprehension.

In other words, the central focus of this work is not on a present institutional gap of the subject examined (*what is studied*) but rather on the method of investigation (*how it is studied*) and the contextual characteristics that make it an interesting case study. In this journey towards a general convergence, it is essential to consider the historical characteristics, as well as the nuances and peculiarities that define a legal and political order.

In light of the premises mentioned above, it is essential to begin by stating that while East Asian constitutionalism draws inspiration and is primarily and widely imported from the West, it also originates from various traditions, cultural norms, and social values. Nevertheless, Western scholars frequently juxtapose and overlap the centuries-long developments in Asian constitutionalism with those that have transpired in Europe and the United States. Although it is possible to affirm that most characteristics are shared, making East Asian constitutionalism entirely fall under the umbrella of Western liberal constitutionalism is incorrect. This statement does not imply that some East Asian countries, such as South Korea, have not adopted and established a well-developed and growing form of liberal constitutionalism. However, as previously mentioned, the system has unique specifics requiring in-depth examination.

Even though many Asian academics have attempted to clarify this notion, Western researchers remain biased. In most cases, they keep supporting the idea that the impressive improvements Asian countries – specifically South Korea in the case of this study – faced and are still facing are the result of a long process of westernisation, perceiving them as just a mere “replica” of the West, or more specifically a copy of the American liberalism.

Lawrence Beer has critiqued American constitutional academics in particular for making assumptions, failing to comprehend culture-specific particularity, and missing the opportunity to engage in constructive conversations on constitutionalism.<sup>5</sup> Curiously, even though a significant amount of time has passed since his publications, these statements might still be relevant.

Furthermore, it is essential to note that authors who support a unique East Asian constitutionalism do not challenge or reject legal terminology, standards, or institutions that originate from the Western world. Indeed, East Asian countries learned a variety of terms from the West, like democracy, freedom, separation of powers, the rule of law, and

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<sup>5</sup> Lawrence W. Beer, *Human Rights Constitutionalism in Japan and Asia*, The Writings of, Global Oriental, Folkestone, 2009, p. 9.

others.<sup>6</sup> On this matter, it is worth citing Chaihark Hahm's viewpoint, which states that East Asians have already embraced and made Western institutions and principles their own, resulting in the contemporary East Asian political and legal culture being a hybrid.<sup>7</sup> As a result, any search for political languages and systems more sympathetic to and supportive of East Asian culture must acknowledge this.

The role of Confucianism has been widely studied in terms of its relationship with democracy and constitutionalism. Bui Ngoc Son's recent publication, *Confucian Constitutionalism in East Asia*, serves as an excellent foundation for this research. It explores Confucianism's influence on East Asia's constitutional culture throughout history, providing innovative insights into the interplay between constitutional law and cultural contexts. This work stimulates a fresh discourse on East Asia, with a significant emphasis on various countries in the region.

In addition, it is critical to highlight that authors such as He Baogang, in his work "Four Models of the Relationship between Confucianism and Democracy,"<sup>8</sup> attempted to explain the relationship between these two concepts (Confucianism and democracy), going a step further in the field by reconceptualising and expanding theories and approaches to the topic. So far, the discussion has mainly focused on China. The main interest has been in understanding how a nation with Confucian values can transition towards democracy in the future rather than exploring why a Confucian country has been successful in achieving a high level of democratisation despite (or thanks to) its traditional culture. In other words, the majority of scholarly endeavours pertaining to the intersection of democracy and Confucianism have thus far been dedicated to conceptualising a prospective new system in China, in which Confucian principles could serve as the foundation for constructing a democratic system anew rather than elucidating the intricacies of an already established democracy within a Confucian or Neo-Confucian context.

For these reasons, it is crucial to analyse the factors that differentiate South Korean experiences in democracy, constitutionalism, the formation of its modern legal system, and civil society, and understand why they cannot fully align with Western experiences.

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<sup>6</sup> Chaihark Hahm, "Constitutionalism, Confucian Civic Virtue, and Ritual Property", in *Confucianism for the Modern World*, (eds.) Daniel A. Bell and Hahm Chaibong, Cambridge University Press, Cambridge, 2009, p. 42.

<sup>7</sup> *Ibid.*

<sup>8</sup> See Baogang He, "Four Models of the Relationship between Confucianism and Democracy", in *Contemporary Chinese Political Thought: Debates and Perspectives*, (eds.) Fred Dallmayr, Zhao Tingyang, University Press of Kentucky, 2012, pp. 131-151.

Additionally, it is important to consider the processes of adoption and adaptation, also known as legal transplant, that can be witnessed in the democratisation of particular countries.

## ***II. Research Aim***

This dissertation seeks to analyse the position of Confucianism, especially the Neo-Confucian tradition, and the influence of culture in the legal and political landscape of South Korea. Specifically, it will examine the role of the Constitutional Court, the evolution of intellectual property, and the impact of culture on the country's political life through a deeper understanding of the concept of *Confucian democratic civil society*. This research encompasses the concepts of democracy, constitutionalism, and the significant importance of the long-standing Confucian tradition, which played a vital role in legal life in pre-modern constitutions and continues to do so today.

Indeed, with the democratisation process, it is becoming increasingly difficult to find a glimpse of what was historically one of the ideologies dominating the private and public spheres of many East Asian nations in the legal domain. In this analysis, considering the so-called constitutional culture (configuration of laws, structures, social culture, politics, and public values) is fundamental. Certain cultural factors promote constitutionalism, while others oppose it.<sup>9</sup> That is why one of the aims of this research is to find and analyse those Confucian principles compatible with the idea of democracy (*zhengming*, *minben*, *li*, the right of revolution, to cite some). This is done to dispel the myth that the sole or most prominent outcome of having a background based on traditional Confucian principles is the predisposition of people to submit to authoritarian and oppressive governments.

However, it is crucial to acknowledge that there are limitations to finding similarities and shared principles between Confucianism and democracy. Certain practices and rules are inherently incompatible and will ultimately conflict with one another. Here is where the function of the Constitutional Court of Korea becomes even more significant. Since its inception, the Court has played a crucial role in reconciling and balancing democratic principles with Confucian tradition. Thanks to the institution's function, progress has been made in protecting citizens' rights when they clashed with Confucian-based laws

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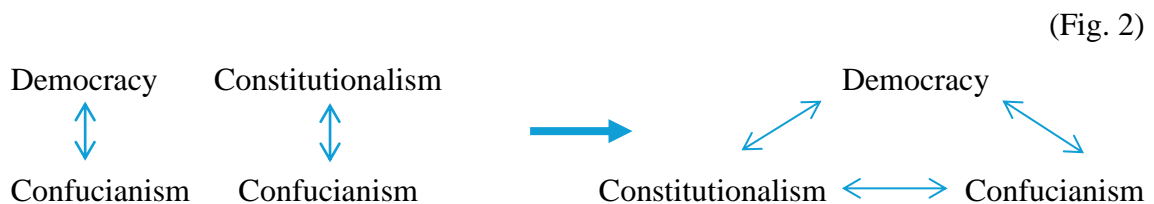
<sup>9</sup> Beer, *Human Rights Constitutionalism in Japan and Asia*, pp. 15-16.

that hindered constitutionalism and the process of democratisation. Later in this work, various examples will be discussed, including the *Same-Surname-Same-Origin Marriage Ban*,<sup>10</sup> which was deemed nonconforming with the Constitution and later amended to pursue more democratic principles.

In order to fully comprehend the East Asian setting, it is insufficient to solely examine the relationship between democracy and Confucianism (Fig. 1). It is imperative to evaluate further the role and evolution of constitutionalism, which serves as a significant third element of analysis.



To successfully navigate the interaction between constitutionalism, democracy, and Confucianism, it is essential to handle these concepts concurrently and in a mutually reinforcing manner (Fig. 2).



Within this context, there are plenty of opportunities for comprehending both Western constitutionalism and indigenous viewpoints and their combination in the East Asian area. It appears clear that – to comprehend a nation’s constitutional identity – it is necessary to grasp the unique circumstances of the country as well as the similarities within the area and in different parts of the world. For this reason, this analysis aims to be both country-specific and cross-national, relying on its multidisciplinary to draw interesting and innovative conclusions.

Specific overarching concepts encompass a transcultural bridge connecting the East and West in both directions. This approach shatters the lens of West-dominated

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<sup>10</sup> Constitutional Court of Korea, 9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997 (S. Kor.).

viewpoints through which the vast array of national constitutional systems is frequently regarded in the West (most notably in the United States),<sup>11</sup> attempting to overcome the biases of legal chauvinism<sup>12</sup> and cultural insularism.<sup>13</sup>

Despite modernisation, the influence of Confucianism and Neo-Confucianism is ongoing. While it is no longer dominant in the legal sphere and has completely vanished from the official political one, it continues to influence contemporary societies of many East Asian countries, including China, Japan, Singapore, and South Korea, being a fundamental set of values for civil society. For example, it is well-known that today's Korean culture is still impacted by filial piety (*hye* in Korean), which can be found in kinship, respect for the elders, and the importance of group cohesiveness. Confucianism is also the source of the collectivist attitude that is common in many East Asian countries.

While laws are typically not heavily influenced by traditions, it is crucial to recognise that several Confucian principles have endured in the present-day Korean legal system. For instance, both the civil and criminal codes incorporated and still incorporate provisions, particularly concerning family matters, derived from traditional Confucian norms, predominantly Neo-Confucianism in the case of Korea. One such provision is the severe punishment for crimes committed against a lineal ascendant, as stipulated in the criminal code.

The goal of this study is not to demonstrate that the rule of law can be transferred into a Confucian setting, nor that traditionally Confucian countries should accept a model of democracy based on traditional culture, which is actually a recurrent topic of study among scholars in this field. This research aims to illustrate that certain Confucian principles can persist and withstand in modern liberal democracies when democratic progress and traditional and cultural values are congruent. This distinction sets apart the specific nations' version of democracy from the Western model, creating a unique environment that, although it may closely resemble its democratic Western counterpart to the point of almost being identical, remains separate.

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<sup>11</sup> Beer, *Human Rights Constitutionalism in Japan and Asia*, p. 8.

<sup>12</sup> The idea that the legal system of a particular group (or country) is superior and dominant because more virtuous than the others, which are considered inferior and less worthy.

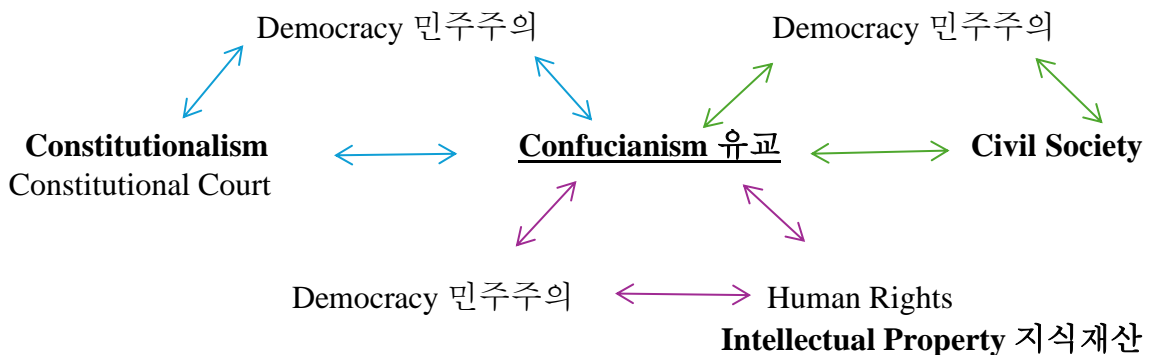
<sup>13</sup> See Beer, *Human Rights Constitutionalism in Japan and Asia*, p. 85: The author defines legal chauvinism as the tendency to overemphasise the importance of American law and democratic institutions as a template for other legal cultures. Cultural insularism, on the other hand, refers to the inclination to view the norms of other countries as so distinct and isolated that universal human rights principles and experience gained in other legal systems are disregarded.

As previously stated, Western and East Asian democracies are achieving high alignment. When discussing the existence of a Western-centric bias or lens and distinguishing between the East and the West, the ultimate objective is to emphasise an additional layer of fundamental characteristics (e.g., cultural and historical) beyond the institutional level and the concrete fulfilment of democratic principles.

This study intends to analyse how (Neo-)Confucianism has interacted with diverse domains of law and civil society to ascertain the degree to which it is possible to claim that Confucian tradition continues to endure in contemporary legal and social spheres. In light of this, the purpose of this analysis is to present a comprehensive examination of the influence of Confucianism in legal matters, considering all the actors involved, including the judiciary and civil society. It seeks to discern the manner in which these parties interact and the nature of the transformations they have brought about and continue to bring about in South Korea's progress towards full democratisation. Additionally, it is meant to identify those aspects of traditional culture that remain significant while impeding further legal and social progress.

To conduct this research, it is crucial to concentrate on particular variables such as constitutionalism, intellectual property rights, and democracy. Additionally, it is essential to consider key actors in South Korea, such as the Constitutional Court of Korea and civil society. Each of these entities and aspects will be examined under the assumption that they operate within an essentially and underlying Neo-Confucian framework even when tradition is not openly acknowledged or recognised. The convergence of these features (Fig. 3) will result in a comprehensive and interdisciplinary effort to comprehend the country to the greatest extent possible through an unbiased magnifying glass.

(Fig. 3)



Given the incredible level of interest in researching South Korea, it is vital to approach the subject without relying solely on a Western viewpoint. This will be helpful in minimising the absence of consideration for other cultural variables and the presumption that Western-centric universalism is the sole legitimate perspective.

### **III. Methodology**

The majority of the texts analysed in this research were authored and published by East Asian experts. The sources examined were primarily written in English and, where necessary, have been translated from Korean.

The first chapter is primarily theoretical, addressing a few significant ideas on the relationship between Confucianism and Democracy. As a result, it will be based on several methodologies, including the *plural approach*, which assumes that Confucianism and democracy are not limited to one kind, and the *case study approach*, to explore the issue as thoroughly as possible.

Using the name of a Cambridge University Series, the following may be defined as a *Law-in-Context procedure*. A contextual approach entails examining legal themes widely, utilising resources from other humanities and social sciences and any other discipline that helps explain how the particular legal area or legal phenomenon under research works practically. This method goes beyond a discussion of legal principles, showing more of what is underlying a particular legal system.

The philosophy of contextualism, especially *contextual (or contextualised) functionalism*, will be considered concerning constitutional changes in East Asia, specifically South Korea. According to Vicki Jackson, contextualised functionalism can work if the following criteria are met: willingness to question whether functions, concepts, or doctrines that appear similar may be quite different in different societies; understanding that allegedly separate institutions or legal practices may be connected to and influenced by others; and openness to noticing how identitarian or expressivist attitudes may affect legal rules and doctrines.<sup>14</sup>

A database search was carried out initially, narrowing the search by year of publication, source type and keywords. This method helps identify critical articles connected to the

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<sup>14</sup> Vicki C. Jackson, "Methodological Challenges in Comparative Constitutional Law", *Penn State International Law Review*, Vol. 28, No. 3 (2010) 319-326, p. 326.

topic of interest. *East Asian Confucianism*, *Confucian Constitutionalism*, *Constitutional Culture*, and *East Asian Confucian Constitutionalism* are the keywords and concepts employed. Additionally, a snowballing systematic review was employed to collect information, legislation, and data, beginning with a set (*starting set*) that included *Confucian Constitutionalism in East Asia* by Bui Ngoc Son, “Four Models of the Relationship between Confucianism and Democracy” by He Baogang and *Confucianism in Context: Classic Philosophy and Contemporary Issues* edited by Wonsuk Chang and Leah Kalmanson. When performing a snowballing review, particularly a backward snowballing review, it is critical to remember that all relevant articles connected to the topic of interest should come before the review’s starting set. As a result, all the articles in the initial batch are recent enough to draw on the broadest possible range of sources.

The same kind of database search paired with snowballing review has also been used for the following chapters. In this case, the analysis and comparison with Western jurisdictions have been necessary as a vehicle for the so-called *explanatory enterprise*, used as a method to identify a change or the reasons behind the resistance to a change.

The second chapter follows what is defined as *the most similar cases logic*, in which the comparison relies on cases with similar characteristics and variables but different outcomes. In this case, the most prominent questions to answer are a) why the outcomes are different and b) if the two systems are similar in a relevant manner. Chapter 3, differently, follows both *the most similar cases logic* (South Korea vs China) and *the most different cases logic* (South Korea and China vs the European experience) based on different characteristics but similar final outcomes. The second and third chapters also rely on a *qualitative case study approach* for the in-depth analysis of the cultural phenomenon (Confucianism) in the specific context of the South Korean legal system.

A big part of the analysis of the second chapter was carried out through the examination of Constitutional Court decisions – mainly related to family issues in both civil and criminal law – retrieved from the official website of the Constitutional Court of Korea. Many of the decisions are landmark cases (for example, the *Same-Surname-Same-Origin Marriage Ban*), which can be found in their extended English version in the online archive of the Constitutional Court. Due to the recent date of many rulings, an unofficial translation of the contents has been required to obtain an approximate English rendition of a few of the Court’s decisions. A comparative analysis of the Korean and Japanese cases has been conducted using a combination of *functional and cultural approaches*. This method, previously defined as *contextualised functionalism*, enables the examination

of law based on its underlying intents and objectives. Studying legal systems with similar attributes but divergent results has facilitated a legal examination of countries with a contemporary legal tradition partially originating from the same heritage. From this perspective, it must be stressed that the functional approach *per se* has faced significant criticism for disregarding cultural differences when addressing legal issues. By scrutinising the role of law and studying legal issues within the framework of the shared cultural background, a broader understanding of the elements that impact the results in both scenarios can be achieved.

In the fourth and final chapter, the snowball review starts from the works of Kim Sungmoon, particularly *Confucianism, Law, and Democracy in Contemporary Korea*. The chapter is also based on an *analytical approach* in which the research on the role of civil society highlights its influence on political and legal matters, focusing on the institution of impeachment. Due to the novelty of a big part of the information needed for this section of the research – that spans from the 1940s to January 2024 – the most recent events have been covered through the analysis of the available academic resources, English and Korean versions of Constitutional Court decisions and the confrontation of many newspaper articles (carefully fact-checked) that can be considered a primary source providing firsthand account on recent events.

#### ***IV. Structure of the Dissertation***

The first chapter of this dissertation will be dedicated to the theoretical approach to constitutionalism, democracy and human rights in correlation with Confucianism and traditional culture in East Asian countries, focusing on South Korea. The works of Bui Ngoc Son will serve as a foundation for discussing and presenting new arguments on relevant topics. For a more in-depth study, after analysing the role of Confucianism and Korean Neo-Confucianism and the traditional cultural values in shaping East Asia and specifically South Korea's kind of constitutionalism and democratic order – based on an East Asian approach and understanding of traditional principles – it is fundamental to answer a few more questions. What is the function of a civil society founded on Confucian ideals in this particular setting, considering its traditional roots and the necessity for additional endeavours towards democratic change? Is it possible for Confucian and democratic values to coexist? Which areas of law have been significantly influenced by traditional values? What are the most recent advancements on these issues?

Following a detailed analysis of East Asian forms of constitutionalism and their correlation with the concepts of democracy and Confucianism, it will be necessary to specifically focus on the Republic of Korea to understand the level of compatibility of those notions. First and foremost, properly analysing Neo-Confucianism's relevance in Korea's legal system is required. This analysis will consist of two main parts. The first section (Chapter 2) will include the study of the function of the Constitutional Court with respect to those branches of the law that were (and continue to be) heavily affected by Neo-Confucianism, with a specific focus on family issues and sanctions for crimes related to family members. In other words, Neo-Confucianism can be employed to clarify and understand the remaining Confucian-related components of Korean legislation. Comprehending South Korea's judicial review, how the Court responds when these principles are at issue, and the potential future outcome is critical to understanding Confucianism's history, present, and future in legal matters.

Another section (Chapter 3) of this dissertation will be dedicated to the role of intellectual property law in Korea, its evolution, and how Confucianism influenced it. It can be argued that it is necessary to go a step further and examine the branch of law that, due to Confucian traditions, has had the most challenging path to development in South Korea. Korea's intellectual property law is a relatively new concept (in the way it is known today), and it is not only an understudied topic across Europe, let alone in Italy, but it is also intriguing from a range of perspectives. Understanding the development of Intellectual Property involves comprehending a different aspect of Confucianism. It also requires understanding to what extent South Korea is distancing itself from some of these traditional principles to pursue democratisation and the protection of individual rights, given that Confucianism can truly impede the development of a country's entire set of laws and rights for a long time. Understanding intellectual property also entails identifying some inadequacies and shadows that this country, a rising star in the global arena, still faces today.

The last part (Chapter 4) will be dedicated to the Korean civil society, which had a fundamental role in advancing democratisation and the subsequent development of the legal system born in a Confucian context with a traditional background, widely explained in the previous parts of this work. Given the significance of South Korean civil society,

which still firmly adheres to Confucian values often without acknowledging it, it is critical to understand what changes the so-called *Confucian democratic civil society*, as it was defined by Kim Sungmoon in his works, contributed to bring to the country. To do so, it is critical to examine the role of this type of society, taking into consideration the fundamental part played by the institution of impeachment in the country in recent times, and including various legal and political scenarios. Among other events, this section will focus on impeachment hearings and the management of the COVID-19 pandemic, which significantly improved the country's global reputation and nation brand.

In summary, this study aims to investigate: 1) the presence of Confucianism (and Neo-Confucianism) in East Asian constitutional contexts and analyse the current constitutional situation in East Asian countries. It also seeks to understand the significance of constitutional culture in comprehending a country's system. It assesses the extent to which Confucianism can be integrated with Western constitutional ideas (Chapter 1); 2) To what degree does Confucian (and Neo-Confucian) philosophy continue to exert influence on society and subsequently impact court rulings, including a comprehensive examination of the Constitutional Court of Korea cases and the role of the judges (Chapter 2); 3) How has Confucianism influenced the progress of individual rights, specifically concerning intellectual property rights (Chapter 3); 4) What impact the (Confucian) civil society may have had on democratising the country, influencing impeachment proceedings, transforming diplomacy and policymaking, particularly in the areas of pandemic control and presidential elections (Chapter 4).

# CHAPTER I

## **Constitutionalism, Democracy and Human Rights vs. Confucianism: Does Traditional Culture Matter? A Theoretical Analysis of East Asia's Developments from a Legal and Political Perspective**

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## I. Introduction

Traditionally, most of the East and Southeast Asian countries<sup>1</sup> have been influenced by Confucian thought. Today's Asian societies have transformed a lot and are not entirely dedicated to Confucianism anymore. In fact, some of them have even rejected the notion of Confucian and Neo-Confucian heritage as a component of people's lives. Additionally, governments are no longer one-man ("Son of Heaven") monarchies with legitimacy derived from the Mandate of Heaven.<sup>2</sup> The social environment typically supports popular sovereignty, and the region, or at least the majority of the countries, is distinguished by pluralism, with individuals adhering to various and different moral, religious, and philosophical ideas.<sup>3</sup> Countries such as Japan, South Korea, and China have established distinct political and legal systems based on their respective political traditions, postwar experiences, and governmental and leadership legitimacy,<sup>4</sup> and they developed different kinds of governments.<sup>5</sup> Additionally, East cultures impacted by Confucian tradition and values (China, Hong Kong, Japan, Korea, Singapore, Taiwan, and Vietnam) have experienced modernisation and have been subjected to global capitalism pressures and political processes that have significantly undermined cultural traditions.<sup>6</sup>

Despite these changes and adjustments throughout the decades, including how Confucianism is perceived and acknowledged within society, key Confucian ideas, such

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<sup>1</sup> It is vital to state that Vietnam is geographically situated among Southeast Asian nations. Despite this, it is often categorised as part of East Asia due to its historical association with the Chinese cultural sphere. Other Southeast Asian countries, such as Singapore, Indonesia, and Malaysia, were greatly impacted by Confucianism, too. These countries, however, are not included in this analysis. For a better understanding on these countries see Eddie C. Y. Kuo, Qingjuan Sun, "Confucianism in Singapore, Malaysia, and Indonesia", in *The Oxford Handbook of Confucianism*, (ed.) Jennifer Oldstone-Moore, Oxford University Press, New York, 2023.

<sup>2</sup> Sungmoon Kim, "Confucianism, Moral Equality, and Human Rights: A Mencian Perspective", *The American Journal of Economics and Sociology*, Vol. 74, No. 1, January 2015, pp. 178-180.

<sup>3</sup> *Ibid.*

<sup>4</sup> David Warren, *Governance, Leadership and Legitimacy in East Asia*, Chatham House, The Royal Institute of International Affairs, July 2019, p. 3.

<sup>5</sup> In the 2022 Democracy Index report by the Economist Intelligence Unit based on electoral process and pluralism, civil liberties, functioning of government, political participation and political culture, Japan, Taiwan, and South Korea were included in the list of 24 countries considered full democracies. These countries are characterised by respected and strengthened civil liberties, an effective check and balance system, and an independent judiciary. Only 14% of the nations comprised in this research and 8% of the world's population are represented in this category. China, Vietnam, and North Korea were included among authoritarian states, which consist of governments that may have embraced democratic structures but lack effective enforcement, do not have free elections, and violate individual rights. Hong Kong was classified as a hybrid regime, category that encompasses nations with political opposition pressure, non-independent judiciaries, and insufficient political culture, among other features. All these countries' regime types were confirmed for another year in the 2023 Index.

<sup>6</sup> Joseph C. W. Chan, "Confucianism and Human Rights", in *Religion and Human Rights: An Introduction*, (eds.) John Witte, M. Christian Green, Oxford University, 2011, p. 89.

as the significance of family, harmony, and respect for learning and education, remain firmly entrenched in most communities.<sup>7</sup> Hence, it is crucial to comprehend the importance of traditional culture in present-day advancements and determine how various aspects of people's lives continue to be influenced. Additionally, it is essential to understand the basis on which Confucianism may coexist with liberal democracies or potential future democracies in pluralist systems.

To make sense of the unique experience of the East Asian region, one needs to understand its history and the ideals profoundly embedded in the countries' culture. Furthermore, discussing the compatibility of concepts traditionally linked to the East with ideas originally from the West is critical to understanding points of agreement and discrepancies between the two parts of the world, which are, in most cases, pursuing the same kind of developments in the contemporary age. For these reasons, it is critical to grasp key concepts related to the whole region before delving deeper into the case studies.

First, it is necessary to understand if and why culture, considered among other essential features that have shaped these countries' developments, is relevant in examining legal, social, and constitutional instances. Then, it is vital to emphasise and describe the changing function of Confucianism, a critical philosophy in defining and creating East Asian cultures and civilizations and one of the dissertation's primary themes of examination, throughout the ages.

Following a general definition of Confucianism's role with a focus on Korean Neo-Confucianism and its function in contemporaneity, approaches related to Confucianism's compatibility with constitutionalism and liberal democratic systems will be examined. This analysis aims to determine if traditional thought can coexist in democratic settings and to what extent they can be reciprocally influenced or hindered. From this perspective, this work will examine theories generally used to propose methods for the democratisation of non-democratic countries and apply them to the discussion of already democratised Confucian systems, specifically focusing on South Korea. In fact, it is vital to assess whether aspects of the Confucian heritage, if any at all, may persist in traditionally Confucian countries that have grown into democracies in a globalised world. In doing so, different perspectives and new challenges will be considered. Finally, the debate will briefly focus on the relationship between Confucianism and the concept of rights, which will be addressed more extensively in the following chapters.

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<sup>7</sup> *Ibid.*

This analysis will make it easier to understand that traditionally Confucian countries did not encounter the concept of Constitutionalism with the backing of the West, but they had previously developed their versions even in the pre-modern ages. Furthermore, as Western institutions were adopted and adapted, these nations took various paths emblematic of this part of the world. For example, they codified provisions into their laws, mainly on the respect for ascendants and family-related matters, that reflected Confucian values or delayed the growth of individual rights due to the influence of Confucian philosophy.

After delineating the overall significance of the cultural landscape as the concepts, philosophies, and societal behaviours that have shaped a society, this study aims at drawing conclusions on intricate legal and political issues. By incorporating historical and institutional explanations and experiences, the reference to culture will be enhanced and reinforced.

It is fundamental to stress that this research does not discuss or suggest that one path to future development is superior to another, nor does it seek to reintroduce more Confucian terminology and prerogatives into the institutions to produce a more locally suitable kind of democracy. It just wishes to highlight that, while East Asian nations now rely on a system that originated in the West at first, they are also experiencing the effect of traditional values – that Western history is unfamiliar with – which impacts changes and new challenges in this region of the world in a different way. This impact might be favourable or unfavourable, but this dissertation aims to show that deep-rooted Confucian ideals are still essential in affecting East Asia's present and future, particularly in South Korea.

## **1. The Importance of Culture**

For decades, scholars from several social sciences and humanities have used culture to obtain insights into their subject fields. Interestingly, even legal scholarship has approached this concept to gain a deeper understanding of laws and regulations in specific areas of the world,<sup>8</sup> pointing out, in many situations, friction between tradition and modernity, with an essential duty to place legislation in context. From this perspective,

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<sup>8</sup> Menachem Mautner, "Three Approaches to Law and Culture", *Cornell Law Review*, Vol. 96, (2011) 839-868, pp. 840-41.

many diverse methods and schools of thought exist. However, most of them are founded on a Western attempt to understand legal concerns in connection to culture (e.g., the German Historical School in German Law).<sup>9</sup> Furthermore, areas of studies such as cultural legal studies or law and society studies are growing in importance as they attempt to investigate the co-constitution of law and culture, where culture is analysed from a variety of perspectives and meanings, interpreting law through “the prism of culture”<sup>10</sup> or the prism of society.

Additionally, it is crucial to note how, lately, the study of East Asian-specific constitutionalism has been attracting interest worldwide, with new research in religion and public law, for example, on the impact of Buddhist actors in shaping local constitutional politics.<sup>11</sup> Once again, it is possible to point out that these investigations are not novel in the Western world. For example, there are several analyses and studies regarding the European Union’s role in balancing the history of Christianity, secularisation, and liberal principles in a region increasingly distinguished by religious and cultural diversity.<sup>12</sup> However, it is crucial to emphasise that, despite their differences, Buddhism, which shares characteristics with philosophical thinking, and Christianity are both religions. From a Western point of view, Confucianism becomes highly intriguing as a religion-oriented philosophical school of thought.

### *1.1. A Short Analysis of the Phenomenon of Sameness and Contextualised Functionalism*

From a strictly functionalist standpoint, which emphasises generalities, comparing cultures and institutions would be unnecessary because norms and institutions would be assessed only on their function and purpose, which are reasonably similar in liberal democracies or aspiring liberal democracies worldwide. However, one critique often raised to this approach is that legal problems are considered to be abstracted from cultural differences in different societies.

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<sup>9</sup> *Ibid.*

<sup>10</sup> Jennifer L. Schulz, “What is Cultural Legal Studies?”, *Manitoba Law Journal*, Vol. 44, No. 2 (2021), pp. 143-144.

<sup>11</sup> See Tom Ginsburg and Benjamin Schonthal (eds.), *Buddhism and Comparative Constitutional Law*, Comparative Constitutional Law and Policy, Cambridge University Press, 2022.

<sup>12</sup> Tuuli Lähdesmäki, “The role of Christianity in the European Union’s heritage and history initiatives”, *Journal of European Studies*, Volume 52, No. 3-4, Sage Journals, November 2022, p. 170.

A suitable approach for analysing countries is based on legal transplants, which often overlap with the cultural approach, carrying out an analysis of laws by reference to the culture. From the 1970s, studying legal transplants was seen as a revolutionary method of doing comparative law research, according to Alan Watson's contribution,<sup>13</sup> which saw legal transplant and borrowing as the primary mechanisms of legal change. Watson later acknowledged and clarified that similarities are significant, but comparativists should also look at differences for an all-encompassing analysis. However, Pierre Legrand strongly criticised the concept of legal transplant because, in his opinion, it did not place a strong emphasis on the variations but only on the shared characteristics of two legal systems, stating that comparison should not tend towards uniformisation in order to comprehend distance and difference more broadly.<sup>14</sup>

To properly understand constitutionalism and later political, judicial, and intellectual property developments associated with Confucianism, particularly in the East Asian context, it is necessary to transcend what Pierre Legrand calls the sense of "sameness". In his paper titled "Foreign Law Understanding Understanding", Legrand quotes Paul Celan, poet and translator, who stated that: "When a 'stone' is mentioned in a poem, it is, of course, important what can be meant by 'stones'; but what matters in the poem is *this* stone, the one the poem mentions".<sup>15</sup> This quote is an excellent metaphor for illustrating how, in general, all nations that reached the same institutional and constitutional advancement may appear to have increasingly overlapping legal systems. However, each has a history and different cultural assets that make every experience unique and distinct; for this reason, it is necessary to learn from differences rather than from concepts stemming from sameness.<sup>16</sup> In the author's perspective, in an era of globalisation, there is a need to meaningfully understand the other's law (foreign law) to recognise and respect why a particular legal culture remains linked to a specific rule.<sup>17</sup>

According to Legrand, sameness, defined as a lack of legal variation, which appears to be employed as a derogatory term, is achieved when: "[...] historical, political, social, philosophical, linguistic, economic and other constitutive discourses to which law-texts

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<sup>13</sup> John W. Cairnes, "Watson, Walton, and the History of Legal Transplants", 41 *GA. J. INT'L & COMP. L.* 637 (2013), p. 638.

<sup>14</sup> Pierre Legrand, "The Impossibility of 'Legal Transplants'", *Maastricht Journal of European and Comparative Law*, Vol. 4 (1997) 111-124, p. 123.

<sup>15</sup> Pierre Legrand, "Foreign Law Understanding Understanding", *Journal of Comparative Law*, Vol. 6 (2011) 67-177, p. 90.

<sup>16</sup> *Ibid.*, p. 103.

<sup>17</sup> *Ibid.*, p. 168.

can be traced are dogmatically/artificially excluded from the interpretative framework.”<sup>18</sup> In essence, it is critical to reject the notion that simply because a set of rules and institutions originate mainly from another well-established system—in this case, the Western one—the whole body of norms and institutions is merely a copy-paste of the initial framework that has been imported and adopted, resulting in the receiving country being an exact replica.

It is widely assumed, as Chongko Choi points out, for example, that Korean law is entirely imported (transplanted) from the West, particularly Continental-European law, which may be true if the focus of the analysis is the discontinuity between traditional and contemporary laws. However, from a philosophical standpoint, many traditional aspects and ideals are employed in contemporary legislation.<sup>19</sup> According to Chaihark Hahm, idioms used in East Asia to make sense of the world and render normative judgements often come from the Confucian heritage, with normative judgements still heavily reliant on it.<sup>20</sup>

In her paper “Methodological Challenges in Comparative Constitutional Law”, Vicki C. Jackson overcomes the problem of analysis raised by scholars that criticise the functional approach, finding a solution to highlight both similarities and differences in comparative legal studies, combining functionalism with contextualism in terms of *contextualised functionalism*.<sup>21</sup> From this perspective, original and adapted legal systems are organised around a series of concepts, doctrines and functions that appear similar but could differ from society to society.<sup>22</sup>

On the one hand, understanding that some themes need to be addressed in a transcultural way is essential. These elements are not restricted in their significance by particularity to the country of origin and are applicable and relevant to most cultures.<sup>23</sup>

On the other hand, it is also necessary to consider contextual factors to prevent the amount of abstraction that might result in overgeneralisation: generalising about, for example, human rights – such as freedom of expression or gender equality – might be

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<sup>18</sup> *Ibid.*, p. 107.

<sup>19</sup> Chongko Choi, “Traditional Legal Thoughts in Korea”, *Journal of Korean Law*, Vol. 2, No. 3, (2003) 75-108, p. 77.

<sup>20</sup> Chaihark Hahm, “Constitutionalism, Confucian Civic Virtue, and Ritual Propriety”, in *Confucianism for the Modern World*, Daniel A. Bell, Hahm Chaibong (eds.), Cambridge University Press, Cambridge, 2009, p. 42.

<sup>21</sup> Vicki C. Jackson, “Methodological Challenges in Comparative Constitutional Law”, *Penn State International Law Review*, Vol. 28, No. 3, (2010) 319- 326, p. 326.

<sup>22</sup> *Ibid.*

<sup>23</sup> Lawrence W. Beer, *Human Rights Constitutionalism in Japan and Asia*, The Writings of, Global Oriental, Folkestone, 2009, p. 8.

incorrect since, although they are typically safeguarded in most countries, the level of protection varies depending on various conditions and factors, including culture and traditional values.

In general, even relatively comparable advancements applied to various contexts and experiences can result in significantly different implications. Core societal values may obstruct, favour, or delay future changes and modifications. This approach applies to understanding many aspects of East Asian systems, such as judicial review, intellectual property rights and cultural heritage, public policies, and elections, which will be thoroughly examined in this thesis's second, third, and fourth chapters.

As a result, when analysing constitutional developments, laws and rights, it is critical to remain in a grey area between universalism and particularism, where common elements are considered, and nuances related to the particular setting are also acknowledged. For these reasons, it is of the utmost importance to examine what makes East Asia's structure – South Korea's in particular – distinct and why, despite the almost-convergence with the Western system(s), there is still a layer of differentiation. In addition, it is interesting to consider which adoption and adaptation processes can be found in the country's legal system. Considering the country's constitutional culture, the configuration of laws, structures, social culture, politics, and public values is fundamental to this analysis.

The following considerations show that some Confucian cultural components (*ren, li, zhèngmíng*, the rectification of names, or the right of revolution) are interestingly compatible with democratic ideas. In contrast, other features (in the case of South Korea and China, the prohibition of marriage between two individuals from the same ancestral line<sup>24</sup> and the Confucian idea that copying someone else's creation is a way to respect and pay homage to the author or artist who created it in the first place) hinder(ed) further developments in the legal system and democratic process of the countries.<sup>25</sup> In other words, even if Confucianism is not prevalent in East Asian legal heritage, it is evident that it still influences many aspects of people's lives, either directly or indirectly, affecting the formulation of present-day laws, which is why this topic deserves a further and thorough examination.

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<sup>24</sup> See Constitutional Court of Korea, 9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997 (S. Kor.).

<sup>25</sup> Beer, *Human Rights Constitutionalism in Japan and Asia*, pp. 15-16.

## 1.2. Elements in Common and Differences with the West: The Importance of Finding a Middle Ground through Practical Examples of Contextualism

According to Bui Ngoc Son, the worldwide trend of constitutionalism is “the extension of Western liberal constitutionalism to non-western contexts.”<sup>26</sup> In the twentieth century, since 1945, most Asian nations have enjoyed the independence to “pursue their own constitutional destinies.”<sup>27</sup> Until independence, Asian countries had few or no constitutional alternatives, except for Japan and Thailand. Many Asian nations “[...] have begun, at an accelerated pace, the autonomous development of a constitutional system which appropriately mingles the past and the present, the indigenous and the foreign, the traditional and the new, to meet the needs of the future” in the second half of the century.<sup>28</sup>

East Asian constitutions of liberal democracies accepted all the concepts characterising liberal democracies in the West. On the one hand, many of these East Asian constitutions were drafted with the assistance and influence of Western countries. On the other hand, colonialist and pre-colonialist history “cast shadows of varying length and shape in each nation.”<sup>29</sup>

It is critical to recognise that universally applicable principles regarded as transculturally legitimate are essential for a constitution to function in a democratic society.<sup>30</sup> Because they are universal in nature, they may be applied prescriptively – how they should work – (and occasionally descriptively) to many or all societies.<sup>31</sup> However, as Wen-Chen Chang explains in “East Asian Foundations of Constitutionalism: Three Models Reconstructed”, several East Asian countries have become “liberal democracies with vibrant developments of constitutionalism and rule of law,”<sup>32</sup> with written constitutions and constitutional practices that meet liberal constitutional criteria,<sup>33</sup> little attention has been paid to specific social, political, and cultural foundations of constitutionalism in East Asia.

Indeed, some of the historical-political contingencies (enactment after a war, lack of constitutional authorship, the shadow of a decolonisation process, and more) that

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<sup>26</sup> Ngoc Son Bui, *Confucian Constitutionalism in East Asia*, Routledge Law in Asia, Routledge, 2016, p. 1.

<sup>27</sup> Beer, *Human Rights Constitutionalism in Japan and Asia*, p. 7.

<sup>28</sup> *Ibid.*, p. 8.

<sup>29</sup> *Ibid.*, p. 7.

<sup>30</sup> *Ibid.*, p. 8.

<sup>31</sup> *Ibid.*

<sup>32</sup> Wen-Chen Chang, “East Asian Foundations for Constitutionalism: Three Models Reconstructed”, *National Taiwan University Law Review*, Vol. 3, No. 2 (2009) 111-141, p. 134.

<sup>33</sup> *Ibid.*, p. 115.

characterise the constitution-making process in countries such as South Korea and Japan can be found in the Western constitutional experience, as well.<sup>34</sup> However, East Asian constitutional advances are much too frequently ascribed only to the global growth of Western constitutionalism. This attribution eliminates the possibility of comprehending different ways of developing and reconstructing constitutionalism.<sup>35</sup>

In order to understand the importance of differentiating between the Western and Eastern experience, it is worthwhile to include the research of Korean conceptual historians, a discipline of historical and cultural studies still in its early stages in Korea. This field of study, originating in Europe, particularly Germany, highlights the need for East Asia to develop and define its meanings and terminology to better grasp concepts within its own cultural and linguistic framework.

The study of term change is critical for modern cultural and conceptual comprehension – however, strictly linguistic and semantic aspects are not entirely pertinent to this work. Conceptual history examines culturally specific ideas and practices within a particular context over time. This method is directly linked to the necessity of understanding the extent to which Western ideas have conflicted and combined with existing traditional and cultural perspectives. According to Kato Shuichi, translation is more than merely accepting foreign notions and ideas; it is modifying foreign culture by one’s home tradition. Kurtz stated that translation is “a multi-layered process of translation and appropriation.”<sup>36</sup> In this context, the term appropriation – that in most cases assumes the negative meaning of taking without asking for permission – can have the positive connotation of borrowing and drawing inspiration from an existing operating and well-established system. When appropriating or adapting, it is essential to consider how tradition and contingencies can impact the incorporation of institutions, rights, and laws into a culture in a particular setting.

Referring again to the field of study known as culture and law (where the notion of culture clearly implies a different connotation), using a fictional scenario from a Korean TV series that focuses on legal matters can be helpful and informative in catching the fundamental concept of context. In the made-up situation, a Korean corporation was reorganising its structure and had to fire employees. They determined that if a married

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<sup>34</sup> *Ibid.*, pp. 124-129.

<sup>35</sup> *Ibid.* p. 134.

<sup>36</sup> Haeng-hoon Lee, “Korean Conceptual History: Its Present Conditions and Future Prospects”, *Journal of the History of Ideas in East Asia*, June 2012, p. 423.

pair worked at that company, only one of the two staff members may continue to work there, with the following policy: “If one of the employees of a married couple does not voluntarily resign, the husband will be subject to unpaid leave.”<sup>37</sup> This clause would not be a discriminatory policy under the Constitution because it does not explicitly state that it applies exclusively to wives; hence, there is no discrimination against women. This policy would additionally not violate the Labour Standards Act or Article 32 of the Republic of Korea’s Constitution, which, at par. 4, states, “Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.”<sup>38</sup>

Even if it is only fictional, this scenario might help us understand the notions of context and values. In a cultural environment that continues to uphold patriarchal norms and traditional gender roles, despite attempts to disengage from such beliefs, between the two married individuals, the husband is more likely to be the one to keep the job. Therefore, the woman will probably resign of her own accord. This example indicates that, despite the necessity of considering the situation case by case, the same legislation might have various societal consequences depending on the environment in which it is implemented.

A nonfictional example that might support the comprehension of the problem of overgeneralisation is the function of the presumption of innocence in various judicial systems. Article 11(1) of the Universal Declaration of Human Rights includes the presumption of innocence, encompassing the right to be treated as innocent. It states, “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”<sup>39</sup> This idea is stated explicitly in the text of most democratic constitutions; for example, Article 27(4) of South Korea’s Constitution states: “The accused shall be presumed innocent until a judgement of guilt has been pronounced.”<sup>40</sup> The Italian Constitution states: “[...] a defendant shall be considered not guilty until a final sentence has been passed.”<sup>41</sup> Despite the inclusion of very similar provisions, certain cultures will emphasise the presumption of innocence – or other rights such as freedom of verbal expression – more than other equally democratic cultures.

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<sup>37</sup> Extraordinary Attorney Woo, “Yangtze River Dolphin”, Episode 12x01.

<sup>38</sup> Constitution of the Republic of Korea (1987), Art. 32(4).

<sup>39</sup> Universal Declaration of Human Rights, Art. 11(1).

<sup>40</sup> Constitution of the Republic of Korea (1987), Art. 27(4).

<sup>41</sup> Constitution of The Italian Republic, Art. 27.

To summarise, context is significant from two perspectives: a) understanding the extent to which the same principle or right is guaranteed and protected within different constitutional orders, and b) demonstrating how a law that may be implemented identically in two distinct orders results in different consequences depending on the values of the society to which the legislation is produced.

Here is where contextualism theory comes into play. This argument is not new, and it can be traced back to the Enlightenment period, notably to Montesquieu, who asserted that constitutional law is profoundly embedded in each nation's institutional, doctrinal, social, and cultural background.<sup>42</sup> In the words of Mark Tushnet: "Every society's law is tied to so many aspects of that society—its politics, its particular history, its intellectual life, the institutional forms in which its activities are conducted [...]".<sup>43</sup> This remark, which illustrates the critique against the functionalist approach, will help understand intellectual property rights' (late) evolution in Asia, particularly in South Korea (Chapter 3).

Furthermore, it is essential to highlight that isolating a constitution from its historical context and time and space boundaries is impossible. Tom Ginsburg noted that Constitutions exist in a dynamic environment and must adapt to changing situations.<sup>44</sup> In this regard, Jackson argues that:

Constitutions are made and then interpreted in complex and distinctive historical contexts. Moreover, many of a constitution's provisions are interdependent on others, designed to create an overall system or balance.<sup>45</sup>

She also argues that:

[...] it is certainly possible, at a mid-level between high theory and concrete detail, to identify functions that are performed by almost all constitutions. All constitutions deal with allocation of governmental powers, for example. All constitutions deal with the composition and structure of government. Constitutions are supposed to be functional, and so situating research in a functional problem-oriented analysis makes

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<sup>42</sup> Mark Tushnet, "The Possibilities of Comparative Constitutional Law", *The Yale Law Journal*, Vol. 108, No. 6 (1999) 1225-1309, p. 1265.

<sup>43</sup> *Ibid.*

<sup>44</sup> Tom Ginsburg, "Constitutional Endurance", in *Comparative Constitutional Law*, (eds.) Tom Ginsburg and Rosalind Dixon, Research Handbooks in Comparative Law, Edward Elgar Publishing, 2011, p. 112.

<sup>45</sup> Vicki C. Jackson, "Methodological Challenges in Comparative Constitutional Law", pp. 323-324.

sense. But constitutions also serve as a form of public law that is particularly situated to express, or help constitute, or (possibly even) influence national identity.<sup>46</sup>

Gary Jacobsohn highlighted a dialogical process of identity building that enables the establishment of the distinctive characteristics of a constitution.<sup>47</sup> Constitutional identity is a combination of aspirations and obligations from the nation's past and the determination of those who desire to transcend and overcome it.<sup>48</sup> Dialogue and "ongoing political and interpretative activities occurring in courts, legislatures, and other public and private domains" shape constitutional identity.<sup>49</sup> Features such as the relevance given to specific values may be reduced over time, but they are unlikely to be dismissed entirely by forces of constitutional convergence.

According to Noah Webster, from a time-based viewpoint, the effort to create a perpetual constitution relates to assuming the existence of a right to control the opinion of future generations, who instead have the right to experience social and environmental change.<sup>50</sup> Keeping up with the times is achievable if institutions adapt to new requirements as a society and its underlying circumstances change throughout time. According to Montesquieu, "[l]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another".<sup>51</sup> For these reasons, constitutional institutions and perspectives from other systems must be contextualised in local situations through adoption, adaptation, and transformation.<sup>52</sup> Contextually, to prevent the tendency mentioned above towards overgeneralisation, it is critical to decipher the underlying meanings of established systems that may initially appear to coincide with those other existing frameworks.

In conclusion, cultural and traditional aspects are essential to understanding how some concepts and methods that appear universal get slightly or significantly altered when adopted, implemented, and adapted to other systems, distinguishing them from unquestionably uniform traits. Fundamentally, it is hard to disentangle modern East Asian

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<sup>46</sup> *Ibid.*, p. 325.

<sup>47</sup> Gary J. Jacobsohn, "The formation of constitutional identities", in *Comparative Constitutional Law*, (eds.) Tom Ginsburg, Rosalind Dixon, Edward Elgar Publishing, 2011, pp. 129-130.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Ginsburg, "Constitutional Endurance", pp. 112- 113.

<sup>51</sup> Charles-Louis de Secondat, baron de Montesquieu, *The Spirit of the Laws*, p. 8.

<sup>52</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 5.

changes from centuries, if not millennia, of traditions that moulded social structures, legal frameworks, and cultural norms.

To perceive and comprehend the complete picture of this region of the world, a thorough understanding of the context and culture, with a particular focus on Confucianism, is necessary. Before beginning this analysis, it is imperative to emphasise that the development of these countries has been shaped not only by Confucianism but also by other cultural features. Various cultural characteristics have influenced most nations to different extents, resulting in diverse situations and experiences that deserve further research in the West. To be clear, Confucianism (or Neo-Confucianism) is a cultural paradigm that has had a significant historical impact on East Asia, although it is obviously not the exclusive influencing feature in the region. Within this framework, it is evident that as a factor, Confucianism can solely account for the legislative and political progress that arises from its heritage, not including all aspects that can be examined within the context of culture. Regardless, there is sufficient evidence to make certain conclusions concerning the broader context, even though other aspects, such as other philosophical and religious traits, hold equal significance to Confucianism as a potential subject of investigation.

Additionally, it would be difficult to investigate every aspect of Confucianism, its variations, and the differences in each Confucian nation, and, as discussed later, it would detract from the study's primary objective. As a result, the Confucian explanation covered in this chapter will seek to offer a basic understanding of the concept, taking into consideration some of the traditional version's essential principles as well as specifics of the Neo-Confucian philosophy, primarily in the context of the Korean Joseon dynasty, created in China and disseminated to Korea, for a more comprehensive analysis of the cultural features of the region and, particularly, the country subject matter of this study.

## **2. A Definition of Confucianism**

Confucianism is an ancient Chinese belief system focusing on the significance of morality and personal ethics.<sup>53</sup> The name of this philosophy derives from Confucius, the philosopher and teacher who lived between 551 and 479 BCE, during the Spring and

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<sup>53</sup> National Geographic Education, "Confucianism". Retrieved from: <https://education.nationalgeographic.org/resource/confucianism/> (Accessed October 25, 2023).

Autumn period.<sup>54</sup> His disciples wrote several works concerning his ideas on values, ethical behaviour, and moral character. Among them, Mencius (ca. 379-289 BCE) and Xunzi (ca. 310-235 BCE)<sup>55</sup> systematically extended the tradition in new and diverse ways, offering more details to the philosophy<sup>56</sup> and different views on concepts such as benevolence.<sup>57</sup> Throughout the centuries, Confucianism has evolved in response to political requirements and the challenges posed by other schools of thought since it was founded.<sup>58</sup>

It is important to emphasise that the English terms “Confucius,” “Confucian,” and “Confucianism” are relatively new compared to the East Asian tradition they represent. The first one emerged in the late 1600s, towards the end of the Jesuit mission to spread Roman Catholic Christianity in China, while the other two originated between the 1700s and 1800s. Neither “Confucian” nor “Confucianism” are etymologically derived from the Chinese terms used to denote the “Confucian tradition,” such as *Rújiā* 儒家 (referring to a family of scholars) or *Rújiào* 儒教 (referring to the teachings of scholars).<sup>59</sup> The Western expressions were established during a cultural period when the West had mixed feelings regarding China, perceiving it as both “a land of ancient wisdom and a backwater of modernity.”<sup>60</sup> Simply put, the concept draws parallels to the Christian legacy by presenting China’s intellectual past as centred around a single founder who embodies both a personal and institutional identity (Confucianism).<sup>61</sup> This example might be seen as an early case of analysing and explaining traditional East Asian concepts through a Western-centric perspective.

In order to understand Confucianism as a concept, it is necessary to distinguish between the tradition of philosophy and the Confucian orthodoxy of imperial states,<sup>62</sup> centred on philosophy and ritual in favour of the emperor’s rights and the entrusted

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<sup>54</sup> The Spring and Autumn period in Chinese history lasted from around 770 to 481 BCE. The term “Spring and Autumn Annals” refers to a chronicle of the state of Lu during the period between 722 and 481 BCE, which tradition ties with Confucius (551-479 BCE).

<sup>55</sup> The birth and death dates of the philosophers vary significantly across multiple sources, making them approximate rather than definitive references.

<sup>56</sup> Joseph C. W. Chan, “Confucianism and Human Rights”, in *Religion and Human Rights: An Introduction*, (eds.) John Witte, M. Christian Green, Oxford University Press, 2011, p. 88.

<sup>57</sup> See Chen Ming, “The Difference Between Confucian and Mencian Benevolence”, *Journal of Chinese Humanities*, Vol. 2, 2016, p. 217.

<sup>58</sup> Chan, “Confucianism and Human Rights”, p. 88.

<sup>59</sup> Jeffrey L. Richey, “Confucianism and “Confucianism”: Describing and Problematizing the Tradition”, in *The Oxford Handbook of Confucianism*, (ed.) Jennifer Oldstone-Moore, Oxford University Press, 2023, p. 4.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, pp. 3-4.

<sup>62</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 26.

authority of those who exercised power on his behalf. This is one of the reasons why Confucianism is frequently and exclusively connected with establishing and justifying authoritarian rule, even in the contemporary world. Traditional Confucian beliefs, however, do not necessarily support the establishment of highly centralised governments and instead, as possible to see in Mencius' contribution to the philosophy, respect principles such as the right of revolution, which allows citizens to overthrow an unjust ruler's government if he fails to pursue the common good. This concept is very similar to the one later theorised by Locke, the father of liberalism,<sup>63</sup> albeit with differences in the source of legitimation.

However, prospective or existing regimes distort and twist Confucianism to legitimise their rule, frequently preferring to rely exclusively on the selected concepts that promote their interests. On the matter, it is worth noting that scholars who have studied the use of Confucianism as a justification for both pre-modern and contemporary heavily authoritarian rule or dictatorship have often used terms such as “misappropriation,” “distortion,”<sup>64</sup> or “manipulation”<sup>65</sup> to describe the process undertaken by the ruler to employ Confucianism as a form of legitimisation. In the recent case of North Korea, for example, after rejecting Confucianism for a few years following the division of Korea into two separate countries, Kim Il-Sung was allegedly partially inspired by Confucian tradition to develop and promote the notion of *Juche* (self-reliance).<sup>66</sup> Confucian thought also became an instrument of propaganda for the regime's stability from the late 1960s to the 1970s.<sup>67</sup>

From a Western perspective, Confucianism is a unique dynamic philosophical environment since it is built on a completely distinct cultural approach and does not correspond to Western notions of “philosophy” and “religion”.<sup>68</sup> For example, Confucianism is founded on a different interpretation of philosophical narratives than the Greek concept of philosophy. Furthermore, even if it has a strong religious dimension, it

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<sup>63</sup> Daejung Kim, “Is Culture Destiny? The Myth of Asia's Anti-Democratic Values”, *Foreign Affairs*, Vol. 73, No. 6 (Nov. – Dec. 1994), p. 191.

<sup>64</sup> Sor-hoon Tan, *Confucian Democracy: A Deweyan Reconstruction*, State University Of New York Press, Albany, 2003, p. 7.

<sup>65</sup> Nicolas Levi, “Correlations Between the Contemporary Ideology of the North Korean and Chosen Confucianism Values”, *Krakowskie Studia Międzynarodowe*, Vol. 12, No. 3, 2015, p. 120.

<sup>66</sup> *Ibid.*, pp. 119-124.

<sup>67</sup> *Ibid.*

<sup>68</sup> Kevin N. Cawley, “Religion in contemporary Korean society: interactions between the past, present and future”, in *Routledge Handbook of Contemporary South Korea*, (eds.) Sojin Lim and Niki J.P. Alsford, Routledge, 2022, p. 144.

cannot be considered an organised religion (as the Abrahamic tradition defines religion)<sup>69</sup> because it is not based on dogma and faith,<sup>70</sup> and it does not have fixed creeds; instead, it has always encouraged reinterpretation and revision of its ideas. It has never had an official spokesperson for Heaven, prophets, or books comparable to the Bible.<sup>71</sup>

Being a rather vague tradition, it has allowed for the emergence of numerous interpretations in different cultures and contexts throughout history.<sup>72</sup> Using Japanese, Korean, and Chinese Confucianism as examples would highlight some critical distinctions among traditionally Confucian countries.<sup>73</sup> Chinese Confucianism was primarily centred on *ren* (later explained in detail), or humaneness, associated with love, harmony, generosity, impartiality, and the ability to empathise with others. Japanese Confucianism emphasised loyalty and bravery, with devotion to a community outweighing dedication to universal norms.<sup>74</sup> Finally, Korean Confucian advancements based on the principle of appropriateness were inextricably linked to the country's history,<sup>75</sup> diverging from the Chinese and Japanese forms of this philosophy. Indeed, the spirit of justice in ancient Korean Confucianism was influenced by the literary purges under the Joseon (or *Chosŏn*)<sup>76</sup> dynasty and the countless invasions Korea faced over the years. Some steppingstones of Korean Confucianism were the differences between appropriateness and inappropriateness and appropriateness from selfish goals.<sup>77</sup> According to Chen Lai, the spirit of justice that has marked Korea's history has "fostered the development of Korea as a modern national state."<sup>78</sup>

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<sup>69</sup> The most prominent ones are Judaism, Christianity, and Islam.

<sup>70</sup> Wonsuk Chang, Leah Kalmanson, "The Confucian Tradition - An Evolving Narrative", in *Confucianism in Context: Classic Philosophy and Contemporary Issues, East Asia and Beyond*, (eds.) Wonsuk Chang and Leah Kalmanson, SUNY Series in Chinese Philosophy and Culture, State University of New York Press, 2010, p. 1.

<sup>71</sup> Chan, "Confucianism and Human Rights", p. 89.

<sup>72</sup> Chang and Kalmanson, "The Confucian Tradition - An Evolving Narrative", p. 2.

<sup>73</sup> Lai Chen, "Historical and Cultural Features of Confucianism in East Asia", in *Confucianisms for a Changing World Cultural Order*, (eds.) Roger T. Ames, Peter D. Hershock, University of Hawai'i Press, Honolulu, 2018, p. 102-103.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Chosŏn* and *Joseon* are interchangeable transliterations of the same Korean name. *Chosŏn* is used in the McCune-Reischauer system, while *Joseon* is the spelling used in the Revised Romanization. In this study, the term *Joseon* is consistently used to refer to this dynasty. However, it should be noted that the sources utilised may contain both spellings. For more details on the differences between New Romanization and McCune-Reischauer see "Romanization Chart", The Korea Society [https://www.koreasociety.org/images/pdf/KoreanStudies/Romanization/Romanization\\_Chart\\_with\\_Audio\\_2.pdf](https://www.koreasociety.org/images/pdf/KoreanStudies/Romanization/Romanization_Chart_with_Audio_2.pdf)

<sup>77</sup> Chen, "Historical and Cultural Features of Confucianism in East Asia", pp. 103-108.

<sup>78</sup> *Ibid.*, p. 110.

As proved by the previous examples and as pointed out by Chaihark Hahm, the variation within the Confucian tradition is too broad to be explained in general terms.<sup>79</sup> The higher the number of Confucian nations included in the investigation, the more difficult it would be to uncover parallels and commonalities. As a result, it is critical to examine this ideology from two perspectives: a country-specific discourse and an issue-specific one, since the impact of Confucianism varies depending on the case study and the matters at stake.<sup>80</sup>

Based on the different experiences in the past and today's East Asia, it is safe to state that Confucianism cannot be regarded as a conceptual monolith because of the diversity of its traditions, variations, and forms.<sup>81</sup> As a living and dynamic tradition, Confucianism has experienced changes and alterations.<sup>82</sup> According to Hahm:

In a way, it is peculiarly “un-Confucian” to ignore changed historical circumstances and to insist on identifying an eternal and immutable core of Confucianism. Premodern Confucians themselves were constantly reinterpreting and re-presenting the tradition to meet the exigencies of their days. [...] Confucianism began to function as an agent of oppression and repression when people lost their ability to reinterpret and re-present the inherited tradition.<sup>83</sup>

As a consequence of this consideration, this dissertation will provide a comprehensive summary of the most significant concepts of traditional Confucianism relevant to understanding the topics discussed in the following chapters. However, its primary focus will be on the type of Confucianism specifically developed in Korea<sup>84</sup> and on particular issues within contemporary South Korea's legal system and society – adding comparisons with other countries when needed.

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<sup>79</sup> Chaihark Hahm, “Law, Culture, and the Politics of Confucianism”, *Columbia Journal of Asian Law*, Vol. 16, (2002), p. 268.

<sup>80</sup> *Ibid.*

<sup>81</sup> Baogang He, “Four Models of the Relationship between Confucianism and Democracy”, *Journal of Chinese Philosophy*, Vol. 37, No. 1, March 2010, p. 18.

<sup>82</sup> Hahm, “Constitutionalism, Confucian Civic Virtue, and Ritual Propriety”, p. 48.

<sup>83</sup> *Ibid.*, pp. 48-49.

<sup>84</sup> Korea was a unified territory before being divided into two separate countries after liberation from Japanese rule. Whenever Korea is hereafter mentioned in this work in relation to a period prior to 1945, it will refer to the entire peninsular region that is now divided into South and North Korea, officially the Republic of Korea (ROK) and the Democratic People's Republic of Korea (DPRK).

Among the core principles of Confucianism, the following are significant to the study carried out in this work: *ren* 仁 or *jen* (인 *in*, in Korean),<sup>85</sup> which can be translated with the term ‘humaneness’, *junzi* 君子 (군자 *gunja* in Korean, wise person of high virtues and intellect), which represents the exemplary person, *yi* 義, with the meaning of appropriateness (의 *의* in Korean – justice, righteousness, loyalty, also “임금과 신하 사이에 지켜야 할 바른 도리”, [the duty and principle that should be followed in relations between a king and his lieges]),<sup>86</sup> and *li* 禮 (예 or 례 in Korean) propriety or norms of proper social behaviour, which promote other fundamental ideals, such as righteousness and filial piety (*xiào* 孝 in Chinese,<sup>87</sup> *hyo* 효 in Korean), respect for elders and ancestors.

Following the Confucian concept of cosmic harmony, possessing good moral characteristics is a source of influence on the world.<sup>88</sup> Because what one does influences what others do, this argument implies that there is only one correct way to live and one correct political system. *Ren* 仁, or humaneness, the excellent quality of an altruistic human, is a virtue that may be utilised to build moral character, paving the way for other virtues like respect, generosity, and modesty, all of which are learnable through education. Confucius believed that a person who does not incarnate the *ren* could not have anything to do with *li* (ritual)<sup>89</sup> and music, which he highly valued.<sup>90</sup> Nevertheless, depending on the circumstances, Confucius expressed the notion of *ren* in various ways. As pointed out by Wonsuk Chang and Leah Kalmanson:

At first *ren* means to love others, but at other times *ren* is deference at home, respectfulness in handling public affairs, or doing one’s utmost in relationships. In

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<sup>85</sup> Confucianism’s fundamental virtue. It is the altruistic quality that promotes a prosperous human community. It denotes goodness, humanity, and generosity.

<sup>86</sup> Most of the Korean terminology and definitions were obtained from the Naver Korean - English Dictionary.

<sup>87</sup> In Chinese, 孝 *xiào* is formed combining the characters for ‘old’ and ‘son’ and representing an elder person carried by a son to indicate that the young generations should support their elders.

<sup>88</sup> National Geographic Education, “Confucianism”. Retrieved from: <https://education.nationalgeographic.org/resource/confucianism/> (Accessed October 25, 2023).

<sup>89</sup> Sor-hoon Tan, “Confucianism and Democracy”, in *Confucianism in Context: Classic Philosophy and Contemporary Issues, East Asia and Beyond*, (eds.) Wonsuk Chang and Leah Kalmanson, SUNY series of Chinese Philosophy and Culture, SUNY press, 2010, p. 108.

<sup>90</sup> See Richard Brown, “Confucius and music: eight passages from Analects Book 1-10”, *Medium*, November 6, 2021. Retrieved from: <https://brownbeat.medium.com/confucius-and-music-eight-passages-from-analects-book-1-10-8b3e0bf57e2c>. Analects Book 3.3: “If someone has no goodness, what can they have to do with ritual? If someone has no goodness, what can they have to do with music?”.

every case, Confucius seems to be concerned more with the constant negotiation of meaning necessary for dealing with varying circumstances and less with establishing a determinate definition of the term.<sup>91</sup>

From a Western perspective, this “negotiation of meaning”<sup>92</sup> and the fluidity of concepts in this philosophy make it an even more interesting subject since Confucianism’s dynamic nature is one of the reasons it endured through generations, adjustments, and environments.

Confucianism was brought to Vietnam, Japan, and Korea around the 200 CE. An essential event is the foundation of the Great School, the Confucian Academy (*Daehak*), which later became the Korean National Academy in 372 (in *Goguryeo*, one of the three ancient Korean kingdoms).<sup>93</sup> The successor of this institute was later re-established at the beginning of the XIV century by one of the most prominent Neo-Confucian scholars, An Hyang, also known as An Yu, regarded as the founder of Neo-Confucianism in Korea.

The Korean scholar Wang-In introduced the *Analects* book to Japan around 405 (uncertain date). In addition, Confucian Studies were created in Korea during the Silla Kingdom (365-935).<sup>94</sup> It is also worth noting that the first Japanese constitution, drafted in 604, included and was based on Confucian ideals. It was called the Seventeen Article Constitution, featuring a moral code for the governing elite. It supported various Chinese Confucianism-specific topics, such as hiring officials based on merit rather than inheritance, harmonious administration based on Confucian ideals, and the goal of a united state controlled by one ruler.<sup>95</sup>

Korea was governed by the Goryeo Dynasty (918-1392) during the period corresponding to the Song Dynasty in China (960-1279). Under the Goryeo dynasty, in the years 958-971, after being implemented in China, the civil service examination system was first introduced to Korea, according to Confucian scholarship and talent.<sup>96</sup> Neo-

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<sup>91</sup> Chang, Kalmanson, “The Confucian Tradition - An Evolving Narrative”, p. 1.

<sup>92</sup> *Ibid.*

<sup>93</sup> Michael J. Pettid, “Confucianism in Korea”, in *The Oxford Handbook of Confucianism*, (ed.) Jennifer Oldstone-Moore, Oxford University Press, 2023, p. 285.

<sup>94</sup> Xinzhong Yao, “Confucianism in History: Chronological Timetable”, in *An introduction to Confucianism*, Cambridge University Press, 2001, pp. xiv - xviii.

<sup>95</sup> *Ibid.*

<sup>96</sup> “과거 제도 (the past system)”, National Institute of Korean History. Retrieved from: [http://contents.history.go.kr/front/tg/view.do?treeId=0100&levelId=tg\\_002\\_0510&ganada=&pageUnit=10](http://contents.history.go.kr/front/tg/view.do?treeId=0100&levelId=tg_002_0510&ganada=&pageUnit=10) (Accessed September 13, 2022).

Confucian concepts were brought into the Kingdom near the conclusion of this dynasty's reign.

To briefly summarise, the growth of Confucianism in East Asia may be broken down into six historical epochs:<sup>97</sup>

Ca. 1700 – 221 BCE	Classical period – beginning in the Xia, Shang, and Zhou kingdoms. The classical period began with Confucius, was reformed by Mencius, and ended with Xunzi.
206 BCE – 220 CE	This epoch started when the Han dynasty was founded—rise of the great commentary traditions on the early classical philosophical and religious texts.
220 – 907	Renewal of the Daoist tradition and arrival of Buddhism. Intellectuals of the time integrated Confucianism with Daoist cosmology and metaphysics. This period lasted approximately from the Wei-Qin period until the end of the Tang.
960 – 1644	Period of Neo-Confucian renaissance. The revival of Confucian thought started under the Northern Song dynasty (960-1127). The Neo-Confucian Song scholars gave their teachings a new name: the “learning of the way” or <i>daoxue</i> 道學. Neo-Confucianism spreads into Korea and Japan.
1644 – 1911	Qing's School of Evidential Learning ( <i>hanxue</i> 漢學) and Korean and Japanese Neo-Confucianism growth.
Beginning of the XX century – present	Arrival of the expanding and aggressive Western power and the subsequent fall and reformation of Confucian <i>dao</i> (way) as New Confucianism - political, ethical, and social philosophy based on metaphysical concepts from both the West and the East.

### 2.1. Neo-Confucianism in Korea

In Korean, two different terms are used to describe traditional Confucianism. The words used to define this concept are 유교 (*yukyo*) and 유학 (*yuhak*). The first indicates the Confucian ideas, thoughts, and ideology. The second one refers to the field of studies based on the teachings of Confucius.<sup>98</sup> Differently, the expression 성리학 (*seong-nihak*) – originally the abbreviation of 성명·의리의 학 (‘the science of name and righteousness’), also called 신유학 (*shinyuhak*),<sup>99</sup> refers to the distinctive philosophy of

<sup>97</sup> The six paradigmatic historical transformations have been retrieved and re-elaborated from: John Berthrong, “Transmitting the Dao”, in *Confucianism in Context: Classic Philosophy and Contemporary Issues, East Asia and Beyond*, (eds.) Wonsuk Chang and Leah Kalmanson, SUNY Series in Chinese Philosophy and Culture, State University of New York Press, 2010, pp. 9-13.

<sup>98</sup> Miriam Bartolozzi, “Constitutional Developments and Intellectual Property Rights: Understanding South Korea from a Confucian Perspective”, *Culture, Media, and Entertainment Law*, Vol.16, No.2 (2022), p. 5.

<sup>99</sup> Also referred to as: 도학(道學) ethics, moral philosophy, 송학(宋學), 송명이학(宋明理學), 주자(주희)학, 정주학. See 한국민족문화대백과사전 Encyclopedia of Korean Culture, 송나라 이후의 유학으로 특히 성명(性命)과 이기(理氣)의 관계를 연구하는 학문. 신유학·이학·정주학·주자학. Retrieved from: <https://encykorea.aks.ac.kr/Article/E0029308> (Accessed July 22, 2023).

Neo-Confucianism that gained popularity in Korea during the Joseon dynasty and is based on the cosmos and the foundation of matter. This last term must not be confused with the 현대신유학 (New Confucianism, literally “Neo Confucianism of the contemporary world”), which instead refers to the modern Confucian tradition developed in the nineteenth and twentieth centuries.<sup>100</sup>

Korea was particularly impacted after the development of Neo-Confucianism (성리학), which became the state ideology during the Joseon era (1392-1910). Neo-Confucianism is sometimes referred to as a reinterpretation and reinvention of classic Confucian ideas, in which philosophers and intellectuals employed metaphysics to construct a more rationalism-based ethical philosophy. It was founded during the Tang Dynasty but rose to prominence as a philosophical alternative to Buddhism and Taoism during the Chinese Song Dynasty (960-1279 CE). It centred on ideas of innate human nature that sought to explain the working of human minds and emotions and self-cultivation to put the moral code into effect.<sup>101</sup> The theory of Self-Cultivation (*Suyangron* 修養論) pursued the ideal character training to achieve the ultimate Noble Gentleman’s status, encompassing all human efforts to transcend the existential incompleteness experienced by individuals.<sup>102</sup>

Many historians argue that Confucianism was established in Korea a thousand years before the Joseon era and that by the time Neo-Confucianism expanded over the peninsula, its standards and morality had already influenced people for a long time.<sup>103</sup> According to Choi Youngjin’s work, this might explain how and why the country was ready for the entry of Neo-Confucianism into society. However, Neo-Confucianism under the Joseon dynasty profoundly revolutionised society, allowing political stability for almost five centuries.<sup>104</sup>

It is important to note that due to various responses to different historical situations and contingencies, Neo-Confucianism’s role in the country was not the same throughout

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<sup>100</sup> 신유학, 나무위키. Retrieved from: <https://namu.wiki/w/%EC%8B%A0%EC%9C%A0%ED%95%99> (Accessed July 27, 2023).

<sup>101</sup> Young-jin Koh, “Neo-Confucianism as the Dominant Ideology in Joseon”, *Korea Journal*, Vol. 43, No. 4, 2003, pp. 59-50.

<sup>102</sup> Haesung Lee, “Neo-Confucianism of Joseon dynasty—its theoretical foundation and main issues”, *Asian Studies*, Vol. 4, No.1, 2016, pp. 167-168; 170.

<sup>103</sup> Youngjin Choi, “The History of Confucianism in Korea”, in *Confucianism in Context: Classic Philosophy and Contemporary Issues*, East Asia and Beyond, (eds.) Wonsuk Chang and Leah Kalmanson, SUNY Series in Chinese Philosophy and Culture, State University of New York Press, 2010, pp. 33-34.

<sup>104</sup> *Ibid.*

the 500-year-long history of the Joseon dynasty.<sup>105</sup> Nevertheless, it played a central role in the development of Korean society until the latter half of the seventeenth century. Confucianism was a “catalyst for social reform” during the transition from the Goryeo to the Joseon dynasty, and it was employed to modernise society by the new elite of Confucian literati through the Chinese Neo-Confucian philosophy.<sup>106</sup>

Initially, the Joseon court focused on agricultural advancement, emphasising technique development and population increase.<sup>107</sup> In this period, officials tried to fortify the state’s finances by embracing Confucian ideals relating to the centrality of agriculture at the expense of other economic activities (e.g., commerce) and eliminating unfair tax burdens.<sup>108</sup> Confucianism was beneficial because it promoted intellectual prosperity, enabling Korea to reach the peak of this ideology through the exchange of correspondence, memorials, and publications, connecting the cosmos to human existence and ethics. Philosophical concerns intersected with sociopolitical ones, significantly influencing ritual practices and interactions between people, mainly reflected in family law developments.<sup>109</sup>

The Confucian family law imposed a patrilineal structure that established the family’s legitimacy through the male lineage and demanded rituals to comply with this system, significantly weakening the role of women. During the Joseon period, due to the Confucian idea of justice, ancestor worship earned high esteem, and the distinction between legitimate and illegitimate children grew more pronounced. Additionally, the Family Rituals of Zhu Xi (an influential Neo-Confucian historian and philosopher), rooted in Confucian principles, were widely promoted in society.<sup>110</sup>

The Confucian concept that governed family relations is the *종법(jongbeop)* or agnatic principle (clan rules, related to the father’s side and connected through the male line, patrilineal)<sup>111</sup> based on which all descendants of one common male ancestor, no matter the degree of consanguinity, belong to one family and the family lineage is succeeded in

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<sup>105</sup> Koh, “Neo-Confucianism as the Dominant Ideology in Joseon”, pp. 63-64.

<sup>106</sup> Choi, “The History of Confucianism in Korea”, p. 36.

<sup>107</sup> Koh, “Neo-Confucianism as the Dominant Ideology in Joseon”, pp. 63-64.

<sup>108</sup> Kyung Moon Hwang, *A History of Korea*, Second Edition, Palgrave Macmillan, London, 2017, p. 62.

<sup>109</sup> *Ibid.*, p. 63.

<sup>110</sup> Geung Sik Jung, “The Codifications and Legal Institutions of the Joseon Dynasty”, *Journal of Korean Law*, Vol. 13 (2013), p. 204.

<sup>111</sup> Jinsu Yune, “Tradition and the Constitution in the Context of the Korean Family Law”, *Journal of Korean Law*, Vol. 5, No.1 (2005) 194-212, p. 196.

ancestral rituals and family property by the primary eldest son (장자 *jangja*)<sup>112</sup> of the male ancestor.<sup>113</sup> This structure strongly reinforced the hierarchical order of men and women, and women had the roles of “generous wives, obedient daughters-in-law and modest widows”.<sup>114</sup>

Nevertheless, it is crucial to emphasise that not all concepts associated with family-related and patriarchal principles can be historically regarded as Korean traditions. Around this idea was later built, for example, the so-called *hoju* system (호주제 *hojuje*)<sup>115</sup> or head of the family system, introduced during the Japanese<sup>116</sup> colonial period,<sup>117</sup> codified at Art. 778 of the Civil Code and later declared nonconforming with the Constitution by the Constitutional Court in 2005.<sup>118</sup> Such norms arose from a keen interest in legislation based on Neo-Confucian ideals that originated in Joseon Korea but were not part of Korea’s tradition; after independence, they had been imported from the Japanese system as a sort of ‘colonial legacy’. However, while the family head system does not directly stem from the dynastic period, the patrilineal and patriarchal principles from Korea’s history played a role in legitimising this structure (see more details in Chapter 2).<sup>119</sup>

During the Joseon era, a significant effort was made to create a collection of laws and extend Confucian family law throughout the territory, resulting in a dynastic code (or

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<sup>112</sup> The term “primary” used here is significant in Joseon Korea as it denotes the strict division of spouses into two distinct categories: the legitimate wives and the concubines.

<sup>113</sup> Boram Kim, *조선후기 가계계승과 종부의 역할: Family Succession and the Position of Jongbu in Late Joseon Society*, Graduate School of Seoul National University, 2022, p. 205.

<sup>114</sup> Boram Han, Finding female identity in the Neo-Confucian country of Joseon: analysis of female-related crimes in “Sabeobpumbo” (司法稟報), *International Journal of Korean Humanities and Social Sciences* Vol. 8, 2022, pp. 99-100.

<sup>115</sup> The notion of *hoju*, its codification and nonconformity with the constitution will be thoroughly discussed and explained later in this dissertation.

<sup>116</sup> See Harry Dauer, “Confucianism and its Influence on Marriage in Japan under the Meiji Civil Code and the Post-War Constitution”, *京都女子大学人文論叢 Kyoto Women’s University Humanities Journal*, (2006), pp. 87-91: Japan developed a Confucian-like civil code during the end of the nineteenth century, under the Meiji administration, with the goal of developing a wealthy country with a powerful army. The Code in Meiji Japan was tightly founded on patrilineal and patriarchal ideals, and women had little to no independence because they had to follow their father upon marriage, their husband until he passed away, and afterwards their oldest male son.

<sup>117</sup> 성평등아카이브 (Gender Archive), “호주제 폐지, 호주제란?”. Retrieved from: <http://genderarchive.or.kr/exhibits/show/abolishing-the-hoju-system/ex6-p1> (Accessed August 27, 2023).

<sup>118</sup> Constitutional Court of Korea, 17-1 KCCR 1, 2001Hun-Ka9.10.11.12.13.14.15 and 2004Hun-Ka5(consolidated), February 3, 2005 (S. Kor.).

<sup>119</sup> See Yune, “Tradition and the Constitution in the Context of the Korean Family Law”, p. 199: “The hoju system was never, until forcefully imposed, part of Korean tradition but its reinforcement of the extant patrilineal and patriarchal systems was accepted without reservation by the Korean populace”.

State Code) of law (경국대전 *Gyeongguk Daejeon*)<sup>120</sup> that may be viewed as a kind of constitution<sup>121</sup> (or “evidence of proto-constitutionalism,”<sup>122</sup> which established the principle of legality, restricted punishment and torture, provided rights for timely trials, also including basic rights<sup>123</sup> for some groups)<sup>124</sup> published in the second half of the XV century,<sup>125</sup> more precisely around the end of 1460s – beginning of 1470s.<sup>126</sup> It was revised and enacted for the fifth time in 1485, and no further revisions were planned.

This code, for example, prescribed far heavier sanctions for crimes done against lineal ascendants than for crimes committed against strangers, with enhanced penalties for those who harmed or murdered senior family members.<sup>127</sup> The presence of these clauses in the dynastic code also provided historical legitimacy for their inclusion in contemporary statutes.<sup>128</sup> The impact of these laws on modern society, as well as the function of the Constitutional Court in balancing them with modernity, will be the focus of the next part of this study.

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<sup>120</sup> See 국사 편찬 위원회 National Institute of Korean History, <<경국대전>>의 편찬, 편찬동기와 경과 (‘The Compilation of the *Gyeongguk Daejeon*, Compilation Motivation and Progress’). Retrieved from: [http://contents.history.go.kr/front/nh/view.do?levelId=nh\\_022\\_0020\\_0050\\_0020](http://contents.history.go.kr/front/nh/view.do?levelId=nh_022_0020_0050_0020) (Accessed July 24, 2023).

<sup>121</sup> See Tom Ginsburg, “Constitutionalism: East Asian Antecedents”, *Chicago-Kent Law Review* Vol. 88, (2012) 11-33, p. 32: As Ginsburg pointed out about the dynastic code, it is interesting to note how the Constitutional Court of Korea, in the 2004 case on Relocation of the Capital City Case, mentioned an unwritten customary constitution claiming that Seoul had been the capital since the Joseon dynasty, strengthening an understanding of the Joseon dynasty as a constitutionalist regime.

<sup>122</sup> *Ibid.*, p. 28.

<sup>123</sup> *Ibid.*

<sup>124</sup> See Chaihark Hahm, “Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?” (2001): On the Joseon constitutional discourse, it is interesting to see how the author analyses the sources of traditional Korean constitutional norms. He contends that constitutional traces are not to be found principally in the National Code, which may be classified as administrative law and is not directly concerned with disciplining the power of the ruler. The author believes that some constitutional instances could be found in Joseon Korea, but they were largely in the form of ritual rules that required official legislation and hence were classified as legal. The Joseon ritual (*ye*) code was particularly intriguing because it not only regulated the ruler’s behaviour but also the running of the entire government. It also included laws governing the state’s foreign relations with neighbouring countries and the conduct of its military forces.

<sup>125</sup> The Ming Code served as the fundamental civil and penal code adopted by Korea (and adjusted with special stipulations in order to create the suitable Code for Joseon). However, the dynasty required a code to explicitly define its institutional framework. Initially, the task of developing a lasting code proved to be somewhat challenging. Jeong Dojeon (1342-1398) produced the initial private effort to compile a document on country governance, known as “Six Codes for Administering the Country”. This work is believed to have laid the foundation for the first official attempt of compilation of a dynasty code in 1397, the *Gyeongje Yukjeon*.

<sup>126</sup> Hwang, *A History of Korea*, pp. 64-65.

<sup>127</sup> Marie Seong-Hak Kim, “Confucianism that Confounds: Constitutional Jurisprudence on Filial Piety in Korea”, in *Confucianism, Law, and Democracy in Contemporary Korea*, (ed.) Kim Sungmoon, Rowman & Littlefield International, Lanham, 2015, p.59.

<sup>128</sup> *Ibid.*

It is noteworthy that after the fifteenth-century legal advancements, the following significant legal milestone for Joseon Korea only occurred in the eighteenth century<sup>129</sup> when King Yeongjo ascended to the throne. King Yeongjo reigned from around 1724 to 1776, after a period when the country faced invasions from Japan and the Manchu. He actively pursued the development of a comprehensive ideology and implemented legal reforms to strengthen his authority and adapt the legal system to the changing institutional environment. Following the reign of King Yeongjo, his grandson Jeongjo (who ruled from 1776 to 1800) carried on his endeavours. Their efforts resulted in the compilation of the first supplement to the dynastic code in that century, known as *Sokdaejeon* or “Supplemented Great Code,” in 1746. Later, a new revised version named *Daejeon tongpyeon* or “Unified Great Code” was issued in 1785.<sup>130</sup>

During the reigns of King Yeongjo and Jeongjo in the late Joseon dynasty, mistreatment within the penal system emerged as a significant political and social concern. Strict prohibition of severe physical torture was enforced, and steps were taken to avoid the illegal punishment of commoners.<sup>131</sup> Remarkably, the Kings actively encouraged the dissemination of legal literature, including the *Jeollyul tongbo* (1786), a comprehensive collection of the law codes, criminal laws and precedents, as part of their efforts to promote the new legal code and enhance the penal system.<sup>132</sup> Furthermore, it is noteworthy that under Jeongjo’s reign, but more broadly throughout the eighteenth and nineteenth centuries, many petitions were filed, as evidenced by historical legal records.

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<sup>129</sup> Byoung-ho Park, “The Role and Function of the Yangban(兩班) in the Development of the Legal Culture in Korea”, *법학*, *Seoul National University Law Research Institute*, Vol.24 No. 4 (1983) 25-34, pp. 31-32: It is crucial to acknowledge that, in the sixteenth century, although there was a growing recognition that laws should be modified to reflect the evolving times and circumstances, conservatives vehemently resisted these adjustments. They believed that the stability of the ruling dynasty relied on limiting the unnecessary or urgent proliferation of laws. This approach to laws upheld the *yangban* belief that earlier laws were superior, laws should be unchangeable, and if any changes were required, it was preferable to only eliminate regulations specific to a given application rather than modifying the fundamental principles of previous laws. However, the *yangban* had a unique role in history by introducing Chinese laws, legislation, and the compilation of codes. They also translated the Great Ming Code, which served as the prevailing criminal law until the nineteenth century. Additionally, they collected, categorised, and organised the currently applicable laws in order to create comprehensive codes and revise the ones that already existed.

<sup>130</sup> Anders Karlsson, “Law and the Body in Joseon Korea: Statecraft and the Negotiation of Ideology”, *The Review of Korean Studies*, Vol.16, No. 1 (June 2013), pp. 12-13.

<sup>131</sup> Anders Karlsson, “Confucian Ideology and Legal Developments in Chosŏn Korea: A Methodological Essay”, in *The Spirit of Korean Law: Korean Legal History in Context*, (ed.) Marie Seong-Hak Kim, Brill, Leiden and Boston, 2016, p. 83: The records of the Ministry of Punishment reveal that of the thirty-six entries on the topic of prudence in punishment and the sixteen entries on the abolishment of existing forms of torture, twenty-two and thirteen entries respectively were from the reigns of these two kings.

<sup>132</sup> Sim Jae-woo, “The Penal System”, in *Everyday Life in Joseon-Era Korea: Economy and Society*, (ed.) Michael D. Shin, Global Oriental, Leiden, 2014, pp. 221-222.

These petitions sought to appeal to widely recognised norms, with a considerable portion of them being presented by women to appeal grievances.<sup>133</sup>

Regarding the important role of limiting punishments in Joseon,<sup>134</sup> it is crucial to emphasise that, according to the Confucian legal tradition, excessive physical violence that caused more harm than intended was supposedly prohibited based on principles of judicial prudence and benevolence. These principles played a central role in establishing the legal framework of Joseon. In the Neo-Confucian tradition and Confucian statecraft, the notion of human existence in the physical sense held great significance. This is because material force, a fundamental concept in Neo-Confucianism, establishes a connection among heaven, the world, and the humans who live in it. In its earthly form, based on Zhu Xi's thought, this force connects generations, as individuals inherit their portion of celestial energy from their parents. It appears clear that his concept is closely tied to the idea of filial piety.<sup>135</sup> Furthermore, this framework relates to the concept of the Mandate of Heaven, which is repeatedly mentioned in this work and will be analysed in greater detail later.

According to the Mencian perspective, the people are considered the essential component of the state, and it is the king's responsibility to ensure their well-being. From this point of view, it is worth noting that Joseon underwent a process of balancing and negotiating the use of law and punishment to safeguard the system and social order while still trying to respect traditional beliefs. The rhetoric of judicial prudence remained consistent across the ages; however, a thorough legal reform aimed at better aligning with these principles only occurred in the eighteenth century, as previously indicated.<sup>136</sup>

When Korea began to change from an agriculture-oriented<sup>137</sup> society into a commerce and industry-oriented one, Neo-Confucianism failed to keep up with the social changes,

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<sup>133</sup> Jisoo M. Kim, "Legal Disputes, Women's Legal Voice, and Petitioning Rights in Late Joseon Korea", in *Rights Claiming in South Korea*, (eds.) Celeste L. Arrington, Patricia Goedde, Cambridge University Press, Cambridge, 2021, p. 21.

<sup>134</sup> Park, "The Role and Function of the Yangban(兩班) in the Development of the Legal Culture in Korea", p. 24: On the matter of punishment, it is important to note that whipping was the permitted form of torture in criminal investigations (*gosin* 拷訊) as stipulated by the *Gyeongguk Daejeon*. Nevertheless, the use of torture contradicted the fundamental Confucian principles of caution in the judicial process and benevolence in punishment. As a result, the application of torture, as permitted by the legal code, was limited. However, the issue of torture sparked intense disputes in both the fifteenth and eighteenth centuries.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*, pp. 12-15; 38-40.

<sup>137</sup> See Jakub Łukaczyński, "Korean Legal Thought Under Yi Dynasty as a Reflection of Confucian Worldview Adopted in Early Joseon Period: Chinese Influence, Korean Ideology", *Gdańskie Studia Azji Wschodniej*, Vol. 9, 2016, p. 143: It is crucial to emphasise that Neo-Confucianism primarily represented the concerns of landowners, particularly those who owned small to medium-sized properties under the landowner-tenant peasant system.

creating socioeconomic contradictions.<sup>138</sup> Additionally, the interactions with foreign powers during the nineteenth century intensified the decline of Neo-Confucianism as the dominant ideology. The orthodoxy's status was already being challenged in the seventeenth and eighteenth centuries due to fundamental issues that surfaced inside the ruling order which gave rise to the *Silhak* ("Practical Learning")<sup>139</sup> social reform movement.<sup>140</sup> To improve social, political and economic conditions, the advocates of this movement campaigned for the reformation of the inflexible Confucian social hierarchy, the implementation of land reforms to alleviate the hardships faced by peasant farmers, the promotion of Korea's distinct national identity and culture, the encouragement of scientific studies, and facilitation of technology interchange with foreign nations.

It is noteworthy that, following the death of King Jeongjo, the subsequent four rulers were of a young age and hence lacked the ability to exercise authority. Consequently, throughout the nineteenth century, the court was predominantly influenced by individuals from the royal family, which led to widespread corruption that extended to local administration and incited numerous revolts of varying magnitude. Additionally, religious movements were emerging in this context, with significant prominence by the conclusion of the century.<sup>141</sup>

Driven by a Sino-centric world view, the Korean ruling elite in late nineteenth century rejected diplomatic connections with countries including western powers and the spread of Christianity. The Catholic concept of equality of all individuals at that time presented a serious threat to the *yangban* elites, who had followed a rigorous hierarchical and feudalistic system of status in society.<sup>142</sup> Japan and the Joseon dynasty signed the first modern amity and commerce treaty in February 1876. This showed Japan's desire to reconnect with Korea, prompting the Joseon dynasty's open-door policy. By implementing these new (unequal) treaties with Japan and Western countries and

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<sup>138</sup> Koh, "Neo-Confucianism as the Dominant Ideology in Joseon", p. 82.

<sup>139</sup> From the late seventeenth century, there were several initiatives that sought to unite a deeply divided society and enhance the nation's ability to adapt to the quickly evolving foreign environment. One of these was an intellectual movement called *Silhak*, which might be translated as "Practical Learning". The *Silhak* Movement divided into two primary factions: the agrarian faction, which prioritised the imperative of stability in rural society and advocated for the interests of farmers, and the commercial and industrial faction, which supported the progress of trade and manufacturing as well as the innovation of new technologies.

<sup>140</sup> Michal D. Shin, "The Intimate Past: An Introduction to the Joseon Period", *Everyday Life in Joseon-Era Korea: Economy and Society*, (ed.) Michael D. Shin, Global Oriental, 2014, p. 21.

<sup>141</sup> Hwang, *A History of Korea*, p. 103-104.

<sup>142</sup> Young-hee Suh, "The Modern World and the Korean Empire (Daehan jeguk)", (Trans.) Jong-chol An, in *A History of Korea, The Understanding Korea Series (UKS) 10*, The Academy of Korean Studies, 2019, pp. 194-197.

adopting these new policies, the Joseon dynasty tried to modernise based on Western models. These models inspired King Gojong's (1863-1897) enlightenment programs but were strongly opposed by the *yangban*.<sup>143</sup>

Following the new development, landlords and merchants earned fortunes from exports, but the impoverished peasants suffered from internal shortages of rice, a surge in prices and increase of taxation. Subsequently, the *Donghak* movement,<sup>144</sup> which started as an effort to reform self-cultivation and promoted equality, gained increasing significance,<sup>145</sup> until it erupted in an openly nationalistic revolt, the Donghak Peasant Revolution, an anti-government, anti-*yangban* and anti-foreign uprising in 1894 demanding a just and equal society.

Additionally, due to the focus shift from China to a more Eurocentric perspective, Joseon, which had previously considered itself a civilised nation, was now categorised as “barbarian” in the new global hierarchy. Several intellectuals perceived Confucianism and, in certain instances, the overall history of Joseon as a hindrance to the process of modernisation<sup>146</sup> to the point that, upon the start of the Japanese occupation in August 1910, the Korean people regarded Joseon with disgrace, attributing the loss of the country's sovereignty to its inadequacies.

At that time, most newspapers abroad used the phrase *gyeongsul gukchi*, signifying “the country's humiliation in 1910,” to indicate Japan's takeover of Korea in that year. Nevertheless, due to the country's division and the onset of the Cold War, the progress of decolonisation in the southern region was hindered, resulting in a notable continuity between the colonial and post-colonial periods in their perspectives on Joseon. Individuals persisted in experiencing remorse and pride towards Joseon, yet it did acquire further significance. In response to demands for the eradication of colonial influences that damaged the identity of Korea, Joseon began to be perceived more clearly as a victim of aggression perpetrated by imperial powers.<sup>147</sup>

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<sup>143</sup> *Ibid.*

<sup>144</sup> See Hwang, *A History of Korea*, p. 104: This movement (*Donghak*, “Eastern Learning”) begun as an effort to reform and revive self-cultivation, including native Korean spirituality, Confucian ethics and cosmology and other elements. Due to its focus on equality and rejection of the traditional feudal class order, some authors see this movement as an attempt to create a modernised Confucianism. The name “Easter Learning” was in evident contraposition with *Seohak*, Catholicism and “Western Learning”. However, both of these ideas were vehemently condemned by the *yangban*.

<sup>145</sup> For more details about the last decades of the dynasty until 1910, see Suh, “The Modern World and the Korean Empire (Daehan jeguk)”, pp. 194-215.

<sup>146</sup> Shin, “The Intimate Past: An Introduction to the Joseon Period”, p. 21.

<sup>147</sup> *Ibid.*, pp. 22-23.

However, a genuine and authentic rediscovery of Joseon and a renaissance of Confucianism as a philosophy that does not impede modernisation ultimately occurred in the 1970s. At that time, a strong emphasis was put on the internal development theory following the economic rise of the Asian Tiger and other Asian states, reaching its highest point after the conclusion of the Cold War.<sup>148</sup>

It is evident that after the fall of the Joseon dynasty, Neo-Confucianism lost much, if not all, of its influence in Korean public affairs. Nevertheless, in contemporary Korean culture, some core Confucian ideas are still relevant in the citizens' daily lives and have a considerable – but marginal – impact on the legal system. Confucian concepts, such as encouraging a familial lifestyle and creating an efficient nationwide administration, have played significant roles in Korea's history. For example, they helped the country's rapid recovery and subsequent development after the Korean War<sup>149</sup>, fought between North and South Korea from 1950 to 1953 and known as the first “hot war” of the Cold War.<sup>150</sup>

Among its various moral teachings, the already mentioned principle of filial piety (*hyo* 孝 in Korean), or devotion to family, was and still is a significant concept in Korea and every country that embraced this philosophy. This virtue is founded on ancestor worship, submission and deference to parental authority, and respect for the elders. According to Confucian ethics, the family was considered essential, and devotion to the family was a way to strengthen a group's cohesiveness.<sup>151</sup>

Even though today's population is highly urbanised, it is possible to find filial piety-related concepts and dynamics in many aspects of Koreans' lives. One example is the big Korean corporations or *chaebol*,<sup>152</sup> frequently structured like a traditional Korean family, with a strong desire for group harmony and cohesiveness.<sup>153</sup> As a critical value in society, filial piety continues to impact numerous laws in many fields, and South Korean courts frequently cite it as a justification for upholding decisions or deeming provisions constitutional.

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<sup>148</sup> *Ibid.*, pp. 25-26.

<sup>149</sup> Tomasz Śleziak, “The Role of Confucianism in Contemporary South Korean Society”, *Rocznik Orientalistyczny*, Vol. 66, No. 1, 2013, p. 29.

<sup>150</sup> Hwang, *A History of Korea*, p. 176.

<sup>151</sup> National Geographic Education, “Confucianism”. Retrieved from: <https://education.nationalgeographic.org/resource/confucianism/>. (Accessed October 25, 2023).

<sup>152</sup> South Korea's *chaebol* are family-owned businesses that typically have subsidiaries across diverse industries.

<sup>153</sup> Yong Chen, “The Presence of Confucianism in Korea and its General Influence on Law and Politics”, in *Corea. Una visión jurídica y geopolítica en el siglo XXI*, Arturo García Oropeza (Coord.), Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2021, p. 82.

Furthermore, as explained before, Korea's Confucian heritage drew attention following the country's modernisation based on remarkable economic progress towards the end of the twentieth century.<sup>154</sup> Traditional approaches<sup>155</sup> always include Confucianism as one of the forces driving the country's extraordinary growth and progress, emphasising some of its traits such as Confucian discipline, the importance given to education,<sup>156</sup> and collective devotion.<sup>157</sup>

Neo-Confucianism has significantly impacted the political and legal domains over the centuries, in addition to the social and economic spheres. Even if its effect has decreased and eventually disappeared from the official political realm (though not in terms of how concerns are addressed and campaigns are conducted, nor from the continued emphasis on specific values that ought to be embodied by political figures who represent the nation), it persists to some extent in the legal system – or at least it has been part of a heated debate on legal topics over the past decades. In this context, the judiciary's role in upholding traditional norms and ideas while embracing democratic principles is fundamental and should be analysed in detail. Its role is also essential in other democratised East Asian countries, especially Taiwan, where several topics still considered taboo in many Asian societies are debated publicly.<sup>158</sup>

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<sup>154</sup> Seok-Choon Lew, Woo-Young Choi and Hye Suk Wang, "Confucian Ethics and the Spirit of Capitalism in Korea: The Significance of Filial Piety", *Journal of East Asian Studies*, Vol. 11, No. 2 (May-August 2011), p. 181.

<sup>155</sup> See Hwuy-Chang Moon, *The Strategy for Korea's Economic Success*, Oxford University Press, New York, 2016: for an accurate analysis of the role of this set of values in Korea, it is also essential to take into account new approaches such as Hwuy-chang Moon's study of the factors behind Korea's unprecedented economic growth. Because other heavily Confucian countries did not experience the same process, Confucianism cannot be seen as a factor that always and in general contributes to a nation's economic growth. In the case of Korea, it is crucial to emphasise that Confucianism did not entirely shape the country's economic success on its own. K-strategies must be viewed as part of a larger system in which economic development was also based on many additional characteristics of the society such as speed and precision, learning and best practice, mix and synergy and dedication.

<sup>156</sup> See Juhu Kim, Jong-gak Lee, Soo-kwang Lee, "Understanding of Education Fever in Korea", *KEDI Journal of Educational Policy*, Vol. 2, No. 1, 2005, p. 8: One of the key contributing factors to the development of the Korean economy is the nation's emphasis on education, or "education fever". The recent idea of education fever has been used frequently over the last few decades to explain why Korean parents encourage the ambition for education. Additionally, it includes a sophisticated social system that represents collectivist views on education, an economic system of rewards, the design of educational systems, and the dynamics of educational assessment. Furthermore, higher education is mostly centred on the attempt to harmonise different system based on the "learn from the West, while maintaining Asian values" philosophy that combines Confucian practices (memorisation and choral repetition) with Western academic structures (See Moon, *The Strategy for Korea's Economic Success*, pp. 15-16).

<sup>157</sup> Lew, Choi and Wang, "Confucian Ethics and the Spirit of Capitalism in Korea", p. 181.

<sup>158</sup> Chien-Chih Lin, "Towards an Analytical Framework of Constitutionalism in East Asia: The Case of Taiwan", in *Taiwan and International Human Rights: A Story of Transformation*, (eds.) Jerome A. Cohen, William P. Alford, Chang-fa Lo, Springer, 2019, p. 98.

From this perspective, a fascinating characteristic of Confucianism is that, as a philosophy, it is usually no longer chosen on one's own will, which means that individuals do not consider themselves Confucians and do not even feel they support this heritage. According to Kim Sungmoon's "Civil Confucianism in South Korea," even if citizens uphold principles like filial piety and hold memorial ceremonies for their ancestors, they deny the association of these practices and values with traditional Confucianism.<sup>159</sup>

Notably, younger generations believe that concepts like "Confucian democracy" and "Confucian Constitutionalism" are anachronistic since the country underwent a historic transition to democracy.<sup>160</sup> This situation demonstrates that the Western perception that today's Korean (or East Asian, more broadly) culture is voluntarily Confucian and firmly supports these notions is inaccurate. However, it also proves, once again, that these values are deeply embedded in society. Despite this, cultural negotiations are an essential process in the country.

In addition to the Constitutional Court, which will be the subject of analysis of Chapter 2, the Supreme Court serves as a venue for such discussions. In order to explain this concept, Kim uses the example of a 2005<sup>161</sup> Supreme Court decision, when the judicial institution ruled, in a groundbreaking decision about the validity of a former customary law restricting clan membership to adult males, that women are entitled to formal clan membership with all the related rights of the paternal clan organisation, overturning a decision ruled half a century earlier.<sup>162</sup>

The mass media portrayed the case as a "grand showdown between traditional Confucianism and progressive modernity", and, unsurprisingly, the responses of liberal feminists and Confucian supporters were diametrically opposed.<sup>163</sup> In this circumstance, the Court presented itself as:

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<sup>159</sup> Sungmoon Kim, "Civil Confucianism in South Korea: Liberal Rights, Confucian Reasoning, and Gender Equality", in *Confucianism, Law, and Democracy in Contemporary Korea*, (ed.) Sungmoon Kim, 2015, pp. 105-106.

<sup>160</sup> *Ibid.*

<sup>161</sup> See Yune, "Tradition and the Constitution in the Context of the Korean Family Law", p. 195: It is crucial to underscore that 2005 was an unprecedented year in terms of the determination of compatibility or incompatibility of elements associated with tradition with the Constitution, as will be evident in various sections of this work. In that year, the National Assembly of the Republic of Korea passed a bill that abolished the hoju system, lifted the prohibition on same-surname-same origin marriage, and allowed mothers to pass their surname on to their offspring.

<sup>162</sup> Kim, "Civil Confucianism in South Korea", pp. 105-106.

<sup>163</sup> *Ibid.*, p. 109.

[...] an institutional venue in which traditional Confucian values/practices and liberal rights/values could be negotiated and accommodated by each other, thereby reinventing traditional Confucianism into a mode of Confucianism [...] that is plausible under the modern Korean legal circumstances.<sup>164</sup>

This case is fascinating to comprehend Confucianism and the critical function performed by the judicial branch as a mediator between the society's inherent tradition and the modernity it wishes to seek and attain, which will be discussed in further detail in the next chapter.

### **3. Theories on East Asian Constitutionalism: Three Approaches to the Link Between Confucianism and Constitutionalism Throughout the Ages**

Following an initial examination of Confucian and Neo-Confucian developments, it is necessary to investigate the historical correlations and prominent perspectives on the link between Confucianism and constitutionalism in classical terms, given that East Asian countries have developed their own forms of *Confucian Constitutionalism* in the past during the pre-modern era – where it was possible to find constitutional ideas in Confucian intellectuals' thought,<sup>165</sup> implying that they did not have to wait for the West to develop interesting and culturally-based forms of this concept – and in contemporaneity.

Western scholars often tend to associate the concept of Constitutionalism with their developments.<sup>166</sup> This phenomenon happens due to the West's historical tendency to categorise and assign labels to concepts quickly. For this reason, Confucianism has often been overlooked in comparative constitutional studies, yet examining its relationships to particular constitutional concerns, such as power limitations, written or unwritten constitutions, constitutional review, and other constitutional limitations, is vital to understanding the background of East Asian countries.

In Bui's work, three approaches to the link between these concepts have emerged: conflictivism, compatibilism, and indigenism. From the perspective of this study, these models, which have been grouped and widely described by other prominent scholars of

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<sup>164</sup> *Ibid.*, pp. 106-107.

<sup>165</sup> Ngoc Son Bui, "Confucian Constitutionalism: Classical Foundations", *Australian Journal of Legal Philosophy*, Vol. 37 (2012) 61-98, p. 62.

<sup>166</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 26.

East Asian studies, are not intended to demonstrate that East Asian countries currently have an indigenous model of constitutionalism. As it is now clear, most East Asian countries embraced and imported many Western principles associated with liberal constitutionalism. However, it is not accurate to say that the constitutional experience in East Asia began with the decolonisation or liberation of these countries, thanks to the influence of Western countries that served as provisional governments or helped and inspired their constitutions. Western liberal constitutionalism is not the only constitutional shape these countries have known in the past. Furthermore, some pre-existing indigenous tradition traits were compatible with the notion of constitutionalism. While Confucianism has traditionally embraced ideas similar to the Western concept of constitutionalism, some of these models can be viewed as a proposal to implement Confucian constitutional ideas – opposed to despotic regimes – in countries such as Vietnam and China for further constitutional improvements.

### 3.1. *Conflictivism*

Scholars who accept this view believe that Confucianism and Constitutionalism are irreconcilable. On the one hand, constitutionalism is seen negatively as a kind of restricted governance. Conversely, Confucianism is typically linked with subordination to authoritarian control and tyranny, resulting in an antagonistic connection between the two ideologies.<sup>167</sup> This work has already attempted to contradict this last point, rendering the conflict model unreliable for the current examination.

Among the individual virtues emphasised by Confucianism (loyalty with the meaning of doing the best one can for others, filial piety, propriety, and righteousness), filial piety is still deeply ingrained in East Asian societies today, influencing a wide range of laws and being used, in the case of South Korea, by the Constitutional Court to rule on the constitutionality of numerous acts. However, according to this view, even if both Confucianism and liberal constitutionalism emphasise the importance of the individual, the meaning is quite different. Confucian individuals are positioned in familial contexts or hierarchical social structures; constitutional individuals are viewed as persons without context since they have inviolable fundamental rights and are equals before the law.<sup>168</sup>

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<sup>167</sup> *Ibid.*

<sup>168</sup> Yu Chen, “Confucianism versus Constitutionalism”, *Journal of Cambridge Studies*, Vol. 2, No. 2 (June 2007), p. 26.

According to Yu Chen, comparing Confucian and constitutional legal practices may reveal disparities and inconsistencies between the two legal cultures, particularly in the contrast between the rule of man vs the rule of law and the prejudice against litigation versus the pursuit of justice.<sup>169</sup>

According to Bui Ngoc Son, advocates of this viewpoint, from a historical perspective, fail to distinguish between various kinds of constitutionalism and Confucianism, neglecting that constitutionalism is a “polymorphic phenomenon”<sup>170</sup> with several versions. The author also contends that while specific imperial policies contradicted constitutional concepts, Confucian thought is separate.<sup>171</sup> In his opinion, the notion of litigation was not as foreign to Confucian tradition as Yu Chen portrays it.<sup>172</sup> One of the Confucian classics (*The Book of Changes*), for example, includes the hexagram *sòng* 訟 (conflict, litigation, disputing, and “lawsuit”), which provides instruction about hearing litigation.<sup>173</sup>

### 3.2. Compatibilism

This paradigm seeks Confucian concepts and behaviours congruent with institutions and ideals associated with Western liberal constitutionalism. Scholars who adhere to this idea inherently accept a basic universalism of Western liberal constitutionalism. They believe several East Asian governments have agreed to Western constitutionalism’s prerequisites (court review, periodic elections, human rights, and press freedom).<sup>174</sup> Other nations, such as China, Vietnam, and North Korea, are still examples of authoritarian practices in that region. However, they follow the path in question, not because of Confucian heritage but because of an alternative Marxist state ideology.<sup>175</sup>

Michael Davis, writing a decade after South Korea’s democratisation, mentioned the work of Wejen Chang in his studies on constitutionalism and Asian values, which could be very interesting to get rid of the bias that confines Confucianism as a set of values promoting and supporting authoritarian regimes. The author said that early Confucianism

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<sup>169</sup> *Ibid.*

<sup>170</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 11.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*, pp. 11-12.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*, p. 12.

<sup>175</sup> Michael C. Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values”, *Harvard Human Rights Journal*, Vol. 11, 1998, p. 115.

encouraged compassion and mutual respect and that only later did rudiments of authoritarianism find their way into Confucian views.<sup>176</sup> Promoting such values makes classic Confucianism appear as a human rights-friendly philosophy.<sup>177</sup> In the Confucian understanding, authoritarianism does not imply a widespread subordination of the people to the government and the use of authority without regard for the fundamental rights of individuals.<sup>178</sup> The author also argued that liberal constitutional democracy should be able to support the implementation of its fundamentals, human rights, and the rule of law by creating an open-ended dialogue about values based on local and traditional practices in each country.<sup>179</sup> On the vital topic of the dialogue between foreign institutions and local legitimation, considering the judicial review institution in South Korea and Taiwan, Tom Ginsburg stated that it is compatible with Confucian tradition.<sup>180</sup> He argues that it is possible to “construct a locally legitimate account of what is undeniably a modern institution of foreign origin,”<sup>181</sup> resulting in the phenomenon of convergence.<sup>182</sup> Bui adds that this viewpoint does not consider Confucianism as a barrier. Confucianism may be examined and reinterpreted to explain the practice of constitutionalism, and the growth of constitutionalism in South Korea and Japan is presented as evidence to support this view.<sup>183</sup>

However, compatibilism fails to recognise the existence of non-western forms of constitutionalism, not acknowledging the diversity of constitutionalism and ending up promoting the idea of ‘exceptionalism’<sup>184</sup> and of ‘constitutional orientalism,’<sup>185</sup> implying that Western constitutional values are universal and must be imposed on non-western territories because they are superior, without considering the adoption and adaptation process.<sup>186</sup>

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<sup>176</sup> *Ibid.*, pp. 115-116.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*, pp. 110-111.

<sup>180</sup> Tom Ginsburg, “Confucian Constitutionalism: Globalization and Judicial Review in Korea and Taiwan”, *Illinois Public Law and Legal Theory Research Papers Series* (October 2001), p. 2.

<sup>181</sup> *Ibid.*, p. 50.

<sup>182</sup> *Ibid.*

<sup>183</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 13.

<sup>184</sup> See Tom Ginsburg, “Constitutionalism: East Asian Antecedents”, *Chicago-Kent Law Review*, Vol. 88 (2012) 11-33: described by Ginsburg as a narrative in which “constitutionalism and the rule of law are seen as distinctive Western contributions”.

<sup>185</sup> Western imagination of Constitutional law in Asia (See Andrew Harding, Ngoc Son Bui, “Recent Work in Asian Constitutional Studies: A Review Essay”, *Asian Journal of Comparative Law*, Vol. 11, No. 1 (2016) 163-183).

<sup>186</sup> Bui, *Confucian Constitutionalism in East Asia*, pp. 13-14.

### 3.3. *Indigenism*

Indigenism is the most prominent of the approaches to the link between Confucianism and constitutionalism. It contends that a few Confucian practices are constitutionalist and that Confucianism provides a model of constitutionalism. This layout, known as *Confucian constitutionalism*, is an outstanding example of East Asian pre-modern constitutionalism.

Different varieties of Confucian constitutionalism, carefully summarised by Bui Ngoc Son, can be mentioned based on the part of Confucian constitutionalism researchers focus on (e.g., descriptive features). The first kind is Ritual Confucian constitutionalism (*lizhi*), which emphasises the notion of *li* as a constitutional norm. According to Hahm, the *li* is “indistinguishable from codified rules and regulations” and serves as the foundation for determining the legitimacy of political authority.<sup>187</sup> All of these traits make Confucian ritual (*li*) analogous to modern constitutions in the sense that it may be used to legitimise authority and to contest the legitimacy of the ruler – as happened in seventeenth-century Joseon Korea, which had its own form of Confucian constitutionalism, as pointed out by Hahm and later supported by Bui.<sup>188</sup> The second kind is virtual Confucian constitutionalism, endorsed by Kim Sungmoon, which emphasises the ruler’s moral virtue (*dezhi*) rather than solely the idea of *li*.<sup>189</sup> Third, Institutional Confucian constitutionalism is concerned with the function of institutions.<sup>190</sup> The last model is religious Confucian constitutionalism, which is not empirical. It is more of a normative prescription for China’s future, which is one of the subjects on which academics are concentrating their efforts, as it will be possible to see later in this chapter. Jiang Qing is the prominent advocate of this approach, who strongly criticises Western constitutional legitimacy for extreme secularisation and selfishness. He provides a tri-legitimacy thesis based on heaven, earth (from history and culture), and human legitimacy (from people’s desires),<sup>191</sup> which could be applied to countries like Vietnam and China in order to institutionalise constitutional ideas from Confucianism.<sup>192</sup>

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<sup>187</sup> See Chaihark Hahm, “Ritual and Constitutionalism: Disputing the Ruler’s Legitimacy in a Confucian Polity”, *The American Journal of Comparative Law*, Vol. 57, No. 1 (Winter 2009) 135-204.

<sup>188</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 15.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*, p. 17.

<sup>192</sup> Bui, “Confucian Constitutionalism: Classical Foundations”, p. 98.

Interestingly, Bui Ngoc Son presents a fresh perspective in “Confucian Constitutionalism in East Asia” that may be considered highly stimulating in understanding the importance of Confucianism in constitutional East Asia. As a result, as theorised by the author, mixed constitutionalism, which combines Confucian and Western modern constitutionalism, should emerge.<sup>193</sup>

#### **4. Shaping the Role of Confucianism in Contemporary East Asia: A Variety of Approaches and a First Analysis of Constitutional Texts**

Before digging deeper into the issue, it is critical to establish the methodologies used to study the type and degree of effect Confucianism still has on many aspects of East Asian people’s lives. When it comes to China, the country is not entirely dependent on imported Western liberalism and Marxism but also heavily relies on Confucianism, which continues to impact politics, legislation, and other areas<sup>194</sup> as a source of legitimacy.

As illustrated by the previous case study of Korean Neo-Confucianism, it is safe to argue that South Korea developed its unique dynamic type of Confucianism that evolved and changed shape, failing to maintain the same level of influence through the centuries and eventually disappearing from certain areas of public life. While Confucian practices and ideals are still prevalent in cultural processes and everyday life, Confucianism has often been openly dismissed as an official philosophy. Unlike in China, where Confucianism was reborn under Xi after being discarded for an extended period before and throughout Mao’s Communist revolution,<sup>195</sup> Confucianism in South Korea is not officially used to legitimise power and shape official politics (although, as will be possible to examine in this work, Confucian narratives and symbols remained implicitly crucial for obtaining political public approval even in post-democratisation times).

Due to the variety of scenarios, attempting to conceptualise the correlation between notions such as Confucianism and democracy (often counterposed to a more meritocratic

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<sup>193</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 18.

<sup>194</sup> Sophia Gao, Aaron J. Walayat, “Confucianism and Democracy: Four Models of Compatibility”, *Journal of Chinese Humanities*, Vol. 6, 2021, p. 213.

<sup>195</sup> See “How did Confucianism win back the Chinese Communist Party? A two-millennia-old sage proves his worth to Xi Jinping”, *The Economist*, (June 23, 2021). Retrieved from <https://www.economist.com/the-economist-explains/2021/06/23/how-did-confucianism-win-back-the-chinese-communist-party> (Accessed July 12, 2023): During the Cultural Revolution, in the mid-1960s, the ‘Analects’ were forbidden, Confucian materials were burned and destroyed, and the heritage of the Confucian order was entirely abandoned. Furthermore, influential Party members who fell out of favour in the 1970s were accused of backing a Confucian resurgence.

view, typical of the traditional Confucian society)<sup>196</sup> or Confucianism and constitutionalism in a single definition would result in an incomplete conclusion since different understandings, when considered alongside historical contexts, geopolitics, culture, and power relationships, all play an essential role and lead to different types of correlations.<sup>197</sup> Essentially, there are many realities and viewpoints on the relationship between Confucianism, constitutionalism and democracy that are not always obvious but occasionally implicit in society.

Understanding the existing approaches is required to grasp the relationship between the notions. The following methods are the ones that are most in line with the goal of this work among the other approaches (e.g., philosophical and culturalist, which states that it is impossible to give up Confucianism for the sake of democracy), and they will be employed for an in-depth analysis of the subject matter of this dissertation.

Firstly, the plural approach considers the different forms of democracy and Confucianism. From this perspective, democracy is considered multifarious, just as Confucianism has many sides. The fact that “[t]here are plural truths and multiple ways of reconsidering the relationship between democracy and Confucianism” and “Traditional Western liberal democracy is not the final truth or criterion by which to judge all political systems”<sup>198</sup> makes the connection between the two concepts at stake complicated and multifaceted.<sup>199</sup> Additionally, the debate on democracy and Confucianism usually applies to countries that still have to harmonise the two concepts to find an *ad hoc* system that can work to replace a more authoritarian one, for example, the case of China. In this case, it will also be used to understand and add some considerations on the correlation between the two notions in an already democratised context.

The abovementioned approach is appropriate for this research because it considers the diverse forms of Confucianism created and disseminated in different countries over various ages. At the same time, it does not presume that Western liberal democracy is the sole and immutable choice and even when it is embraced as it is in different contexts, it

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<sup>196</sup> Later in this work, an intriguing analysis pertaining to the Korean case will be conducted about democracy vs. meritocracy in the Confucian civil society.

<sup>197</sup> Hahn, “Constitutionalism, Confucian Civic Virtue, and Ritual Propriety”, pp. 48-49.

<sup>198</sup> Baogang He, “Confucianism and Democracy, Testing Four Analytical Models in an Empirical World”, *Taiwan Journal of Democracy*, Vol. 12, No. 2, December 2016, p. 30.

<sup>199</sup> *Ibid.*: “Just as Confucianism is multidimensional, democracy also is multifaceted, including liberal, developmental, social, deliberative, and republican conceptions of democracy. The relationships between democracy and Confucianism therefore must be multiple and complex”.

develops its own peculiarities, which need to be analysed and addressed in order to understand differences and similarities around the world. In He Baogang's words on the relationship between Confucianism and democratic order:

It is better to remain open to other definitions and interpretations, because different understandings and conceptions of Confucianism and democracy, together with historical contexts, cultural backgrounds, power relationships, and geopolitics, all play their part. In building democracy, changing interpretations and reconstructions of Confucianism often come into play.<sup>200</sup>

Another method that is employed in this work is the comparative approach. This approach underlines the need to compare various situations to the narrow viewpoint of a single-country case study.<sup>201</sup> From this point of view, except for China – which is using the Confucian revival as a way to provide a moral political foundation to legitimise the political function – it is unquestionably true that, for example, East Asian countries do not have a political party expressly employing or connected to Confucianism. This unequivocally demonstrates how little influence Confucianism has in contemporary politics in general.

Furthermore, to better understand Confucianism's modern function, it would be worthwhile to examine examples of both democratic and socialist constitutions to determine if Confucianism has an explicit role in the area. Neither the Constitutions of China, South Korea, nor Japan give Confucianism a special and privileged position in their articles.<sup>202</sup> The terms “Confucius,” “Confucian,” or “Confucianism” do not appear and are not used expressly in any of these constitutions.<sup>203</sup> However, there are a few cases of possible indirect references to this philosophical set of values. One example is Article 9 of the Constitution of South Korea, which has been considered ambiguous when matters related to Confucian principles were at issue. The Article states that: “국가는 전통문화의 계승·발전과 민족문화의 창달에 노력하여야 한다” [“The State shall strive to sustain and develop the cultural heritage and to enhance national culture”].<sup>204</sup> This article does not expressly designate Confucianism as a cultural inheritance in any

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<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*, p. 64.

<sup>202</sup> *Ibid.*

<sup>203</sup> See Constitution of the People's Republic of China (rev. 2018), Constitution of the Republic of Korea (1987), Constitution of Japan (1947).

<sup>204</sup> Constitution of the Republic of Korea (1987), Art. 9.

way, as will be shown through the analysis of a decision of the Constitutional Court later on in this dissertation. Nevertheless, even if there is no direct correlation, it is hard to dismiss Confucianism's essential influence on this country's development and trajectory throughout the decades.<sup>205</sup>

Another interesting case is the constitution of Vietnam,<sup>206</sup> a Socialist Republic that, from the cultural point of view, is often grouped with East Asian countries. In fact, among other traditional principles written in the preamble of the Constitution of the Socialist Republic of Vietnam (in its English version), it is possible to find some traditional Confucian values, such as 'humaneness' and 'righteousness.'<sup>207</sup> Among competing constitutional ideas and other provisions, the 2013 Constitution of the country resonates with Confucianism and its communitarian values.<sup>208</sup> Bui points out that even if Confucianism as a formal political ideology is no longer successful, its impacts on society cannot be readily nullified since conventions, practices, and landscapes "remain permeated with Confucian culture."<sup>209</sup>

In conclusion, apart from a few rare indirect instances, Confucianism is typically left out of official and explicit narratives in the political and constitutional domains. As stated by He:

[...] while increasingly democracy has been established as a fundamental political principle in East Asia, Confucianism has retreated from constitutional and political areas into social and private realms.<sup>210</sup>

However, as previously said, a comprehensive examination that goes beyond the written constitutional documents is required to uncover a large number of Confucian

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<sup>205</sup> Kim, "Confucianism that Confounds", pp. 57-58.

<sup>206</sup> Vietnam is typically not counted as an East Asian country since it is more frequently associated with Southeast Asia. However, it is essential to include it in this analysis considering the significant effect Confucian principles have on Vietnamese society. The influence of those principles makes the country culturally closer to East Asia.

<sup>207</sup> See Preamble of the Constitution of the Socialist Republic of Vietnam (Amended 2013), Unofficial Translation from Vietnamese by International IDEA, Institute for Democracy and Electoral Assistance: "In the course of their millennia old history, the Vietnamese people, working diligently, creatively, and fighting courageously to construct and defend their country, have forged a tradition of patriotism, solidarity, humaneness, righteousness, perseverance, and indomitableness that has created Vietnamese civilisation and culture of today [...]". Retrieved from: [https://constitutionnet.org/sites/default/files/tranlation\\_of\\_vietnams\\_new\\_constitution\\_enuk\\_2.pdf](https://constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf)

<sup>208</sup> Ngoc Son Bui, "Vietnam's Mixed Constitution and Human Rights", *The Law & Ethics of Human Rights*, Vol.16, No. 2 (2022) 295-319, p. 316.

<sup>209</sup> *Ibid.*, 315.

<sup>210</sup> He, "Confucianism and Democracy", pp. 33-34.

practices employed as customs, judicial reasoning, and negative instances for the lack of growth of individual rights.

## **5. East Asian Constitutionalism in the Contemporary World: A Concrete Reality or a Myth?**

The preceding approaches were more likely to explain the compatibility between tradition and a general idea of constitutionalism, considering a classical idea of Confucian constitutionalism. They attempted to dismiss the bias that East Asia could not build its form of constitutionalism or express this concept more accurately, its version of the adapted constitutionalism, traditionally due to Confucianism. To further delve into the topic, it is also essential to emphasise contemporary theories on whether it is possible to show that an East Asian model of constitutionalism exists empirically today. As defined by Bui in the chapter “Toward an East Asian model of constitutionalism” of *Confucian Constitutionalism in East Asia*, two leading schools of thought on this matter, regionalism and universalism, will be analysed in the following section.

### *5.1. Regionalism vs. Universalism*

Universalists believe that constitutionalism in East Asia does not differ from generic constitutionalism because of its universal appeal beyond Western countries.<sup>211</sup> Differently, Yeh and Chang, the key thinkers of the so-called regional approach, stress that several East Asian countries (e.g., Japan and South Korea) are stable constitutional democracies with comparable tendencies and, additionally, they are also based on a few distinguishing traits that characterise these countries and their constitutional evolution.<sup>212</sup> The specific qualities mentioned by the two writers are economic stability following fast growth, the political climate and civil society “capable of monitoring governments and generating political alternatives,”<sup>213</sup> changing familial relationships, and ethnic

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<sup>211</sup> Albert H. Y. Chen, “Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations”, *International Journal of Constitutional Law*, Vol. 8, No. 4 (October 2010), 849–884, p. 850.

<sup>212</sup> *Ibid.*

<sup>213</sup> Jiunn-rong Yeh and Wen-chen Chang, “The Emergence of East Asian Constitutionalism: Features in Comparison”, *The American Journal of Comparative Law*, Vol. 59, No. 3, Oxford University Press (Summer 2011), p. 813.

homogeneity.<sup>214</sup> All these features do not wholly mirror Western constitutionalism, creating what the two authors define as the “East Asian style”<sup>215</sup> of constitutionalism.

According to Yeh and Chang, comprehending the constitutional developments in Japan, South Korea, and Taiwan requires understanding their social and political underpinnings as preconditions for constitutional democracy.<sup>216</sup> The authors also discuss the four distinguishing features of emerging East Asian constitutionalism: instrumental constitutional state-building, textual and institutional continuity, reactive and cautious judicial review, and a broad range of rights responsive to social and political progress.<sup>217</sup>

Among these distinctive attributes, the present work will extensively examine – in the following chapters – the latter two from the viewpoint of Confucian tradition to advance our understanding of the unique characteristics of this part of the world. The authors also state that East Asian democracies embrace “the liberal constitutional structures of enshrining sovereignty, placing checks and balances on government power, and empowering courts to safeguard the rule of law and individual rights”<sup>218</sup> when discussing the differences between East Asian constitutionalism and the so-called standard (Western) constitutionalism. However, unlike its Western counterparts, who established the idea of constitutionalism to “romanticise” their aim following revolutionary accomplishments, constitutional institutions in East Asia only gradually matured into democratic state structures after decades of effort.<sup>219</sup>

Furthermore, the East Asian experience differs from transitional constitutionalism, which is typically associated with East Europe or South Africa, because the judicial attitude is more cautious and usually does not run counter to the will of the political majority, as possible to see, for example, in the way the Constitutional Court of Korea dealt with the first case of presidential impeachment in 2004, and, very differently, with the 2017 case of impeachment of President Park, both widely analysed in Chapter 4. Additionally, unlike in Eastern and Central European cases where the European Union played a pivotal role in shaping constitutionalism and democratisation, East Asian countries did not receive much regional assistance.<sup>220</sup> It is also critical to emphasise that,

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<sup>214</sup> *Ibid.*, pp. 811-814.

<sup>215</sup> *Ibid.*, p. 805.

<sup>216</sup> *Ibid.*, p. 811.

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*, p. 834.

<sup>219</sup> *Ibid.*, pp. 834-835.

<sup>220</sup> *Ibid.*, pp. 836-837.

in contrast to their East European counterparts, East Asian – and primarily South Korean – societies have maintained their vibrant spirit after democratisation.

Lastly, it is crucial to draw parallels with the Asian values discourse, which contends that putting the State or community ahead of the individual is contrary to liberal and democratic constitutionalism. However, in several of today's East Asian countries, the significant value placed on the community does not have a strict connotation that negatively affects individuals within the community. Despite traditional ideals and the patriarchal structure of society, democratic countries such as South Korea and Taiwan have worked to protect rights such as gender equality, notwithstanding the apparent decreasing interest in this form of protection under more conservative administrations.<sup>221</sup>

To summarise, the authors propose an East Asian Constitutionalism model that includes instrumental constitutional state-building, textual and institutional continuity, reactive and cautious judicial review, and an extensive spectrum of rights, departing from traditional understandings of liberal constitutionalism, transitional constitutionalism and Asian values.<sup>222</sup> This paradigm is beneficial for emphasising parallels and contrasts with Western liberal constitutionalism, although it is not exhaustive. While it is enough to explain the situation in Japan, South Korea, and Taiwan, it is insufficient to explain constitutional implementation in semi-democratic regimes and authoritarian constitutionalism that define many East Asian jurisdictions.<sup>223</sup>

Attempting to understand every aspect of constitutionalism from the perspective of a macro group (regionalists from East Asia and universalists from all countries that have embraced constitutionalism) can be counterproductive at times because it makes it impossible to understand the unique features of single countries. For instance, in the case of judicial review, universalist theorists argue that being politically cautious is a trait of every successful working court with the task of constitutional adjudication.<sup>224</sup> In contrast, regionalist theorists argue the opposite, claiming that these characteristics are typical of the region due to how constitutionalism has evolved there. As even Bui supports, it is true that judicial actors must act with prudence everywhere and that the judicial recognition of human rights is a global phenomenon.<sup>225</sup>

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<sup>221</sup> See Hyo-jin Lee, "Proposal to abolish gender equality ministry reemerges as key issue ahead of elections", *The Korea Times*, February 27, 2024. Retrieved from: [https://www.koreatimes.co.kr/www/nation/2024/02/113\\_369380.html](https://www.koreatimes.co.kr/www/nation/2024/02/113_369380.html) (Accessed March 5, 2024).

<sup>222</sup> Lin, *Towards an Analytical Framework of Constitutionalism in East Asia*, pp. 99-100.

<sup>223</sup> *Ibid.*

<sup>224</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 157.

<sup>225</sup> *Ibid.*, p.158.

Additionally, it is necessary to analyse each context for a more accurate explanation. In the case of South Korea, for example, even if the Constitutional Court itself stated that the society has moved from the traditional idea of family to the concept of the nuclear family<sup>226</sup> when analysing the developments towards a more inclusive democratisation process and safeguard of human rights, there is still strong opposition from supporters of tradition, and there are also conflictual positions within the judiciary. The writers from both schools of thought fail to acknowledge that collective and moral values linked with the Confucian heritage, such as filial piety, remain very powerful, impacting society and court judgements. Indeed, labelling East Asian constitutionalism as “exotic” to differentiate it from the Western one is inaccurate and sounds extremely derogatory because it is used with a negative meaning as opposed to a superior Western perspective. Once again, a possible answer to this dilemma could be found in a middle position, considering that a set of institutions and rights imported from the West has become a culture-specific case, developed in countries with different traditional backgrounds and historical and geographical contingencies.

#### **6. Four Approaches to the Similarities between Democracy and Confucian Tradition: Are Traditional Values Partially Compatible with Democratic Ideas?**

After a first step in defining the East Asian general foundations concerning Confucianism and constitutionalism, it is necessary to investigate any potential links between democracy and Confucianism within this framework to carry out an even more detailed analysis of the development of legal systems and democracies in this region. In the recent past, the following models have been applied to States like China to describe a prospective [Confucian democratic] order. From an alternative point of view, since at least three countries that have been based on Confucian tradition for centuries have bloomed into full and advanced democracies already, they may also be utilised to demonstrate the effectiveness of well-established frameworks in which Confucian ideals and advanced modern democratic structures already interact without forcefully becoming mutually exclusive, concluding that traditions stemming from Confucianism do not just favour authoritarianism since they share many basic views with contemporary

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<sup>226</sup> Constitutional Court of Korea, 9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997 (S. Kor.).

democracies. They are not just an impediment to democratic growth, but many Confucian principles are frequently interestingly comparable to liberal democratic values. To put it another way, because South Korea, Japan, and Taiwan are East Asian models of democratic growth, some of these approaches may help to explain why Confucianism can exist in the background of liberal democracies, adding some considerations on what the role of Confucianism is today. From another perspective, it would be intriguing to study the compatibility of core Confucian notions with elements of democratic regimes. As a result, this thesis will examine prospective and established and flourishing democracies in the region to provide an early-stage comprehensive analysis of Confucianism's role and the position it might take to offer a more democratic alternative to current authoritarian governments.

Traditionally, there are two models of the connection between democracy and Confucianism (and their variations). However, He Baogang elaborated on a more complex division into four ideal-type models: conflictivism, compatibility, hybrid model, and critical model.<sup>227</sup> The first two models are diametrically opposed and overly extreme in their stances. Those two theories are traditionally recognised and are antithetical, contending that democracy and Confucianism are either incompatible or may perfectly blend to form a constructive relationship. Furthermore, both the conflict and compatibility models prioritise democracy, relegating Confucianism to a peripheral and passive position that may be adjusted and altered to make it compatible with democracy.<sup>228</sup>

The compatibility and hybrid models are very similar in broad terms. However, the latter argues that even if democracy and Confucianism can coexist, they still have tensions, placing this model in a middle position between conflictivism and compatibility, revealing the complicated interaction of these two concepts in practice. The critical model, which considers Confucianism an active arbiter of political norms while respecting the values usually associated with liberal democracies, assumes instead a pivotal role of Confucian thought for an analysis devoid of Western bias.<sup>229</sup>

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<sup>227</sup> He, "Four Models of the Relationship between Confucianism and Democracy", p. 19.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*, p. 20.

### 6.1. Conflict Approach

Conflict model theorists, like Samuel Huntington, claim that Confucius' original values cannot match with liberal principles – and consequently with liberal democracies – because they stem from two completely different realities, one agricultural and the other one industrial.<sup>230</sup> For example, beginning in the early twentieth century, some Korean intellectuals saw Confucianism as a source of backwardness that impeded the process of modernisation, and later, scholars who opposed Park Chung-hee (1963-1979) and Chun Doo-hwan's (1980-1988) regimes saw Confucianism as something that hampered the country's pursuit of democracy and social justice.<sup>231</sup>

Scholars who support this theory believe that the Confucian concepts of *ren*, ritual, and the figure of the Gentleman represent a type of order that has nothing to do with a democratic order and in which conflict, as opposed to harmony, is seen as a normal condition of political life. Traditional Confucian morality, in this view, impedes transactional politics and democratic institutions. According to this viewpoint, rights should be bestowed by the state rather than inherited by the individual. Furthermore, a political party should symbolise moral correctness. Two types of parties may be identified based on party members' aims. The *junzidang* 君子黨 (*Gentleman party/party of decent people*) is concerned with public interests, pursuing altruistic public goals<sup>232</sup> in contrast to the *xiaorendang* 小人黨 (*Villain party*), which is solely concerned with its greedy private ambitions.<sup>233</sup> Given that gentlemen should only pursue the broad public's interest, factions (or pluralism, a traditional characteristic of liberal democracies) should not exist since they would only advocate their specific desires at the expense of the community.<sup>234</sup>

It is evident that – within this approach – the notion of pluralism acquires an extremely negative meaning. This is comparable to Carl Schmitt's concept of pluralism as an impediment to people's uniformity at the detriment of the nation's public good. However, conflictive scholars argue that pluralism's adverse impact stems from the stress on

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<sup>230</sup> Gao and Walayat, "Confucianism and Democracy", p. 215.

<sup>231</sup> Tan, "Confucianism and Democracy", pp. 103-104.

<sup>232</sup> Sang-jun Kim, "The genealogy of Confucian Moralpolitik and its implications for modern civil society", in *Korean Society: Civil Society, Democracy, and the State*, (ed.) Charles Armstrong, Routledge, 2002, p. 73-74.

<sup>233</sup> *Ibid.*

<sup>234</sup> He, "Four Models of the Relationship between Confucianism and Democracy", p. 21.

righteousness rooted in Confucian ideas, which allows the ruler to move away from the idea of the common good, also allowing authoritarian drifts.

It is undeniable that Confucianism has been used in the past as a narrative for suppressing democratic movements and to oppose Western democracies in various circumstances (e.g., Yuan Shikai's<sup>235</sup> dynastic revival, Chiang Kai-shek's<sup>236</sup> use of Confucian values to create a controlled society ruled by fear in the 1930s and 1940s,<sup>237</sup> democratisation process slowdown in Korea).<sup>238</sup> It is also true that Confucianism is frequently associated with tendencies of submission to authoritarian governments. However, as seen in the previous parts of this work, it is not the purpose of Confucianism when analysed in its integrity.

On this matter, Kim Sungmoon (not a conflict theorist) brilliantly criticised Chan's perfectionist justification of democracy<sup>239</sup> in correlation with Confucianism based on the role of authority. From his perspective, one significant difference between Confucianism and democracy in terms of the relationship between the ruler and the ruled is that in the first case, this relationship had already been established, and the sole obligation was to make this existing relationship ethical, leading to the idea that one-man absolutism could be an effective way towards this goal.<sup>240</sup> In a democracy, however, the 'ruled' also serve as co-rulers, resulting in an entirely different sort of citizenship.<sup>241</sup> Even if the relationship between the ruler and the ruled required by Confucianism is inclined to authoritarianism, there are a few aspects of this philosophy that must be considered and that conflictive theorists fail to recognise because they look at the matter from a Western-centric perspective<sup>242</sup> and they are unable to remain within the previously mentioned grey area of analysis.

To begin with, Confucian scholars argue that coercion and the force of law are inferior methods of regulating human conduct, failing to inspire trustworthy moral behaviour

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<sup>235</sup> Yuan Shikai (1859-1916) was a Chinese military and government figure who rose to prominent position during the late Qing dynasty and became Emperor of China in 1912.

<sup>236</sup> Chiang Kai-shek (1887-1975) was a Chinese politician and military leader who served as the Generalissimo of the Republic of China (ROC) from 1928 until his death. Following the CCP's defeat of the Kuomintang in the Chinese Civil War (which concluded in 1949), he remained as leader of the ROC government in Taiwan.

<sup>237</sup> He, "Four Models of the Relationship between Confucianism and Democracy", pp. 21-22.

<sup>238</sup> *Ibid.*

<sup>239</sup> For the details on the theory see: Joseph Chan, *Confucian Perfectionism: A political Philosophy for Modern Times*, The Princeton-China Series, Princeton University Press, 2013.

<sup>240</sup> Sungmoon Kim, "Confucian Authority, Political Right, and Democracy", *Philosophy East and West*, Vol. 67, No. 1, University of Hawai'i Press, January 2017, pp. 11-12.

<sup>241</sup> *Ibid.*

<sup>242</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 17.

among citizens.<sup>243</sup> In order to become a Noble Gentleman (*Junzi*), someone who has acquired all the virtues and has become an example for society,<sup>244</sup> Confucianism places a high value on self-cultivation by studying and observing ritual or normative behaviours<sup>245</sup> and moral development is fostered in order to maintain overall peace within society. In addition, a few mechanisms have been implemented to maintain a balance between the monarch and his subjects. The notion of *zhèngmíng* (rectification of names), considered fundamental by Bui Ngoc Son to understand the philosophy of Confucian constitutionalism,<sup>246</sup> suggests the existence of a government (a ruler) monitored by knowledgeable academics. This system can be considered a kind of check and balance power<sup>247</sup> to prevent the authority from deviating from the general well-being of the people (public good, which can be identified in the concept of *minben* – people-as-basis)<sup>248</sup> and to maintain compliance to the ethical principles upon which the relationship with the ruled is built. Even in cases in which the political-institutional mechanisms were to be considered insufficient, Confucianism endorsed the concept of a citizens-led uprising in the event that the government breached the rules of society – a concept traditionally associated with liberalism, which will be explained in detail later.

Somehow, even conflictive theorists draw fascinating conclusions, food for thought. In 1991, in his work *The Third Wave: Democratization in the Late Twentieth Century*, Huntington defined Confucian democracy as a “contradiction in terms.”<sup>249</sup> Many advocates of the absolute incompatibility of Confucianism and democracy cite this section of his works. However, he also argued that “[...] democracy in a Confucian society need not be.”<sup>250</sup> Additionally, he further added that even if a country’s tradition becomes an impediment to democracy at some point in time, this should not be a problem because

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<sup>243</sup> Sarah Flavel, Brad Hall, “Exemplary Paternalism: A Consideration of Confucian Models of Moral Oversight”, *Culture and Dialogue*, Vol. 8, Brill, 2020, p. 224.

<sup>244</sup> As mentioned by Confucius in the *Analects*: “When one rules by means of virtue it is like the North Star – it dwells in its place and the other stars pay reverence to it”.

<sup>245</sup> Charlene Tan, “A Confucian perspective of self-cultivation in learning: Its implications for self-directed learning”, *Journal of Adult and Continuing Education*, Vol. 23, No.1, July 2017, p. 5.

<sup>246</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 27.

<sup>247</sup> See Hein Cho, “The Historical Origin of Civil Society in Korea, The Academy of Korean Studies”, *Korea Journal*, Vol. 37 No.2, 1997, p. 28: “Confucians also came up with a mechanism for checks and balances though in different arrangements. Through the ages, they developed a highly articulated governmental organization by which monarchical power was institutionally controlled so that their self-designated role as people’s guardian might be better realized. The governmental organization of Chosŏn [Joseon] dynasty (1392-1910) Korea contained probably the most elaborate form of Confucian checks and balances.”

<sup>248</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 27.

<sup>249</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, 1991, p. 310.

<sup>250</sup> *Ibid.*

cultures are historically dynamic.<sup>251</sup> One criticism that might be raised here is that advocates of this extreme viewpoint, primarily Western scholars who have to dismiss the importance of tradition to justify the dominance of Western systems, cherry-pick little pieces of the broader narrative to match their own.

## 6.2. *Compatibility Approach*

Scholars who adhere to this approach (also widely Western-centric in nature) – for example, William Theodore de Bary, Andrew Nathan, and Edward Friedman – contend that certain aspects of Confucianism are congruent with democratic principles and institutions.<sup>252</sup> Some scholars who support this school of thought argue that the most democratised countries of East Asia, Korea, Japan, and Taiwan, are also countries that still heavily rely on Confucian principles.<sup>253</sup> In addition, referring to the compatibility of democracy and Confucianism, Tan Sor-hoon cited two writers, Kwon Tai-hwan and Cho He-in, who argued that the Confucian heritage might have a long-term good impact on Korean democratisation “through mutual adjustments in the interface between Confucian and western ideals.”<sup>254</sup>

Some of the traditional Confucianism’s key concepts, institutions, and practices, such as *minben* – people as roots, expecting the ruler to be responsible – and Heaven related to the notion of people, might, for example, encourage democratic systems, as shown before in this work when attempting to dispute certain features of the conflictivist approach. Another interesting idea under the concept of *minben* is, as mentioned earlier, *zhèngmíng*. It is the foundation for a constitutional interpretation of Confucianism,<sup>255</sup> and it pertains to the constitution of a government that guarantees executive accountability for the public good via the employment of mechanisms such as the *li*, norms of social behaviour.<sup>256</sup>

Furthermore, several classic Confucian traits can be associated with a democratic society. A few examples are the *shenshi* (local gentry) class,<sup>257</sup> which parallels

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<sup>251</sup> *Ibid.*, pp. 310-311.

<sup>252</sup> He, “Four Models of the Relationship between Confucianism and Democracy”, pp. 21-22.

<sup>253</sup> Tan, “Confucianism and Democracy”, p. 104.

<sup>254</sup> *Ibid.*

<sup>255</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 27.

<sup>256</sup> *Ibid.*

<sup>257</sup> It was the elite who gained privileged status by passing the Imperial examinations, which qualified them for office.

contemporary local autonomy, and the *xuetang* (public forum), where the political elite discuss moral, social, and political concerns, which may be translated into today's idea of civil society.<sup>258</sup> Related to humaneness is the concept of (religious) acceptance,<sup>259</sup> making Confucian societies potential areas of liberal tolerance.<sup>260</sup>

Additionally, both Confucianism and democracy recognise dignity and self-respect<sup>261</sup> as essential values. This school also sees the notion of *ren* as a feature of Confucianism that makes it even more akin to democracy, because humaneness, which is concerned with individuality and personal moral value,<sup>262</sup> may serve as the theoretical foundation for the concept of human rights.<sup>263</sup> Some academics claim that the Confucian tradition does not entirely exclude individual or liberal components; for example, some beliefs, such as the government's duty for the welfare of the people and morally independent people, were critical in establishing pro-democratisation movements.<sup>264</sup>

Various approaches fall under the umbrella of the compatibility model.<sup>265</sup> All the previously described ideas are part of the soft approach, which recognises Confucian themes and immediately associates them with liberal concepts to demonstrate that Confucianism is, for the most part, a wellspring of democracy. The main objection against this paradigm is that concepts are so broad that many democratic values may remotely resemble an aspect found in Confucian philosophy (e.g., *minben*).<sup>266</sup> From this new perspective, *minben* is no longer an outstanding illustration of the connections between Confucianism and democracy. Even though it is typically associated with democratic

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<sup>258</sup> He, "Four Models of the Relationship between Confucianism and Democracy", p. 22.

<sup>259</sup> Wang Xinke, "Confucian intolerance contradicts philosophy's own values". *Global Times*, (February 1, 2016). Retrieved from: <https://www.globaltimes.cn/content/966770.shtml> (Accessed June 25, 2023).

<sup>260</sup> He, "Four Models of the relationship between Confucianism and Democracy", p. 22.

<sup>261</sup> See An'xian Luo, "Human Dignity in Traditional Chinese Confucianism", in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, (eds.) Marcus Düwell, Jens Braarvig, Roger Brownsword, Dietmar Mieth, Cambridge University Press, 2015: Confucianism is centred on how one should behave oneself and what type of person one should be. A person's life is no longer valuable if he or she works against benevolence. As a result, a life devoid of benevolence is a life devoid of dignity.

<sup>262</sup> He, "Four Models of the Relationship between Confucianism and Democracy", p. 23.

<sup>263</sup> Ancient Confucianism was not founded on the concept of rights. On this matter, Kim Sungmoon believes that it is possible to demonstrate the compatibility of human rights and Confucianism. According to Kim's work "Confucianism, Moral Equality, and Human Rights", Mencius acknowledges socioeconomic and civil-political rights, recognising subsistence as an integral aspect of Confucian-constitutional rights. However, he also sought to emphasise that Mencius was not a self-conscious supporter of human rights, and the focus of a Confucianism and human rights examination should be on the question of how Confucianism justified human rights.

<sup>264</sup> He, "Four Models of the relationship between Confucianism and Democracy", p. 23.

<sup>265</sup> There are several intriguing classifications of the two notions' compatibility. Another noteworthy distinction developed by Gao and Walayat takes into account four different forms of compatibility: soft, hard, coexistence, and integration.

<sup>266</sup> He, "Four Models of the relationship between Confucianism and Democracy", p. 23.

principles, it lacks crucial qualities like democratic institutions and a party system representing the people's interests. Furthermore, as will be discussed later, there are whole categories of rights (e.g., intellectual property rights), and thus laws arising from the need to protect them, that are entirely incompatible with the Confucian tradition, which, in some cases, has been the reason for the delay in developing a legal framework aimed at protecting the rights of individuals such as authors and writers.

Within the same theory, there is also the objective approach, which is closer to the idea of avoiding generality and particularism that this study attempts to supply and claims that Confucian abstract notions are more compatible with democracy than Confucian institutions.<sup>267</sup> On the matter, He Baogang wrote that “[t]o make democracy and Confucianism institutionally compatible, it is necessary either to change the ‘locker’ or cut a new ‘key.’”<sup>268</sup>

Korea has long been regarded as an example of how democracy can coexist with some abstract Confucian ideals, with the Constitutional Court, for example, pronouncing Confucian-based measures legitimate. Nevertheless, Confucianism has definitely lost public relevance and has become “a doctrine of private life”<sup>269</sup> in South Korea, where it has not hampered the rise of liberal democracy. Furthermore, this theory can indeed explain why Confucianism has been far more substantial in China, making it more challenging to accommodate democratic institutions in comparison to Korea and Japan, which have more easily absorbed political reforms.<sup>270</sup> This paradigm, however, overlooks essential elements of Western institutions in Confucian scenarios.

This approach assumes that the ultimate aim is democracy, and that Confucian culture will eventually converge and accommodate Western democracy.<sup>271</sup> Converging does not imply abandoning such values entirely, supporting the premise that, even if the ultimate goal is to achieve a thriving democratic system, certain underlying Confucian ideals may continue to operate within society in countries with different forms of government.

For an in-depth analysis, it would be interesting to investigate the role of Confucian democratic civil society in this context. It continues to participate in political and democratic issues guided by Confucian concepts. This process happens without purposefully referring to Confucian ideals, an underlying part of the general thought

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<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*, p. 30.

process. On this point, it is reasonable to conclude that a shift in viewpoint is required to comprehend the extent to which democracy and Confucianism may coexist because this approach is either too democracy-centric or too wide in including Confucian concepts into the democratisation narrative. Using the same metaphor again, sometimes replacing the lock or producing a new key is insufficient. Both must be slightly adjusted on certain occasions to appear adequate for a rearranged space.

To summarise, the counterargument to the concept of Confucianism as a supporter of virtuous democratic growth is that countries become democratic *despite*, rather than *because of*, Confucianism, and undertaking this process, they become less Confucian than before.<sup>272</sup> This suggests that, in some forms, Confucian principles may endure in countries undergoing a continuous democratisation process, even if not integrally. The truth this theory highlights, given its adaptive and changeable character, is that Confucianism must constantly negotiate its legal space and adapt to changes in order to survive in a democratic society.

### 6.3. *Hybrid model*

The hybrid paradigm has the advantage of viewing Asian systems as a combination of Western and Confucian cultures, which this work attempts to demonstrate. It admits that democratic and Confucian values may coexist, but underlying difficulties must still be addressed and overcome. Based on these reasons, this theory might explain Korea's legal and social structures, where Confucianism coexists with a rising democratic system. In other words, this model argues that Confucianism, in a democratic context, can adapt to local needs.

This approach takes a step further, investigating the mixed practices in the real world and recognising that reality is more complex than it appears. However, when it comes to potential democracies, it fails to answer the question of how these elements operate and which one is predominant. Furthermore, it appears that this model has only been concretely applied to examples of deliberative democracy (based on citizen discussions) to make the government more responsive to public needs, with deliberation occurring

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<sup>272</sup> Tan, "Confucianism and Democracy", p. 104.

within authoritarian regimes.<sup>273</sup> The proximity of this idea to representative democracy, and thus a liberal one, has been fervently debated.

#### 6.4. *Critical model*

This approach is very similar to the hybrid one, but it is the most creative since it attempts to answer questions related to the relationship between Confucianism and democracy from a Confucian perspective. It upholds liberal democratic norms while emphasising that Confucianism may be required to deal with challenges. This model supports the view that Confucianism is not an impediment to democratic institutions and that it may aid in developing a new sort of moral politics to improve the quality of democratic life without going overboard towards individualism.<sup>274</sup> For example, one of the most prominent scholars who supported a Confucian-centric theory, Jiang Qing, criticised democracy, claiming it lacked a moral dimension. From this perspective, Confucianism opposes the concept of government neutrality because, in that context, the state does nothing to encourage a moral existence.<sup>275</sup> What a liberal democracy fails to understand is that an individualistic rights system creates a diversified, fragmented, and instrumental moral life. Furthermore, according to Confucian principles, the state is not an advocate for class or group interests but rather represents the interests of the entire community; as a result, as will be shown later, it is easier to correlate Confucian practices with communitarian human rights, which will also explain the late development of individual rights in strongly Confucian nations.

Furthermore, in Confucianism, the state is based on the family or its extension. Filial piety is the moral principle that governs the family, while loyalty is the moral value that governs the state. Without going into more detail, it is essential to note that his approach is intriguing because, in He's words, "[it] reverses the conventional wisdom on the negative or secondary role of Confucianism and reconstructs Confucian democracy."<sup>276</sup>

Essentially, viewing Confucianism as the starting place for democracy can lead to underestimating the role of the democratisation process, presuming little autonomy and

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<sup>273</sup> Deyong Ma and Szu-chien Hsu, "The Political Consequences of Deliberative Democracy and Electoral Democracy in China: An Empirical Comparative Analysis from Four Counties", *China Review*, Vol. 18, No. 2, Special Themed Section: Frontiers and Ethnic Groups in China (May 2018), pp. 2-3.

<sup>274</sup> He, "Four Models of the relationship between Confucianism and Democracy", pp. 25-26.

<sup>275</sup> *Ibid.*, p. 27.

<sup>276</sup> *Ibid.*, p. 31.

flexibility in how an order can be established in the country. However, returning to the example of established democracies, it is evident that the function of the family and the notion of filial piety continue to play a role that cannot be understood without giving this concept historical significance in Confucian terms. Although it is possible to argue that Confucianism does not strongly influence South Korea's legal system, this ideology produced societal standards that have been carried into the legal environment and continue to dominate particular disciplines of law.

Some of these standards are still generally accepted today, while others have been abandoned after becoming a significant impediment to progress in the democratisation process. Interestingly, this approach provides a new perspective on Confucianism's position, reversing popular understanding about marginal importance. However, according to He, to demonstrate the effectiveness of Confucian mechanisms in a democratic setting, it is necessary to renounce the label "Confucianism," allowing the implementation of those principles outside of the philosophical framework, resulting in an erosion of the notion of Confucianism itself,<sup>277</sup> as has unmistakably occurred in South Korea's democratic evolution: individuals no longer identify as Confucian, yet they remain Confucian at heart in a democratic society.

### *6.5. A Series of Considerations*

Except for the first model, which categorically rejects the concept of a potential link between democracy and Confucianism, all the other models advocate for the possibility of democracies founded on Confucian ideals. The primary variations among approaches are the degree of impact and the viewpoint from which the two notions are studied. Furthermore, the critical model is the only one that examines the two concepts through the lens of Confucianism. Empirical examples of the development of countries such as Japan and South Korea demonstrate that the connection between Confucianism and democracy cannot be fully described or explained by the most extreme views on the topic since they are not entirely incompatible or completely compatible, as demonstrated by more moderate positions.

To varying degrees, these methods emphasise a crucial point: the re-negotiation of Confucianism's meaning in order to integrate it within democratic narratives.

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<sup>277</sup> He, "Confucianism and Democracy", p. 52.

Furthermore, except for the conflict one, which is the most Western-centric of all the hypotheses, they highlight some intriguing elements of the issue. First and foremost, they all stress that Western notions must be adapted to an entirely novel setting, proving that the adoption and adaptation are not mere copy-paste processes. Second, they highlight the fundamental importance of the concept of filial piety, which is still relevant in every East Asian country, in shaping not only society but also the legal sphere. Lastly, at various degrees, they claim that Confucianism, in general terms, does not only have features that hinder the democratic process and it is not solely beneficial as a foundation for authoritarianism. In other words, not everything about Confucianism is detrimental to the democratic process, especially when considering abstract concepts rather than specific institutions. On the contrary, it may even be reorganised to possibly carry out an *ad hoc* democratisation process in nations still significantly influenced by this school of thought but lacking a democratic framework.

To sum up, opening the debate to two more moderate and less conventional perspectives recognises the necessity to integrate Confucianism and democracy in a context-specific way. Approaches such as the hybrid and critical ones do not weaken the attempt to justify the coexistence of the two concepts of this analysis – since there is no strong positive or negative statement – but instead provide explanations that could be more reasonable in a real-life context.

## **7. Confucianism and the Concept of Rights: A First Discussion on Communitarian and Individual Perspectives**

The concept of rights has been recurrent in the previous paragraphs. As previously indicated, principles such as compassion and mutual respect make classical Confucianism appear to be compatible with human rights. Compared to human rights in the liberal sense, it seems to be slightly simpler to discover concordance between Confucianism and communitarian human rights. One particular case is the Gwangju uprising in South Korea, where the individual battle for recognition coexisted with attaining social well-being and dignity. According to Han Sangjin's perspective, "The essence of human dignity, then, is not to be found in the pursuit of personal rewards or social standing, but in the acknowledgement of an entity more valuable than one's own life and in the act of risking

one's life for the sake of this entity."<sup>278</sup> This idea highlights a critical component of the system, civil society, which will be examined further and in detail in the dissertation's final chapter.

The concept of human rights enshrined in official policy and formal law, as evolved in parts of the West, was utterly foreign to Korea. However, the notion of human rights, which became a component of indigenous governance with the end of colonialism and the independence after 1945, is now more integrated than rival Confucian ideas. It is evident that finding an appropriate connection between Confucianism and human rights in the liberal sense becomes much more difficult. From this perspective, the primary thought about rights is that they are founded on the autonomous individual and the individual liberty of pursuing one's interests as long as they do not interfere with the liberty of others, which are concepts alien to Confucian philosophy.<sup>279</sup> On this issue, it is vital to state that nations must be viewed individually rather than collectively because each East Asian country established (or did not) its system uniquely. Tushnet believes that too much abstraction leads to overgeneralization,<sup>280</sup> and he wonders how human rights such as freedom of speech or gender equality can be generalised. Furthermore, Beer claims that constitutional rights apply to humans as "persons-in-community" rather than separate "individuals-in-nature."<sup>281</sup> As a result, as indicated at the outset of this chapter, it is critical to underline how individuals in different cultural communities choose different types of behaviours as expressions of respect for their human and legal rights.<sup>282</sup>

Focusing on the case of East Asia, one thing is sure: it is incredibly challenging to reconcile patrilineal and patriarchal principles from Confucianism with the actual fulfilment of principles such as gender equality. As a result, as discussed in the second chapter in the case of South Korea, provisions related to traditional Confucianism have been replaced and modified to become non-discriminatory to support the gender equality provided in the Korean Constitution. The Republic of Korea's Constitution guarantees the preservation of fundamental human rights, which have progressed considerably – since the days of the military leadership – with the country's democratisation.

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<sup>278</sup> Sangjin Han, "Confucianism and Human Rights", in *Confucianism in Context: Classic Philosophy and Contemporary Issues*, East Asia and Beyond, (eds.) Wonsuk Chang and Leah Kalmanson, SUNY Series in Chinese Philosophy and Culture, State University of New York Press, 2010, p. 125.

<sup>279</sup> May Sim, "A Confucian Approach to Human Rights", *History of Philosophy Quarterly*, Vol. 21, No. 4 October 2004, p. 338.

<sup>280</sup> Bui, *Confucian Constitutionalism in East Asia*, p. 2.

<sup>281</sup> Beer, *Human Rights Constitutionalism in Japan and Asia*, p. 53.

<sup>282</sup> *Ibid.*

Furthermore, the Constitutional Court has referred to international human rights law on several occasions, indicating a gradually more open attitude towards it throughout the process of constitutional adjudication, indicating a strong commitment to safeguarding individual rights and adding new rights and elements to the existing list of constitutionally protected rights, as well as a willingness to provide arguments in support of the protection of existing rights.<sup>283</sup>

However, in this area of the world, intellectual property rights, which are the subject of heated debate on their affinity with human rights, are one set of rights that merit special attention and investigation. In the case of South Korea, one of the main reasons the country was unable to develop human rights earlier in time – while many other countries continue to struggle to do so today – was its inability to also develop intellectual property rights.

The third chapter of this dissertation will examine the country's status, recent changes, and the reasons for the relationship between the ideas of intellectual property and Confucianism in depth. For the time being, it is sufficient to state that while Confucian principles, constitutionalism, and democracy are not mutually exclusive concepts because they can coexist to some extent – or at least find some points of convergence – the same cannot be said of intellectual property rights. Confucian principles and the tradition of copying the original author's works, seen as a form of paying tribute, significantly contributed to the delayed establishment of these rights in Korea and other East Asian nations, particularly China. However, in some cases, the protection of authors' rights – way before the democratisation process – has been fundamental in helping the promotion of the liberation of the country, as it will be broadly analysed in the third chapter of this work. As will be seen later in this dissertation, Confucianism has played a significant role in the (non-)protection of certain rights, making South Korea a country with a long way to go in this field.

## **II. Conclusions**

Traditional culture and values have had such an impact on East (and Southeast) Asian countries that their constitutional experiences differ from those of Western ones. On this

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<sup>283</sup> Wen-Chen Chang, "The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison", *North Carolina Journal of International Law*, Vol. 36, No. 3 (2010) 593-624, pp. 601-611.

matter, it is also important to underline that, under the terminological umbrella used to define constitutionalism, East Asian countries have been able to develop their kind of analogues or antecedents of constitutionalism since pre-modern times, way before the influence of the West.

Going back to the contemporary world, most liberal institutions have been adopted and adapted from the Western experience. However, because many of the nations in the region are not well-established liberal democracies, it is difficult to find common ground among all East Asian countries. For this reason, it is necessary to differentiate between democratic and non-democratic countries. Regarding specific groups within East Asia, democratised states (South Korea, Japan, and Taiwan) may reveal differences that separate their experience from Western liberal democracies despite accepting much of their constitutional culture and assets. The gap with the West becomes much more evident when looking at each nation individually, each with its own historical, geographical, and cultural history. Nonetheless, the peculiar cases of East Asian countries show that emphasising the universality of concepts is also inaccurate because East Asian nations developed differently due to those historical and cultural factors. Even in the most democratic societies of the region, it is hard to dismiss centuries of history and tradition, expecting it to make no impact on contemporary life, leaving no legacy at all.

Nevertheless, it is remarkable to see how certain societies, which have long depended on Confucian concepts, have grown into virtuous liberal democratic regimes. For States that remain authoritarian, there is a wide range of views on the potential of integrating Confucianism with democracy to facilitate a smooth change of government. It is important to stress that countries are not authoritarian *because* of Confucianism. In fact, after this analysis, it is safe to state that Confucianism does not always favour the formation of authoritarian governments. Traditionally, as supported by most theoretical approaches, principles such as rectification of names, people-as-base (*minben*), or the right of revolution share many characteristics with Western ideas, demonstrating an interesting degree of affinity with democratic liberalism. As the basis for such regimes in the pre-modern and contemporary world, it is evident that authoritarianism's rationale was concentrated on specific components of tradition that were convenient to carry out this narrative, deliberately leaving other elements of this philosophy behind.

According to Hahm, law and Confucian tradition are mutually constitutive in the specific context of South Korea, a remarkable example of democratisation that still has space for growth. Most of the law is unrelated to cultural considerations; nonetheless, the

law operates inside a cultural framework, modifying and influencing how culture functions within that setting.

To summarise, Confucianism is a significant component of East Asian culture and history, and it continues to impact people's ideas and values in the modern world. Concepts such as filial piety, group harmony and the importance of education are still relevant and can be applied to the everyday life of people in this area. However, except for China, which is undergoing a Confucian renaissance for political legitimacy, Confucian ideas have lost influence in the public and political arenas in many East Asian countries. As many experts have pointed out, China finds it more difficult to abandon traditional values than nations such as Japan and Korea since it is the place where traditional Confucian philosophy developed its foundations.

In democratic settings, Confucian notions formulated in the past under governing dynasties have historical legitimacy, which has kept them alive throughout the ages, ultimately making their way into contemporary regulations and legislation. However, as will be discussed in the following chapter, many of these laws have been gradually struck down over the years in order to promote the safeguarding of human rights in the liberal sense primarily thanks to the exceptional work of the Courts, essential bodies in balancing history, tradition, modernity, and the demand for stronger protection of human rights.

To adopt Yu Ying-shih's concept, Confucianism might be considered a "wandering soul" in East (and Southeast) Asian societies today.<sup>284</sup> This term denotes that Confucianism lost its reliance on a well-established system at some point in history; it is not an institutionalised set of beliefs; in many cases, it must coexist with democratic institutions derived from the Western liberal system; and it is difficult to find outside of social interactions and people's daily lives.

On the one hand, it is reasonable to say that Confucianism, as a very dynamic and adaptable philosophy, does not directly contradict the general concepts of liberal constitutionalism and the democratic legal system. On the other hand, some aspects of the traditional Confucian legal system and philosophy impede the development of a right-based system (in the liberal sense). As illustrated in Chapter 3, several parts of the Confucian tradition inhibited the formation and application of various rights, particularly those related to intellectual property protection, which had been delayed due to Confucian values.

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<sup>284</sup> Ming-huei Lee, "Confucian Traditions in Modern East Asia: Their Destinies and Prospects", *Oriens Extremus*, Vol. 49, 2010, pp. 237-238.

In light of these factors, in response to the question proposed in the chapter's title, it is possible to conclude that culture does indeed impact contemporary countries. In the specific context of East Asia, Confucian personal ethics may contribute to the establishment of democratic institutions, as evidenced by supporting views on Confucianism and democracy that might be used in China for a frictionless democratisation process; however, other features may jeopardise this process.

The specific example of South Korea, a largely Confucian country and one of the most democratic in the area, will be analysed to dive deeper into the meaning of Confucianism today. With a functioning Constitutional Court that constantly attempts to strike a balance between tradition and modernity, a continuous effort to improve its intellectual property rights, which have been limited for centuries by Confucian tradition, and a kind of civil society that has been described as "Confucian democratic civil society," it is a country that requires an in-depth analysis from a legal and social standpoint.

# CHAPTER II

## Confucian Traces in Law

### Part I

## A Balance between Tradition and Modernity: Considerations on the Role of Confucianism on Laws through the Decisions of the Constitutional Court of Korea

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## I. Introduction

After examining their theoretical compatibility, it is imperative to investigate the practical dynamics of the interaction between Confucian principles and concepts such as democracy and constitutionalism. The contemporary manifestation of Confucianism exhibits notable divergence not just from hypothetical Western interpretations but also from the historical practice of Confucianism in premodern East Asia. During that particular era, there was a notable attempt and aspiration to implement a set of regulations and principles that, in retrospect, resemble contemporary constitutionalism, evident in both the dynastic Code and the ritual norms (*ye*).

The development of contemporary Korean jurisprudence can be attributed to two primary influencing sources: the local heritage of Confucianism, Legalism, Daoism, and folklore, as well as the incorporation of legal principles from Western legal systems. Within the confines of this theoretical framework, it can be argued that Confucianism alone does not constitute a primary component of the country's legal legacy.<sup>1</sup> According to Han Park Insook and Cho Lee-Jay, it can be described as “a code of latent ethics and values.”<sup>2</sup> Nonetheless, due to its deep-rooted integration throughout society, the prevalence of this phenomenon has a direct or indirect influence on legislative processes in Korea. This leads to what Chaibong Hahm, drawing upon the words of Godamer, describes as a “fusion of horizons.”<sup>3</sup>

In order to make progress on this subject, a more comprehensive overview of legal branches is required to carry out a complete analysis of the nation's legal framework. This problem with Confucianism is most evident in some specific legal practice areas. Traditionally, only family and criminal law have been considered when studying the influence or hindrance provided by the Confucian tradition in the field of law; however, this research concentrates its attention on three subfields of law: family law, criminal law, and intellectual property law. The first two aspects have undergone thorough examination by eminent legal experts interested in exploring Confucianism's impact on contemporary regulatory frameworks. However, it seems that this topic has mostly been the focus of

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<sup>1</sup> Yong Chen, “The Presence of Confucianism in Korea and its General Influence on Law and Politics”, in *Corea. Una visión jurídica y geopolítica en el siglo XXI*, Arturo García Oropeza (Coord.), Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2021, p. 83.

<sup>2</sup> Insook Han Park and Lee-Jay Cho, “Confucianism and the Korean Family”, *Journal of Comparative Family Studies*, Vol. 26, No. 1, Families in Asia: Beliefs and Realities, 1995, p. 119.

<sup>3</sup> Chaibong Hahm and Wooyeal Paik, “Legalistic Confucianism and Economic Development in East Asia”, *Journal of East Asian Studies*, Vol. 3, 2003, p. 462.

research from the early 2000s to the early 2010s, which were notable and prosperous years in Korean legal studies. The increased focus on these matters in that period might be attributed to significant transformations associated with traditions and Confucian legacy that unfolded during that time, notably landmark judicial cases like the *Same-Surname-Same-Origin Marriage Ban case* (1997)<sup>4</sup> and the *Abolition of the Hoju System* (2005).<sup>5</sup> Nevertheless, it is essential to acknowledge that significant progress and modifications have occurred in recent years. Consequently, a thorough evaluation of these legal transformations may be necessary to explore the current legal landscape in the country comprehensively.

Conversely, the intellectual property legal domain represents a notable and pioneering addition to this field of study due to its distinctiveness from Confucian heritage. Intellectual property provisions within this area lack any discernible influence from Confucianism. What makes it a captivating subject for examination is that even if Confucianism did not directly impact the formation of legal provisions, it is the primary cause for the delayed emergence of these regulations in the region. The attribution of this late development to traditional cultural factors further enhances the significance of cultural legacy in the country as an exemplary case study, offering valuable insights and adding another puzzle piece in reconstructing Confucianism's influence in the legal realm. Indeed, examining the development and progress of intellectual property law in South Korea, specifically, the establishment and evolution of such laws, allows the chance to draw further conclusions regarding the perception and safeguard of the nation's cultural heritage intertwined with the Confucian tradition.

The contents of the current chapter will provide an overview of the initial two areas of law, namely family law and criminal law. This study will utilise the decisions rendered by the Constitutional Court, an institution that has played a transformative role in shaping Korean legal culture, to identify the traditional concepts that have been upheld and those that have been discarded to facilitate a more effective process of democratisation and enhanced protection of human rights.

The significance of courts in facilitating judicial review is crucial in aligning legislation with the expectations and desires of the populace, as will be explored afterwards. The Korean Constitutional Court has demonstrated a commendable ability to

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<sup>4</sup> Constitutional Court of Korea, 9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997 (S. Kor.).

<sup>5</sup> Constitutional Court of Korea, 17-1 KCCR 1, 2001Hun-Ka9.10.11.12.13.14.15 and 2004Hun-Ka5(consolidated), February 3, 2005 (S. Kor.).

harmonise traditional values with modern advancements for several decades, making South Korea a unique case within the area.

To begin with, this chapter aims to provide an academic examination of the role of Constitutional Courts in East Asia, specifically focusing on the establishment of such a court in South Korea as an essential element of the democratisation process. A comparative analysis will also be conducted between countries with an established Constitutional Court and those without one in order to understand the complex path towards democracy in the region. This discourse will encompass countries with a system of constitutional review by a Supreme Court and those without an independent judicial review mechanism.

Additionally, following a clarifying explanation of the historical significance of Confucianism in East Asia, with a specific focus on its impact in South Korea, it is fundamental to delve into a more in-depth examination of the subject matter. Once it is comprehended that the presence of Confucianism in East Asian societies does not inherently impede the establishment of a democratic system, it is crucial to recognise that, on the other hand, relinquishing certain aspects of this heritage may be a requisite measure for advancing its modernisation and accommodating the evolving needs of the people. Undoubtedly, the existence of an ongoing debate regarding the abandonment of traditional principles to enhance safeguards for individuals implies that those values have established their domain within the legal sphere, and fundamental Confucian concepts continue to exert their influence in society.

After conducting an initial analysis of the topic, which will contribute to a better awareness of South Korea's distinctiveness within the region, it becomes necessary to recognise and thoroughly comprehend the role of Confucianism in contemporary society. This will be achieved by examining specific instances where the Constitutional Court employed concepts and specific language to identify which aspects of Confucianism persist and which have been eliminated from the legal framework to reflect democratic principles. This inquiry also fosters critical thinking and discourse around the role and responsibilities of judges within this setting and the approaches they employ when rendering judgements within a particular cultural framework.

As previously indicated, the South Korean Constitution does not explicitly reference Confucianism, yet both the Constitutional and Supreme Courts have historically invoked Confucian notions to justify their decisions. This characteristic not only distinguishes East Asian democracies from the rest of the world but also highlights the critical role that High

Courts play in balancing tradition and modernity. As a result, after addressing the main differences between judicial systems in the area, with details on the fundamental case of the developments of the Constitutional Court of Korea, the country's symbol of democratisation, this chapter will attempt to highlight Confucianism-related legal developments in South Korea through some landmark court decisions, with comparisons to other countries.

Confucianism gained historical legitimacy with the enactment of the Code during the Joseon era, which has subsequently been translated into present acts and norms. Nevertheless, adjustments have been necessary to accommodate citizens' evolving demands. Consequently, there has been an ongoing and continuous adaptation process in response to the demands brought about by democratisation. The Constitutional Court of Korea, established during South Korea's significant shift towards democracy, has played an instrumental part in safeguarding the rights of individuals within the nation during the past three and a half decades. The Korean case might be regarded as an exemplification of the efficacy of judicial review within the context of nascent democratic systems in the Asian region.<sup>6</sup>

In addition, it is indispensable to discuss the intricate process of South Korea's democratisation using the Constitutional Court's advancements as a chronological timeline of events since the nation's independence. The Court's judicial developments could then be seen throughout its expanding case law; among its rulings, it is essential to mention the one regarding the *Same-Surname-Same-Origin Marriage Ban (1997)* and the subsequent *Case on Prohibition and Nullity of Marriage between Blood Relatives within Eighth Degree of Relationship (2022)*, the *Case on the House Head System (2005)*, the *Prohibition of Filing a Complaint Against Lineal Ascendants (2011)*, and the *Aggravated Punishment on Parricide (2013)*. The reasoning and dissenting opinions explicitly referenced Confucianism and traditional values in many of these decisions.

However, the perception of the role covered by this tradition in cases involving various branches of law differs. Tradition is regarded as obsolete in some instances, whereas, in others, it is regarded as a moral foundation that must be preserved. This chapter's objective is to examine Confucianism's contemporary relevance in judicial decisions, thereby providing insights into the judiciary's role and the requisite conduct of judges within this unique framework.

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<sup>6</sup> Ngoc Son Bui, *Confucian Constitutionalism in East Asia*, Routledge, New York, 2016, p. 153.

This part of the present work also explores potential developments in this domain. This study can be accomplished comprehensively by analysing Court cases spanning from the period of democratic transformation to the present. By examining Court rulings, one can better understand Confucianism's contemporary significance in South Korea, which is frequently juxtaposed with the situation in Japan. Additionally, this analysis can enhance comprehension of how the courts in South Korea navigate the delicate balance between tradition and culture and the need for advanced modernisation and democratisation.

### **1. Presence and Absence of Constitutional Courts: An Overview of the Region**

With the exception of Hong Kong, East Asian nations predominantly adhere to an inquisitorial legal system, a legal framework prevalent in countries outside the historical British sphere of influence, particularly in Continental Europe, Latin America, and Africa. In contrast to the adversarial (or adversary) system, commonly found in Anglo-American jurisdictions, courts actively examine factual evidence about a case. In these systems, the courts prioritise the investigation of facts and are not solely concerned with matters of law and procedure. Moreover, their function is not limited to serving as impartial referees between the prosecution and defence, as in adversarial systems. The presence of this fascinating element arises from the fact that many countries, despite having Constitutions that were written with the assistance of the United States, primarily rely on Continental European principles due to their civil law legal systems.

Furthermore, East Asia is characterised by a diverse array of legal systems and a multitude of different kinds of government. Certain nations have a centralised legal framework and instituted an independent Constitutional Court. This phenomenon can be observed in the cases of South Korea and Taiwan, both of which have implemented highly comparable models but exhibit several notable differences that will be examined in this chapter. Another example worth considering is Japan, a country that does not have a Constitutional Court and instead relies on a judicial review system modelled after the American system. In this structure, the Supreme Court of Japan fulfils the dual role of both the court of last resort and the authority responsible for constitutional review. When looking into the similarities between the two systems, it is essential to acknowledge that there are also substantial differences in the extent of moderation observed in the judicial review process of the Supreme Courts of the United States and Japan. The U.S. Court

tends to exercise this function more expansively, whereas the Japanese counterpart is often characterised by “judicial passiveness”.<sup>7</sup> Lastly, some countries still have authoritarian governments and cannot benefit from the constitutional review process.

This study offers a fresh perspective on the judicial systems within a specific geographical area. Instead of categorising countries based on the presence or absence of a system of judicial review, this research will divide them into two distinct groups. The first group comprises countries that have established a separate and independent Constitutional Court, while the second group encompasses countries without such a court. For this reason, the second group includes countries with an ordinary court that fulfils the function of judicial review and countries that lack any mechanisms for constitutional review.

By examining various categories, this present investigation aims to offer insights into the distinguishing features of nations that have effectively established an independent Constitutional Court. Before delving into the specific case of Confucianism in relation to court decisions, the primary objective is to comprehensively understand the regional context in which the Constitutional Court of Korea operates, representing a remarkable and unparalleled case.

### *1.1. The Absence: How do Judicial Systems in East Asia Work? The Cases of Japan and China*

Countries lacking an autonomous Constitutional Court are those in which constitutional adjudication is entrusted to a court inside the ordinary judicial system (e.g., Japan) and nations without an independent judiciary. The latter case results in the total absence of constitutional review, as exemplified by China, North Korea, and Vietnam. Despite their varying levels of development, governmental structures, and societal characteristics, these countries share a commonality: a lack of trust that includes mutual distrust within the countries and neighbouring nations.

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<sup>7</sup> Masahito Tadano, “The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan”, in *Contemporary Issues in Human Rights Law: Europe and Asia*, (ed.) Yumiko Nakanishi, Springer, Singapore, 2018, p. 74.

Japan was the first Asian country to embark upon the project of constitutionalisation<sup>8</sup> with the Meiji Constitution of 1889 under a sort of hybrid constitutionalism.<sup>9</sup> Subsequently, the nation implemented a judicial review system akin to that of the United States in its 1946 Constitution, drawing heavily from the framework established by the American occupying forces.<sup>10</sup> The highest judicial court is the Supreme Court (*Saiko Saibansho*), with the constitutional review power as part of its authority, exercising it to the extent necessary to resolve legal disputes.<sup>11</sup> According to Article 81 of Japan's Constitution, "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."<sup>12</sup> Although lower courts have the authority to deem a norm unconstitutional, it is customary for such decisions to be appealed to the Supreme Court through the appeal system.<sup>13</sup> As the comparison with the United States Supreme Court demonstrates, this Court has acquired an international reputation for being extremely conservative. This perception stems from several factors, notably its limited instances of deeming legislation unconstitutional and its tendency to affirm the constitutionality of statutes, thereby aligning itself closely with the longstanding conservative party in power.<sup>14</sup>

Very different from this situation, the People's Republic of China, Vietnam, and the Democratic People's Republic of Korea (North Korea) are one-party states contradicting the trends of constitutionalisation, judicialization, and democratisation.<sup>15</sup> In China, there is only legislative constitutional review and no established system of constitutional review, with the power of review vesting in the legislature instead of the courts.<sup>16</sup> In the country, the concept of judicial review is often associated with administrative review,

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<sup>8</sup> Albert H.Y. Chen, "The Achievement of Constitutionalism in Asia, Moving Beyond Constitutions without Constitutionalism", in *Constitutionalism in Asia in the Early Twenty-first century*, (ed.) Albert H.Y. Chen, Cambridge, 2014, p. 17.

<sup>9</sup> *Ibid.*

<sup>10</sup> Yasuo Hasebe, "The Supreme Court of Japan: A Judicial Court, Not Necessarily a Constitutional Court, Review in Taiwan", in *Constitutional Courts in East Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, 2018, p. 289.

<sup>11</sup> *Ibid.*, p. 289.

<sup>12</sup> Constitution of Japan (1947), Article 81.

<sup>13</sup> Giorgio Fabio Colombo, "Giappone", in *Diritto dell'Asia Orientale*, (ed.) Renzo Cavalieri, Libreria Editrice Cafoscarina, Venezia, 2019, p. 98.

<sup>14</sup> See Shojiro Sakaguchi, "Major constitutional developments in Japan in the first decade of the twenty-first century", in *Constitutionalism in Asia in the Early Twenty-first century*, (ed.) Albert H.Y. Chen, Cambridge, 2014, pp. 66-67: The author also added that it is possible to note that the Court has employed another mechanism to protect constitutional rights, which is the doctrine of the abuse of discretion.

<sup>15</sup> Chen, "The Achievement of Constitutionalism in Asia", pp. 3-4.

<sup>16</sup> Guobin Zhu, "Constitutional Review in China, An Unaccomplished Project or a Mirage?", *Suffolk University Law Review*, Vol. 43, No. 3 (2010) 625-636.

which is the proceeding examining the conformity of decisions made by executive authorities with laws other than the Constitution.<sup>17</sup>

As widely analysed in the first chapter, China is a country that has not been governed by democracy nor by the rule of law for millennia. It is crucial to acknowledge that while rejecting constitutional review is not exclusive to socialist constitutions,<sup>18</sup> nations with a socialist orientation often hold a derogatory perception of the judiciary, perceiving it as an elite minority that contradicts the nation's ideology.<sup>19</sup> The Constitution issued in 1982 does not explicitly address the concept of judicial review, nor does it provide explicit authorisation for courts or the establishment of a distinct court to handle such disputes. The Chinese judiciary attempted to replicate the spirit of “common law constitutionalism” by asserting that judges serve as the ultimate safeguard for the Constitution and the protection of individual rights. Unfortunately, the tactic above was ineffective due to the inherent impracticability of the judiciary to exert control over the administration, given the prevailing hierarchical structure in Chinese politics, where officials typically hold a superior position than judges.<sup>20</sup> One prominent and distinctive – but isolated – case within the constitutional history of modern China deals with the right to education, commonly referred to as *Qi Yuling v. Chen Xiaoqi et al. (2001)*.<sup>21</sup> After this case, the judges have not undertaken any measures to consolidate their authority. Nevertheless, the role of courts in China could hold significant importance for the development and trajectory of constitutional law in the country. The Chinese constitutional discourse being publicly accessible distinguishes it from North Korea, where the judiciary and its interaction with the Constitution are never subject to open contestation.

Despite including the judiciary as an independent power in the Constitution of China, the courts are not truly autonomous due to their historical connection to the Chinese revolutionary tradition. Consequently, they operate under the supervision of the People's Congress. Furthermore, Article 131 (formerly referred to as Article 126 before the 2018

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<sup>17</sup> Shiling Xiao, Yang Lin, “Judicial Review of Administrative Rules in China: Incremental Expansion of Judicial Power”, *Journal of Comparative Law*, Vol. 17, No. 2, University of Hong Kong Faculty of Law Research Paper No. 2023/02 (2022), pp. 1-2.

<sup>18</sup> Ngoc Son Bui, “Why do Countries Decide Not to Adopt Constitutional Review? The Case of Vietnam”, in *Constitutional Court in Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, Cambridge University Press, New York, 2018, p. 337.

<sup>19</sup> Qianfan Zhang, “Establishing Judicial Review in China: Impediments and Prospects”, in *Constitutional Court in Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, Cambridge University Press, New York, 2018.

<sup>20</sup> *Ibid.*, pp. 312-313.

<sup>21</sup> *Ibid.*, p. 314.

revision) provides the concept of court independence, which should be distinguished from the independence of individual judges. It is important to note that judges do not possess the same level of independence in their routine judicial activities. Consequently, it becomes challenging to adequately address constitutional matters in practice.<sup>22</sup>

Comparably, it is worth noting that the latest 2013 constitution of Vietnam does not have a provision for constitutional review.<sup>23</sup> In this particular case, political elites expressed opposition towards the presence of impediments that may hinder the execution of their objectives.<sup>24</sup>

### *1.2. The Presence: A Comprehensive Examination of Constitutional Courts in East Asia and Beyond*

Historically, Constitutional Courts have primarily fulfilled two core roles: the assessment of the legality of legislation and the resolution of jurisdictional conflicts between various branches, entities, and tiers of governance. Moreover, in contemporary governance, constitutional courts have been entrusted with overseeing electoral processes and referendums and verifying the legality of political parties. Furthermore, these courts can initiate impeachment proceedings and enforce legal measures against political leaders and high-ranking officials.<sup>25</sup> For example, the Constitutional Court of Korea has rendered judgements on two occasions regarding impeachment proceedings against a President, resulting in one negative and one affirmative outcome. Additionally, it is noteworthy to acknowledge that in a recent development dated July 25, 2023, the Court rejected the first-ever legislative motion seeking the impeachment of a minister.<sup>26</sup> A comprehensive analysis of each impeachment case mentioned will be presented in Chapter 4.

It is significant to highlight that, in numerous instances, nations opt to establish a Constitutional Court as part of their transition to democracy. This decision is often motivated by the Court's ability to serve as a symbolic representation of political and

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<sup>22</sup> *Ibid.*, pp. 325-329.

<sup>23</sup> Bui, "Why do Countries Decide Not to Adopt Constitutional Review?", p. 335.

<sup>24</sup> *Ibid.*, p. 363.

<sup>25</sup> Albert H. Y. Chen, "Constitutional Courts in Asia: Western Origins and Asian Practice", in *Constitutional Courts in Asia*, (eds.) Albert H. Y. Chen and Andrew Harding, Cambridge University Press, New York, 2018, p. 7.

<sup>26</sup> See Constitutional Court of Korea, 2023Hun-Na1, July 25, 2023 (S. Kor.): On February 8, the National Assembly requested the adjudication of impeachment of Minister Lee Sang-min, an unprecedented case in which the respondent was accused of violating the Constitution and disaster prevention laws, and additionally he made post-mortem remarks in relation to the Itaewon disaster happened on October 29, 2022. In the case the Court has dismissed the motion for impeachment.

legal advancement, signalling the advent of a new era characterised by constitutionalism, the rule of law, and the protection of human rights. Consequently, establishing a Constitutional Court contributes to bolstering the legitimacy of the constitutional order.<sup>27</sup>

Only seven countries have succeeded in establishing a Constitutional Court in East and Southeast Asia regions.<sup>28</sup> Taiwan holds the distinction of being the first-ever nation to establish a Constitutional Court or tribunal in the area in 1947. Conversely, the latest one is Myanmar's Constitutional Tribunal, created in 2011 following the enactment of the 2008 Constitution, which represents the country's first independent judicial institution endowed with the power of constitutional review. Out of the seven countries under consideration, it is noteworthy that only three belong to the East Asian region, namely South Korea, Taiwan, and Mongolia. Given the diverse range of circumstances, it is crucial to briefly examine the key features of East Asian nations before digging further into the distinctive case of South Korea.

Concerning democratic transformations, the country shares certain similarities with Thailand and Mongolia. However, due to cultural and geographical factors, these two nations are often omitted from the East Asian discourse, hence making South Korea a distinctive example within the region. In fact, even if Mongolia is geographically situated in East Asia, its unique cultural identity and variations in geopolitical and geo-economic circumstances often result in limited research conducted on this country compared to others in the region. The development of this society has shown minimal impact from Confucianism and has predominantly been shaped by its Nomadic heritage, Tibetan Buddhist influences, and the enduring legacy of socialism under Soviet domination.<sup>29</sup> The lack of correlation and synergy with the rest of the region explains why this country has never been mentioned before in this work despite being part of the area. Excluding this country from the analysis due to substantial cultural differences, it is possible to notice the unique case of South Korea as the only East Asian country – considering Taiwan's different path to development – with a Confucian background to have a Constitutional Court created by constitutional provisions at a constitutional moment and based on the consensus among political forces to inaugurate a new era of constitutional democracy.<sup>30</sup>

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<sup>27</sup> Chen, "Constitutional Courts in Asia", p. 10.

<sup>28</sup> Cheryl Saunders, "Constitutional Review in Asia: A Comparative Perspective", in *Constitutional Courts in Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, 2018, Cambridge University Press, New York, p. 51.

<sup>29</sup> John Irgengioro, "Mongolia–Central Asia relations and the implications of the rise of China on its future evolution", *International Politics*, Vol. 60, 2023, p. 77.

<sup>30</sup> Chen, "Constitutional Courts in Asia", p. 20.

Constitutional reforms in South Korea were carried out quickly at the beginning of the transition, even if other democratic advancements happened more gradually. On the contrary, Taiwan's transition was gradual from the very beginning.<sup>31</sup> Additionally, among the seven countries with a Constitutional Court, the Republic of Korea is the only one in which abstract review of the constitutionality of a law is not initiated by designated state organs, office holders or a number of members of the parliament, but has a system of constitutional complaints by individuals with a broad scope.<sup>32</sup> Review in the country must be considered concrete, which means it must be employed when the law has already been applied or is about to be applied.

As mentioned before, the earliest Constitutional Court in the region was established in Taiwan by the 1946 Constitution of the Republic of China. It was known as the Council of Grand Justices of the Judicial Yuan, the Taiwan Constitutional Court (TCC).<sup>33</sup> This Court has been a fascinating case since its establishment in 1948 even predated the one of the *Bundesverfassungsgericht*, the German Federal Constitutional Court<sup>34</sup>, which was established three years later. The Judicial Yuan started operating in the 1950s, exercising the powers of issuing and interpreting laws and constitutional review. However, it looked more like it was a legal adviser to the government and a source of legitimation of the regime's decisions. From 1949 to 1987, the Court's activities, along with the constitution, civil liberties, and democratic elections, were halted under the governance of the Kuomintang regime originating from mainland China.<sup>35</sup> It subsequently assumed a significant and active role in Taiwan's democratisation in the 1980s.<sup>36</sup> After the end of the martial law under President Chiang Ching-kuo, which allowed the creation of the opposition Democratic Progressive Party (DPP),<sup>37</sup> it helped reform the authoritarian era rules<sup>38</sup> on matters like criminal procedure, civil liberties, and administrative law in the late 1980s and 1990s.<sup>39</sup> From 1987, a significant year marked by political advancements

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<sup>31</sup> Tom Ginsburg, "Constitutional Courts in East Asia: Understanding Variation", *Journal of Comparative Law*, Vol. 3 (2008) 80-99, p. 97.

<sup>32</sup> *Ibid.*, p. 22.

<sup>33</sup> Matt Chang, "Taiwan's Constitutional Court: Judicial Activism and Politicization in a New Democracy", *Jackson School Journal*, Vol. 10, No. 1, University of Washington, 2022, p. 6.

<sup>34</sup> Chen, "Constitutional Courts in Asia", p. 20.

<sup>35</sup> *Ibid.*, p. 8.

<sup>36</sup> *Ibid.*, p. 13.

<sup>37</sup> Ginsburg, "Constitutional Courts in East Asia", p. 82.

<sup>38</sup> Jiunn-rong Yeh, Wen-Chen Chang, "An Evolving Court with Changing Functions: The Constitutional Court and Judicial Review in Taiwan", in *Constitutional Courts in East Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, 2018, p. 111.

<sup>39</sup> Chen, "Constitutional Courts in Asia", p. 14.

across East Asia, the Council experienced increased engagement following the election of Lee Teng-hui, who became the first Taiwan-born President of the Republic of China.

Furthermore, with the appointment of new justices in 1994, the composition of the Court included a significant number of judges born in Taiwan. These justices held values of independence congruent with those of the President.<sup>40</sup> As analysed by Matt Chang, in the last two decades, the Court has exponentially increased the number of interpretations addressing individual rights protection, expanded through the citation and incorporation of international law.<sup>41</sup> Based on these findings, the author emphasises that constitutional courts in post-authoritarian democracies might give precedence to safeguarding individual rights.<sup>42</sup>

Many of these judicial models influenced each other; for example, the Constitutional Court of Korea, as it will be seen later, borrowed a lot from the German system,<sup>43</sup> and the Indonesian Constitutional Court borrowed, in turn, from the Korean model, including what are defined as its ‘activist’ tendencies and implication of rights.<sup>44</sup> An interesting perspective on this matter is that, for example, countries that underwent a democratic transition, such as Taiwan and South Korea (but also other countries that are not subject of this analysis, namely Mongolia and Thailand), despite receiving substantial American influence, they all embraced a Kelsenian model with a centralised institution, as a special tribunal outside the regular judiciary with the aim of providing constitutional defence against unconstitutional legislative actions, the symbol of which is the German Constitutional Court.

Interestingly, many of these countries (except for Myanmar, Thailand and Taiwan), including South Korea, adopted the Italian organisational model of the Court,<sup>45</sup> specifically the representation model of appointment of the Court members<sup>46</sup> with the idea that when each institution appoints a third of the members, none of the institutions

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<sup>40</sup> *Ibid.*, pp. 82-83.

<sup>41</sup> Chang, “Taiwan’s Constitutional Court”, pp. 11-15.

<sup>42</sup> *Ibid.*

<sup>43</sup> For example, the *Verfassungsbeschwerde*, the institute of individual constitutional complaint.

<sup>44</sup> Simon Butt, “The Indonesian Constitutional Court: Implying Rights from the ‘Rule of Law’”, in *The Invisible Constitution in Comparative Perspective*, (eds.) Rosalind Dixon and Adrienne Stone, Cambridge University Press, Cambridge, 2018, p. 319.

<sup>45</sup> This is different, for example, from the case of the French Constitutional Council which has members appointed for nine years, three every three years, in the following way: three by the President of the Republic, three by the President of the Senate and three by the President of the National Assembly. The French model, however, was influential in the design of the Cambodian Constitutional Council.

<sup>46</sup> Chen, “Constitutional Courts in Asia”, pp. 12-13.

can dominate the court.<sup>47</sup> In Italy, the Constitutional Court comprises fifteen judges: five are appointed by the President, five are elected by the Parliament in joint session, and five by the ordinary and administrative supreme courts.<sup>48</sup> In the same way, the nine judges of the Constitutional Court of Korea, appointed by the President, are nominated in equal portions (one-third each) by the National Assembly, the Supreme Court Chief Justice, and the President.<sup>49</sup>

These courts may have additional powers or exercise ancillary jurisdiction, taking care of matters not usually under the courts' jurisdiction. For example, in South Korea, Mongolia, Taiwan and Indonesia, the Court has the power to impeach the President or high officials. In the same countries<sup>50</sup> except Mongolia and Thailand, the Court also has the power to determine the constitutionality or legality of political parties and the subsequent dissolution.<sup>51</sup> Once again, South Korea must be considered a peculiar case since it is the only country that has actively exercised both powers in the past. In order to understand South Korea's developments fully, the next section will be dedicated entirely to this country, and it will summarise the main events that led to the establishment of an operating and well-functioning Constitutional Court.

## **2. Constitutional Court of Korea: A Balance between the Old and the New**

Since its establishment, the Constitutional Court, as “a facilitator of fundamental rights claiming,”<sup>52</sup> has played a critical role in assisting and promoting the country's democratisation and respect for the human rights of individuals, further enhancing awareness of citizens' rights.<sup>53</sup> Simultaneously, the court has been considering the country's rich history and everlasting ideals. Basically, it has found itself in a middle position between the interests of the reformists who valued democracy, social development, and gender equality, and traditionalists like the Confucian group called *Yulim*, who are faithful to the importance of tradition and the historical past.

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<sup>47</sup> Ginsburg, “Constitutional Courts in East Asia”, pp. 91-92.

<sup>48</sup> Constitution of The Italian Republic, Art. 135.

<sup>49</sup> Constitution of the Republic of Korea (1987), Art. 111.

<sup>50</sup> In Thailand, for example, the 1992 Constitutional Amendment provided for the Council to hear challenges against “Unconstitutional” political parties that aimed at jeopardising the free democratic constitutional order (See Ginsburg, “Constitutional Courts in East Asia”, p. 84).

<sup>51</sup> Chen, “Constitutional Courts in Asia”, pp. 23-24.

<sup>52</sup> Hannes B. Mosler, “The Constitutional Court as a Facilitator of Fundamental Rights Claiming in South Korea, 1988-2018”, in *Rights Claiming in South Korea*, (eds.) Celeste L. Arrington and Patricia Goedde, Cambridge University Press, Cambridge, 2021, p. 126.

<sup>53</sup> *Ibid.*, pp. 146-147.

Historically, the development of Korean law has been shaped by contextual particularism and role-based norms, exerting a notable impact on the domains of criminal and family law.<sup>54</sup> In order to gain a comprehensive understanding of the Court's operational methods, it is intriguing to analyse its approach towards various traditional concepts, resulting in disparate consequences. This study examines two aspects of the balancing function: the reform of family law (the new) and the maintenance of laws rooted in filial piety (the old). The role of tradition within the context of the legal environment has been a crucial concept, and it has been considered a body of legal principles for the preservation of law throughout the decades.

On the one hand, this research will examine the family law concepts based on the Chinese clan system, the so-called 동성동본 (*dongseong dongbon*) that was transformed to seek a new idea of family mainly developed after three major events: urbanisation and industrialisation, changing the country from an agricultural to an industrial economy within one generation,<sup>55</sup> and the abolition of the *Hoju* (head of the house) system. On the other hand, this study will examine filial piety, a deeply ingrained societal belief that even high court judges perceive as challenging to modify or surmount. In this regard, it is imperative to stress that in cases where a legal matter encompasses the notion of filial piety, the court typically adopts a more conservative position.

### *2.1.A Brief History of Constitutional Adjudication and the Constitutional Court in South Korea: The Difficult Path towards Democracy*

The inaugural liberal democratic constitution of the Republic of Korea was ratified in 1948, after the partitioning of Korea into two distinct independent nations. Subsequently, the text has undergone nine revisions,<sup>56</sup> culminating in the 1987 Constitutional Amendment as the last one. The establishment of the Sixth Republic resulted from the aforementioned constitutional revision, which also led to the formation of the nation's first operational Constitutional Court. On paper, the nation has been classified as a democracy since the latter half of the 1940s. However, during the initial four decades

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<sup>54</sup> Jingyuan Ma and Mel Marquis, *Confucian Culture and Competition Law in East Asia*, Cambridge University Press, 2022, p. 32.

<sup>55</sup> Park and Cho, "Confucianism and the Korean Family", p. 121.

<sup>56</sup> Jongcheol Kim, "Upgrading Constitutionalism, the ups and downs of constitutional developments in South Korea since 2000", in *Constitutionalism in Asia in the Early Twenty-first Century*, (ed.) Albert H. Y. Chen, Cambridge University Press, 2014, p. 77.

following its independence, South Korea encountered several political obstacles, including military and authoritarian regimes. These periods were characterised by numerous amendments to the constitution aimed at altering the government's structure or accommodating changes in the distribution of political influence.<sup>57</sup> During that time, the constitution played a limited role and was seen primarily as a symbolic representation rather than a legally binding instrument, "more of an ornament than a document with binding force."<sup>58</sup>

The first constitution provided separate *ad hoc* committees to review the constitutionality of laws and adjudicate impeachment. However, not many cases have been submitted to those committees.<sup>59</sup> The following constitution enacted in 1960 incorporated provisions concerning the establishment of a Constitutional Court. The implementation of these reforms was hindered due to the occurrence of a military *coup d'état* orchestrated by Park Chung-hee, resulting in the termination of the Second Republic of South Korea.<sup>60</sup> In the first constitution under his regime (1962), he gave the power of judicial review to the Supreme Court. Later, with the 1972 revision, he adopted the so-called *Yushin* (유신, revitalisation) constitution,<sup>61</sup> prohibiting political dissent and giving the power of reviewing legislation and adjudication of impeachment to an agency called Constitutional Committee.

In 1971, President Park undertook the action of dismissing the justices who had made attempts to strike down laws on the grounds of being unconstitutional. For this reason, when the Supreme Court was given the chance to refer cases to the Committee with the latest reform, it refrained from exercising this power.<sup>62</sup> The Constitutional Committee

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<sup>57</sup> *Ibid.*

<sup>58</sup> Chaihark Hahm, "Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?", in *Confucianism, Law, and Democracy in Contemporary Korea*, (ed.) Sungmoon Kim, Rowman & Littlefield International, 2015, p. 18.

<sup>59</sup> Chaihark Hahm, "Constitutional Court of Korea: Guardian of the Constitution or Mouthpiece of the Government?", in *Constitutional Courts in Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, Cambridge University Press, 2018, p. 141.

<sup>60</sup> *Ibid.*

<sup>61</sup> See Kang Ro Lee, "Bureaucratic-mobilizational Regime: The Yushin System in South Korea 1972-1979", *Asian Perspective*, Vol. 14, No. 2, Fall-Winter 1990, pp. 203-204: The Fourth Republic of Korea was built on a harshly authoritarian constitution. It was distinguished by the president's acquisition of broad executive and legislative powers. The term was extended to six years, with no limitations related to re-elections. The *Yushin* constitution granted the president the so-called neutral power of intermediating functions of the executive, legislative, and judicial branches. Furthermore, the new constitution provided the president the authority to make judgements on key issues. The president was acknowledged as the ultimate authority, possessing complete political control over the state. Their responsibilities included upholding the independence and stability of the nation, protecting the Constitution, and facilitating the peaceful reunification of the fatherland (*Yushin* Constitution, Article 43).

<sup>62</sup> Hahm, "Constitutional Court of Korea", pp. 141-142.

established with the *Yushin* was kept after the following reform of 1980, under Chun Doo-hwan, and – exactly as before – it remained almost inactive.<sup>63</sup> On June 10, 1987, Chun announced that later that year, the end of his “term” would not be followed by popular vote but by parliamentary elections for the next President to ensure the appointment of a successor of his choice, Roh Tae-woo. This action resulted in a notable mass demonstration, widely regarded as one of the most momentous in the chronicles of South Korean history.

In contrast to rallies witnessed in prior decades, the advocacy for rights extended beyond the traditional participation of students, religious leaders, and labour activists. Various groups of the society, including individuals from diverse social backgrounds such as salaried workers, managers, and housewives, actively participated in the protests, advocating for the amendment of the constitution and the implementation of direct popular voting in elections.<sup>64</sup> In conjunction with several historical circumstances,<sup>65</sup> Roh released a declaration calling for the implementation of direct presidential elections and establishing a new constitutional framework grounded upon lasting democratic reforms and enhanced safeguards for individual rights.<sup>66</sup>

Revising the new constitution was an important milestone achieved through a democratic mechanism that required cooperation and harmonisation across multiple interests. A dedicated committee was formed in the National Assembly with government and opposition parties’ representatives to discuss the details of the proposed democratic constitution.<sup>67</sup>

In “Law, Culture, and the Politics of Confucianism”, Chaihark Hahm described South Korea’s constitutional development as “accidental constitutionalism.”<sup>68</sup> Furthermore, in his contribution to the book *Confucianism, Law and Democracy in Contemporary Korea*, he added that the establishment of the Court was not “the result of any principled or reasoned deliberation.”<sup>69</sup> Tom Ginsburg also described the Constitutional Court’s pivotal role in the country as completely unexpected.<sup>70</sup> The considerations above arise from the

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<sup>63</sup> *Ibid.*

<sup>64</sup> Chaihark Hahm, “Law, Culture, and the Politics of Confucianism”, *Columbia Journal of Asian Law*, Vol. 16, No. 2 (Spring 2003) 253-301, p.261.

<sup>65</sup> For example, the fact that South Korea was going to host the Summer Olympics the following year and the fact the American ambassador condemned any form of violent repression against protesters.

<sup>66</sup> Kyung Moon Hwang, *A History of Korea*, Second Edition, Palgrave Macmillan, 2017, pp. 231-232.

<sup>67</sup> Hahm, “Law, Culture, and the Politics of Confucianism”, pp. 260-261.

<sup>68</sup> *Ibid.*

<sup>69</sup> Hahm, “Conceptualizing Korean Constitutionalism”, p. 17.

<sup>70</sup> Ginsburg, “Constitutional Courts in East Asia”, p. 85.

fact that, during the constitutional revision process, the drafters did not prioritise constitutional adjudication as they were primarily focused on other matters, such as identifying the scope of individual rights to be integrated into the new constitution.

Another critical priority was determining the appropriate form of government to prevent the recurrence of a presidential dictatorship characterised by a lifelong mandate.<sup>71</sup> The lack of enthusiasm and anticipation about the possible new court's function can be traced back to previous instances where past court structures, established or confirmed by constitutional changes, did not have substantial power or significant responsibilities. Irrespective of how they were addressed, matters about the Constitution were infrequently presented, resulting in minimal contemplation about the appropriate authority responsible for adjudicating constitutional questions.<sup>72</sup> As a consequence of these circumstances, it was observed that three out of the four initial drafts presented to the Special Committee did not refer to the possibility of an independent court.<sup>73</sup> Conversely, they intended to expand the jurisdiction of the Supreme Court by endowing it with the responsibility of assessing the constitutionality of legislative statutes,<sup>74</sup> dissolving political parties and adjudicating impeachment cases. However, during negotiations, a member of the opposition party suggested the creation of a separate Constitutional Court intending to facilitate the submission of constitutional petitions by individuals. During the deliberations, a suggestion was put forth to institute a novel framework for constitutional complaints, which would empower individual citizens to file complaints aimed at safeguarding their constitutional rights. This proposal drew inspiration from the long-standing constitutional petition system in Germany<sup>75</sup> to ensure that such complaints were shielded from any interference by state authority.<sup>76</sup>

In the end, all the parties involved agreed on the idea of establishing a separate Constitutional Court.<sup>77</sup> Since the 1987 reform, when the democratisation process started to have effects on the legal system and society,<sup>78</sup> the Constitutional Court has been very active, and its influence has been far-reaching. Constitutional adjudication has emerged as the predominant mechanism for upholding fundamental principles of individual rights

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<sup>71</sup> Hahm, "Law, Culture, and the Politics of Confucianism", p. 263.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Hahm, "Constitutional Court of Korea", pp. 142-143.

<sup>75</sup> Hahm, "Law, Culture, and the Politics of Confucianism", p. 263.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Suggesting that the democratisation process started with the enactment of the 1987 constitution would belittle the long and painful struggle of the citizens against the political and economic domination.

and liberal democracy. It has played a crucial role in dismantling what remained of illiberal laws and responding to the need for transitional justice.<sup>79</sup>

As a result of this activity, popular perceptions of the Constitution and law in general have changed.<sup>80</sup> In this particular context, it is essential to highlight the significant observation that, after the democratisation process, both the Supreme Court and the lower ordinary courts have faced substantial criticism due to their failure to adequately safeguard citizens' rights during authoritarian regimes. This criticism has properly delineated a differentiation between eras preceding and following democratisation.<sup>81</sup>

The statement mentioned above starkly contrasts the notable achievements of the Constitutional Court, often regarded as the most successful institution in contemporary South Korea.<sup>82</sup> “The juxtaposition of the new and the old courts,”<sup>83</sup> as defined by Kim Marie Seong-Hak, is accompanied by the juxtaposition of the old and the new in terms of societal principles and demands. This analogy underscores the tension between the growing necessity for strengthened rights protection and the enduring impact of deeply ingrained traditional principles in society, which creates a distinction between what is consciously recognised and perceived and what is frequently unconsciously and deeply rooted in public sentiment and common wisdom. Korean people no longer recognise their values as Confucian and tend to reject traditional practices, often deeming them antiquated within the context of a democratic nation. Nevertheless, specific customs from Confucianism are still frequent, and values remain of significant influence to the extent that even in contemporary times, the Constitutional Court has invoked traditional culture as a basis for its legal reasoning. For these reasons, it is fundamental to analyse the role of Confucianism in this legal system and specifically in the way the Constitutional Court operates.

Around a decade and a half after the establishment of the Constitutional Court of Korea, Chaihark Hahm analysed the “place of culture in the operation of law, in a society heavily influenced by Confucian tradition.”<sup>84</sup> Even though two decades passed since this statement, it is intriguing to observe how the situation is still much the same when

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<sup>79</sup> Marie Seong-Hak Kim, *Constitutional Transition and the Travail of Judges: The Courts of South Korea*, Cambridge University Press, 2019, p. 285.

<sup>80</sup> Daekyu Yoon, “The Constitutional Court System of Korea: The New Road for Constitutional Adjudication”, *Journal of Korean Law*, Vol.1, No. 2, (2001) 1-16, p. 3.

<sup>81</sup> Kim, *Constitutional Transition and the Travail of Judges*, p. 1.

<sup>82</sup> *Ibid.*, pp. 2-3.

<sup>83</sup> *Ibid.*

<sup>84</sup> Hahm, “Law, Culture, and the Politics of Confucianism”, p. 256.

comparing the author's words and analysis with the more recent framework exploring the relationship between law and Confucianism. The author posits that examining the interplay and convergence of law, culture, and Confucianism in Korea presents a compelling and noteworthy research subject. Although it is a highly prominent feature of society, the interaction of Confucian culture with the legal sphere is also inadequately articulated. Based on Clifford Geertz's interpretative approach to culture, Hahm tried to explain to what extent Confucianism and the legal system influence each other:

Confucian culture provides the tools with which Koreans interpret and give order to the world around them. On this view, the law is also a part of the culture, for to be meaningful to the people it regulates, law must partake of the resources within culture. To that extent, Confucian culture may influence the legal and constitutional discourse. Legal meaning is dependent on the cultural signs and narrative.<sup>85</sup>

The author argues that Confucianism in Korean culture is not characterised by a static and solidified nature. Contrarily, it is consistently subject to renegotiation and readjustment (what was defined in the previous chapter as "negotiation of meaning"). This statement is proven by the Constitutional Court's work and the constitutionalisation process that has shaped the discourse surrounding its role within contemporary Korean national identity. Within this particular framework, the cultural significance of Confucianism is examined and determined through legal proceedings, despite the traditional perspective that the law was not the preferred method for resolving conflicts.<sup>86</sup> From the scholar's perspective, Confucianism has become a "site of cultural contestation in contemporary Korea."<sup>87</sup>

Since the implementation of the 1987 Constitution, South Korea has witnessed the coexistence of Confucian traditional symbols and narratives alongside other ideas such as liberty, human rights, and the pursuit of happiness, which have become commonplace over time.<sup>88</sup> However, it is essential to note that the concept of pursuing happiness, as stated in the Constitution of the Republic of Korea, has been subject to frequent criticism by legal scholars, as discussed later in this chapter.

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<sup>85</sup> *Ibid.*, pp. 257-258.

<sup>86</sup> *Ibid.*, pp. 258-259.

<sup>87</sup> *Ibid.*, p. 260.

<sup>88</sup> *Ibid.*, p. 259.

Moreover, the outcomes achieved during the process of transitioning to democracy are intriguing when examined from a comparative standpoint. As asserted by Kim Sunhyuk and subsequently confirmed by Kim Sungmoon, a notable disparity exists between the process of democratic transition in South Korea and comparable circumstances observed in Europe and Latin America. The former approach did not primarily rely on negotiation, confrontations, and agreements but instead emphasised the role of a resistant and rebellious civil society. This civil society exerted pressure on the authoritarian State from below.<sup>89</sup>

As extensively explored in the introductory chapter, which presented a comprehensive elucidation and examination of the significance of Confucianism in Korean history and society, Confucianism stands as one of the foremost philosophies that continue to shape the everyday lives of Koreans. Confucianism has exerted diverse levels of influence on individuals and the nation's legal framework for centuries.

The next phase of this study will analyse a selection of decisions by the Constitutional Court to better understand the contemporary significance of Confucian principles in Korea. As will be seen from the investigation, Confucianism is gradually reducing its influence on family law while it continues to exert a significant presence in criminal law. However, potential future modifications in these laws are not to be excluded.

Upon analysing several cases, it becomes reasonable to come to certain conclusions on the present role of Confucianism, potential future developments, and the fundamental responsibilities undertaken by the Constitutional Court of Korea since its inception as a vital institution for the country.

### **3. Constitutional Court of Korea and Developments in the Concept of Family**

Family law under the Joseon dynasty was built on patrilineal and patriarchal principles.<sup>90</sup> As seen in the previous chapter, family law in this period was regulated, from the fifteenth century, by the Code called *Gyeonguk Daejeon*, which, more broadly, included all the laws, decrees and customs released during the late Goryeo-early Joseon. The government initially imposed the family-related rules, which were progressively

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<sup>89</sup> Sungmoon Kim, "Candlelight for Our Country's Right Name: A Confucian Interpretation of South Korea's Candlelight Revolution", *Religions*, Vol. 9, No. 11, October 2018, p. 5.

<sup>90</sup> Jinsu Yune, "Tradition and the Constitution in the Context of the Korean Family Law", *Journal of Korean Law*, Vol. 5, No. 1 (2005) 194-212, p. 196.

accepted by the general population. By the seventeenth century, they had become widespread social norms.<sup>91</sup>

The Korean society in this period was based on three fundamental principles of the three basic human relationships (*samgang* 삼강)<sup>92</sup> and five moral disciplines or ethical norms (*oryun* 오륜).<sup>93</sup> The three essential relationships can be summarised as follows: 부위자강 parents and children (효 *hyo*, filial piety), 군위신강 king and subject (충 *chung*, loyalty to the king) and 부위부강 husband and wife, distinctly separating the roles of the married couple and focusing on the wife obedience and faithfulness and her filial piety to parents. This classification shows that the central familial relationship was not horizontal but vertical, based on filial piety characterised by benevolence and authority.<sup>94</sup> Hierarchical relations served as the basis under which legal codes were formulated.<sup>95</sup>

The following cases will aid in comprehending the significant role played by the Constitutional Court in reshaping and reevaluating these ties, establishing and perpetually advancing a novel approach to constructing a family unit. Nevertheless, it is evident that many shortcomings and challenges still necessitate adequate resolution.

### 3.1. Same-Surname-Same-Origin Marriage Ban

Joseon Korea was centred on a clan system known as *bongwan* 본관 (today literally meaning “ancestral hometown”), in which different clans may have had the same family name, identifying descend groups by geographic place of origin. This norm existed before Joseon but became stricter and part of state law during this era. One corollary of the *종법* (clan rules, agnatic principle) was the prohibition of marriage between a man and a woman who possessed a common surname and shared the same ancestral seat.<sup>96</sup>

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<sup>91</sup> *Ibid.*

<sup>92</sup> Söl, Sun (1408-1432), et al., “Samgang Haengsilto [The Principles of Three Basic Human Relationships],” UHM Library Digital Image Collections. Available at <https://digital.library.manoa.hawaii.edu/items/show/31889> (Accessed August 6, 2023).

<sup>93</sup> See 국립중앙박물관 (National Museum of Korea), *오륜행실도*: “부모 자식 간에는 친함이, 임금과 신하 간에는 의로움이, 부부 사이에는 구별이, 어른과 어린이 사이에는 질서가, 친구 간에는 신의가 있어야 한다는 뜻입니다”. [There should be closeness between parents and children, righteousness/justice between ruler/king and servant, differentiation between husband and wife (meaning the wife’s inferior status), (hierarchical) order between senior and junior and trust/loyalty between friends]. It is evident that, with the exception of the last relationship, all the other ones were structured around a dominant-subordinate dynamic.

<sup>94</sup> Park and Cho, “Confucianism and the Korean Family”, p. 124.

<sup>95</sup> Ma and Marquis, *Confucian Culture and Competition Law in East Asia*, p. 32.

<sup>96</sup> Yune, “Tradition and the Constitution in the Context of the Korean Family Law”, pp. 196-197.

According to this regulation, which originated in China and has been present in Korea since the late Joseon period, men and women with the same surname and coming from the same ancestral line (동성동본, which means “same surname from the same ancestor”) were not allowed to get married because the two were part of the same family.

It is important to note that, in the ancient and medieval ages of Silla (668-935) and Goryeo, this prohibition did not exist.<sup>97</sup> Due to the influence of Confucianism, marrying someone from the same ancestral line became unusual as early as the mid-Goryeo era (which approximately dates back to the twelfth century) and ultimately fell into disuse by the end of this period. Following Confucian thinking, the marriage prohibition law was implemented to protect and maintain the integrity and identity of families.

During the Japanese colonial period (1910-1945), the *dongseong dongbon* marriage ban became a customary law, and a few years after Korea’s liberation from Japanese rule, when the Civil Code came into force, this rule was codified in the Code at Article 809(1). It is important to stress that the section related to the codification of family law – and the relationship between constitution and tradition – sparked considerable debate.<sup>98</sup> Throughout the years, many efforts to amend this law had been undertaken, but they all had to face strong opposition from fervent supporters of the Confucian tradition.<sup>99</sup> For example, Confucian groups called *Yulim* believed that this provision was essential to maintain the high moral standards of the society<sup>100</sup> and thought of this system as a “good and beautiful custom” (미풍양속, “good and laudable custom”).<sup>101</sup> The lack of specificity in the Constitutional provision about culture (Article 9), as extensively discussed in Chapter 1, along with the supplementary mention of the “resplendent history and traditions”<sup>102</sup> in the preamble of the Constitution, has supported these ideas for a long time.

Furthermore, it is crucial to acknowledge that during the drafting of the Code after the liberation, many of the prominent lawmakers were deeply impacted by Confucianism from childhood. Consequently, when conflicting opinions arose, the prevailing approach

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<sup>97</sup> Chongko Choi, “Confucianism and Law in Korea”, 법학, *Seoul National University Law Institute*, Vol. 37 No. 2, (1996), 124.

<sup>98</sup> Yune, “Tradition and the Constitution in the Context of the Korean Family Law”, p. 197.

<sup>99</sup> *Ibid.*, p. 200.

<sup>100</sup> Choi, “Confucianism and Law in Korea”, p. 123.

<sup>101</sup> Hyunah Yang, “A Journey of Family Law Reform in Korea: Tradition, Equality, and Social Change”, *Journal of Korean Law*, Vol. 8 (December 2008) 77-94, p. 89.

<sup>102</sup> Preamble of the Constitution of the Republic of Korea.

often favoured implementing the Confucian perspective.<sup>103</sup> One prominent figure was Pyongro Kim, who later became the first Chief Justice of the Republic of Korea. Despite studying modern jurisprudence in Japan during his university years, he received early formation in Confucian Ethics. He joined the Confucian Righteous Army against the Japanese takeover<sup>104</sup> and was Chief Justice of the Special Tribunal for Punishing the Pro-Japanese Collaborators.<sup>105</sup>

However, things began to shift less than ten years after the Constitutional Court was established. On May 20, 1995, eight couples presented their case before the Family Court of Seoul, which referred the matter to the Constitutional Court. The petitioners sought to nullify the administrative action that rejected their marriage registration due to the same-surname-same-origin provision.<sup>106</sup> Two years later, the Constitutional Court delivered a 7-2 decision of nonconformity<sup>107</sup> to the Constitution. The Court argued that this Article was incompatible with Articles 10 and 36 of the Constitution of the Republic of Korea.

In that case, the majority opinion stated that society has significantly changed from the period in which a provision like this one was tolerated and that the institutional foundation of this ban had to be questioned.<sup>108</sup> Article 10 of the ROK Constitution states, “All citizens shall be assured of their human worth and dignity and shall have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”<sup>109</sup> The utilisation of this provision as a foundation for deeming a legal clause unconstitutional has generated scepticism among legal scholars who argue that this clause lacks substantive content. These scholars contend that the Court has often resorted to its application when encountering challenges in establishing constitutional justifications for its rulings.<sup>110</sup>

Furthermore, Article 36(1) states that “marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State

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<sup>103</sup> Choi, “Confucianism and Law in Korea”, pp. 120-121.

<sup>104</sup> *Ibid.*

<sup>105</sup> In Sup Han, “제 1 공화국에서 사법과 정치 - 김병로 대법원장의 역할을 중심으로 - The Role of Kim Pyong Ro, the Chief Justice of the Supreme Court, as the Bulwark of Judicial Independence under the first Republic of Korea”, *Kangwon Law Review*, Vol.58 (2019) 433-476, p. 475.

<sup>106</sup> Constitutional Court of Korea, 95Hun-Ka6, July 16, 1997 (S. Kor.).

<sup>107</sup> The final decision was of nonconformity and the provision was not considered decidedly unconstitutional. In fact, 2 out of the 7 majority Justices contended that it was “incompatible with the constitution” so, they would have lacked the quorum of six justices needed for the declaration of unconstitutionality (see Constitution of the Republic of Korea, Article 113).

<sup>108</sup> Constitutional Court of Korea, 95Hun-Ka6, Jul 16, 1997 (S. Kor.).

<sup>109</sup> Constitution of the Republic of Korea (1987), Art. 10.

<sup>110</sup> Jibong Lim, “Pursuit of Happiness Clause in the Korean Constitution”, *Journal of Korean Law*, Vol. 1, No. 2, (2001), pp. 74-75.

shall do everything in its power to achieve that goal.”<sup>111</sup> Another noteworthy aspect is that the Court emphasised that people’s views on marriage have shifted from a union between two families (extended family) to a union between two individuals (nuclear family), founded on gender equality and with free will, which must be respected.<sup>112</sup> It is also significant to note that the importance and relevance of ideas such as lineal origin are fading and becoming obsolete due to the substantial rise in urban population.

Lastly, the majority of the judges stated that since the scope of prohibition is limited to the same surnames, it is exclusively related to patrilineal blood ties,<sup>113</sup> constituting gender discrimination and violating the principle of equality that can be found in Article 11 of the Constitution.<sup>114</sup> The Article states that “all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status.”<sup>115</sup>

However, strong opposition from Confucian groups led to the exclusion of the reformed Art. 809 from the reform bill presented within the deadline of December 1998, provided by the Constitutional Court. Yet, it was included in the reform bill passed in March 2005 – long after the deadline imposed by the Court – and came into effect at the end of the month.<sup>116</sup>

One noteworthy aspect of the *Same-Surname-Same-Origin Marriage Ban case* is that a dissenting justice’s viewpoint was grounded in the belief that the preservation of traditional culture’s lineage takes precedence over individual freedom, as traditional culture is included in Article 9 of the Constitution: “The State shall strive to sustain and develop the cultural heritage and to enhance national culture.”<sup>117</sup> However, it is necessary to observe once again that this Article does not explicitly or indirectly refer to Confucianism as part of the country’s cultural heritage.<sup>118</sup> This viewpoint exemplifies the enduring influence of traditional culture and Confucian ideas throughout modern culture and society. Shifting away from deeply rooted values to embrace more democratic ideas can be challenging due to resistance from individuals in civil society, such as strong

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<sup>111</sup> Constitution of the Republic of Korea (1987), Art. 36(1).

<sup>112</sup> Constitutional Court of Korea, 95Hun-Ka6, Jul 16, 1997 (S. Kor.).

<sup>113</sup> This distinction putting more emphasis on the patrilineal line was also visible in the calculation of *Chon* (degrees of kinship), which is different from both the West and China.

<sup>114</sup> Constitutional Court of Korea, 95Hun-Ka6, Jul 16, 1997 (S. Kor.).

<sup>115</sup> Constitution of the Republic of Korea (1987), Art. 11.

<sup>116</sup> Constitutional Court of Korea, 95Hun-Ka6, Jul 16, 1997 (S. Kor.).

<sup>117</sup> Constitution of the Republic of Korea (1987), Art. 9.

<sup>118</sup> Marie Seong-Hak Kim, “Confucianism That Confounds: Constitutional Jurisprudence on Filial Piety”, in *Confucianism, Law, and Democracy in Contemporary Korea*, (ed.) Sungmoon Kim, Rowman & Littlefield International, 2015, pp. 57-58.

proponents of the Confucian tradition, and obstacles within the judicial system. These factors can hinder substantial changes in both the legal system and society as a whole.

In the end, the new provision introduced measures prohibiting consanguineous marriage between blood relatives within the eighth degree of relationship, stating that “A marriage may not be allowed between blood relatives, including the blood relatives of an adoptee before full adoption, within the eighth degree of relationship.”<sup>119</sup>

### *3.2. Prohibition and Nullity of Marriage between Blood Relatives within Eighth Degree of Relationship*

In connection with the revised Article, a complainant submitted a constitutional complaint in 2018 after the dismissal of their appeal and petition. The complainant sought a review of Article 809(1) and Article 815(2), which pertains to the invalidation of a marriage that violates Article 809(1).<sup>120</sup> In this instance, the Court said that the Marriage Prohibition Provision cannot be regarded as imposing superfluous or excessive restrictions to accomplish its legislative objectives. Furthermore, it cannot be deemed overly expansive, encompassing blood relatives up to the eighth degree.<sup>121</sup> For these reasons, the provision does not fail the balance of interest test and “does not infringe freedom of marriage by violating the rule against excessive restriction.”<sup>122</sup>

In this case, the Court stated that the Marriage Prohibition Provision aims to prevent confusion and maintain the functions of the institution of family. The Court acknowledged the rationality of the provision, noting that it previously prohibited marriage between patrilineal relatives without considering the degree of relation. The provision now restricts consanguineous marriage to the extent and scope accepted by society, focusing on establishing family relationships based on gender equality.<sup>123</sup> Due to the justifications mentioned above, it is unacceptable to deem the protection and preservation of family order as excessive or superfluous. On the contrary, it is imperative to recognise the significant public interest in safeguarding and upholding such order.

On the other hand, the Nullity Provision in Article 815(2) was declared nonconforming to the Constitution. According to the perspective of five judges, the restriction in question

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<sup>119</sup> Civil Act of the Republic of Korea, Article 809(1) amended by Act No. 7427, March 31, 2005.

<sup>120</sup> See Constitutional Court of Korea, 2018Hun-Ba115, Oct 27, 2022 (S. Kor.).

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

infringed upon the fundamental freedom of marriage, as it can potentially yield outcomes inconsistent with the legislation's initial intent in some specific situations. Four other justices pointed out that, by rendering null and void all cases of violation of Article 809(1), the Nullity Provision fails the test of least restrictive means and balance of interest. The nullity provision should be amended by December 31, 2024.<sup>124</sup>

Another interesting aspect pertains to the dissenting opinion of four justices regarding the Marriage Prohibition Provision. They contended that the prohibition of marriage within the eighth degree extended well beyond the boundaries of the incest ban and further argued that it is exceedingly challenging for individuals to verify the existence of such blood-kin relationships. They added that many other countries have less stringent provisions on this matter since freedom of marriage should be respected and protected as a universal human right. Since there is no scientific proof that marrying a very distant relative could be genetically harmful to the offspring, genetics is not a reasonable ground to limit the freedom of marriage.<sup>125</sup>

In this case, the more traditional way of dealing with family issues was successful. Despite this, the fact that four of the nine judges viewed this clause, which had been modified a few years earlier, as being still excessively restrictive and inhibiting the full exercise of rights can serve as a jumping-off point for a discussion on the potential future course that this nation could conceivably follow. The dissenting judges have observed that the provision, although having already been altered, is still extensive compared to other nations, including China. This indicates that the traditional Confucian idea of the family still significantly affects society and the legal system. On the other hand, the fact that nearly half of the Court voted in support of declaring it in violation of the Constitution indicates a widespread desire to make additional changes to the matter.

### *3.3. The Abolition of the Hoju System, Gender Equality and Non-discrimination*

It is plausible to argue that traditional patriarchal norms in Korea did not serve as a founding set of principles for the country. In fact, the gender inequality that prevailed in Joseon Korea was not representative of the reality of Korea from the very beginning of its history. The procedure for redefining the social position of women began its execution

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<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

when the role of the aristocracy, known as the *yangban*,<sup>126</sup> was essential in forming a patriarchal family order within a Confucian-based society. Many long-standing customs that have impacted the country for several centuries were developed during this time frame.

For instance, during Joseon, the traditional practice of a husband moving in with his in-laws gave way to the antithetical concept of patrilocal society, in which wives began cohabitating with their husbands' families.<sup>127</sup> In this period, specifically from the late Joseon era, there was also a change in the inheritance system, from an equal to a gender-based one, in which the eldest son became the sole inheritor;<sup>128</sup> daughters were completely excluded from receiving any inheritance, while younger sons faced growing discrimination.<sup>129</sup> The factor behind this shift is that the people who founded the Joseon Dynasty generally believed that one of the reasons for the fall of the Goryeo Dynasty was the deterioration of public morals. As a result, they tried and successfully established a new era of gender relationships based on Neo-Confucian ideals by imposing many gender-based restrictions primarily under the rule of King Sejong (1418-1450)<sup>130</sup> and later reinforced with the publication of the *Gyeonguk Daejeon*<sup>131</sup> or with the

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<sup>126</sup> Marie Seong-Hak Kim, "Law and Legal Culture under the Chosŏn Dynasty", in *Law and Custom in Korea: Comparative Legal History*, Cambridge, 2012, p. 41; Jakub Łukaczyński, "Korean legal thought under Yi dynasty as a reflection of Confucian worldview adopted in early Joseon period: Chinese influence, Korean ideology", *Gdańskie Studia Azji Wschodniej*, 2016, p. 149: Marie Seong-Hak Kim's research shows that the state did not want to interfere in private relationships. Instead, the hereditary *yangban* elite, who were strongly influenced by Confucianism, acted as a quasi-judicial administration in the provinces. When they acted as mediators in informal justice, it resulted in local social control. Furthermore, the *yangban* position was heavily safeguarded, and this particular group experienced a majority of the socioeconomic advantages. Jakub Łukaczyński, quoting Chun Bongduck, said that one of the principles of old Korean Law is that it only serves the interests of the elite *yangban* class. However, as a result of the social instability during the late Joseon period, the term "yangban" no longer immediately referred to the ruling class anymore.

<sup>127</sup> Hee-sook Han, "Women's Life during the Chosŏn Dynasty", *International Journal of Korean History*, Vol. 6, Dec. 2004, p. 113.

<sup>128</sup> *Ibid.*

<sup>129</sup> Geung Sik Jung, "The Codifications and Legal Institutions of the Joseon Dynasty", *Journal of Korean Law*, Vol. 13 (2013) 175-212, p. 204; Michal Tomášek, "Notes on the Development of Korean Law", *The Lawyer Quarterly*, Vol. 5 No. 2 (2015) 102-115, p. 110: It is important to emphasise that while Chinese and Korean laws during the initial stages of the Joseon era shared many similarities, there was a significant difference, for example, in their hereditary laws. In China, only male descendants were eligible to inherit, whereas under Korean law, both male and female inheritors had equal rights at first.

<sup>130</sup> Han, "Women's Life during the Chosŏn Dynasty", p. 115: During that time, for example, there was a strict prohibition on women entering the temple monastery, and likewise, monks were not allowed to visit the residence of a widow. Furthermore, under his rule, the Six Codes of Governance provided specific guidelines regarding the social interactions of women belonging to the *yangban* class. These guidelines allowed women to engage with their immediate family members (parents and siblings) as well as their paternal and maternal relatives (uncles and aunts' families) within a range of three degrees of relations.

<sup>131</sup> *Ibid.*

crystallisation of even more patriarchal customs and practices than what provided by the Code (e.g., on inheritance).<sup>132</sup>

Among the characteristics that strengthened the patriarchal system, the Joseon society initiated the acknowledgement and establishment of gender roles when children reached the age of seven.<sup>133</sup> Additionally, it is crucial to point out that men had the exclusive right to ask for divorce based on certain specific grounds, while women were only provided with a set of “safeguards” that protected them from being sent away by their husbands or in-laws.<sup>134</sup>

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<sup>132</sup> Jung, “The Codifications and Legal Institutions of the Joseon Dynasty”, pp. 193-204: As illustrated by Jung, multiple sources confirm that while there is a significant focus on patrilineal identity and succession in Joseon society, it is crucial to acknowledge that different characteristics primarily present in early Joseon customs did not completely relegate women to a marginal or inactive role in society. Illegitimate sons were typically given priority over adopted ones, and it was customary for both sons and daughters to alternate in performing ancestral memorial rites. Grandchildren also participated in rites to honour both sets of their grandparents, aligning customs with those of the Goryeo period. Based on historical documents from the 1400s and 1500s, it was observed that in early Joseon society, children were added to the family record based on their age rather than their gender. In the *Gyeongguk Daejeon*, specifically in the article titled *Bongsa*, it was stated that the designated heir of the ancestral memorial rites should get an additional 1/5 portion of the inheritance. Only after the transformation of family and a stronger emphasis on succession, the first legitimate son gained complete authority over the ancestral memorial rites, exclusively claiming the remuneration for conducting those rites. As a result, the effective regulatory authority of equal inheritance specified in the *Gyeongguk Daejeon* was abandoned.

<sup>133</sup> Soon-Hyung Kwon, “Did People Divorce in the Joseon Period?”, in *Everyday Life in Joseon-Era Korea: Economy and Society*, (ed.) Michael D. Shin, Global Oriental, Leiden, 2014, pp. 190-191: Around this age, boys and girls could no longer sit and consume meals together. According to multiple sources, gender inequalities were already deeply rooted in children’s minds from a very young age. Male babies were dressed in robes and placed on a table, while female babies were laid on the ground. As they grew up, their education differed significantly. Boys learned about numbers first, followed by principles related to the calendar. At the age of ten, they received education from teachers who came from outside the household. Conversely, girls were provided with instruction for their future duties in home life. In addition, their main responsibility was to ensure the perpetuation of the husband’s family lineage. Therefore, they received teaching on how to adjust to married life, perform ancestral rituals, and adhere to proper etiquette, such as walking in the in-law’s house and walking backwards in front of adults without facing away from them.

<sup>134</sup> *Ibid.*, pp. 193-194: The institution of divorce was a reflection of the patriarchal society, where only the husband had the right to initiate divorce. The reasons for divorce were limited to the so-called *chilgeo jia*, which were seven specific sins (from the Great Ming Code) that would allow a husband to abandon his wife, but not the other way around. Divorce was permitted for reasons such as neglecting the in-laws, failing to give birth to a male heir or being unable to have children due to a severe illness, engaging in extramarital affairs and potentially conceiving a child with another man, spreading gossip that could disrupt family harmony, being excessively jealous of the husband’s concubines, or engaging in theft. However, if a family desired to exclude a daughter-in-law, they could always identify a behavioural aspect of hers that would fit into one of the seven classifications. Regardless, she was shielded by the *sambulgeo*, which consisted of three exceptions to divorce. These exceptions remained in effect even if she was found to have engaged in one evil act: not having a home to go back to, observing a three-year period of mourning for her in-laws, or marrying before her husband’s family became wealthy. These exceptions were not applicable in cases of adultery or disrespectful attitude towards in-laws. Nevertheless, divorce was infrequent in order to avert the possibility of numerous divorced women becoming a societal concern. Under the rule of Gojong (1864-1907), the number of evil acts was lowered to five, while the number of exceptions for divorce increased from three to four, with divorce not being allowed if the couple had children.

In general, the condition of women deteriorated with time. Several factors contributed to this shift, including a heightened focus on ancestral rituals that elevated the status of firstborn sons, resulting in wives losing many of their property rights.

Additionally, during Joseon, there was an increasing emphasis on women's loyalty. Previously, a woman was deemed virtuous if she refrained from remarrying after her husband's death.<sup>135</sup> However, during the Joseon period, societal expectations demanded widows' engagement in more extreme actions, such as voluntarily joining their husbands in death.<sup>136</sup> These activities became more widespread among ordinary people as well, as they were experiencing more remarkable social progress, and the influence of Neo-Confucian ideology was expanding from the *yangban* class to the commoners.<sup>137</sup>

However, even if the abovementioned information proves that, generally speaking, the role of the woman in Korean society changed for the worse throughout the Joseon era, not all provisions that are considered "tradition," such as the head of the house system, were actually part of this patriarchal system. In fact, they were later imposed on Korea by the Japanese, which included this structure in the Japanese Civil Code during the Meiji Restoration.<sup>138</sup> There are many explanations for why these non-Korean traditions spread in South Korea and got codified, starting from the fact that in postcolonial Korea there

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<sup>135</sup> Han, "Women's Life during the Chosŏn Dynasty", pp. 121-122: The issue of widows remarrying gained significance during the reign of King Seongjong (1457-1495), when the neo-Confucianist order had become firmly established. In July 1477, the king held a meeting with 46 esteemed loyal subjects of the nation, with the aim of discussing the necessity of implementing a prohibition on women remarrying after the death of their spouses. As a consequence, a provision that made descendants of remarried women and concubines ineligible for the government service examination was included in the *Gyeonguk Daejeon*.

<sup>136</sup> "여성에 대한 유교 규범의 강화-어우동 사건" ["Strengthening of Confucian norms on Women - Uhwudong Case"], 사료로 본 한국사, 우리역사넷. Retrieved from: [http://contents.history.go.kr/front/hm/view.do?levelId=hm\\_086\\_0040](http://contents.history.go.kr/front/hm/view.do?levelId=hm_086_0040) (Accessed July 27, 2024): The Joseon Dynasty endeavoured to establish a distinct social custom separate from that of Goryeo, concurrently reinforcing the standards for women. In terms of cosmology, men, who symbolise the heaven, hold dominance over women, who symbolise the earth. To ensure the application of this universal principle to human society, it was believed that the desires of women, who were considered inferior beings, should be repressed. Similarly, they insisted on the proper conduct that aligns with the newly established social structure, specifically emphasising the moral qualities expected of women as advocated by Neo-Confucianism. Thus, it sought to restrict actions that might damage families and society by expressing strong desires or departing from established customs. One famous episode that occurred during King Seongjong's reign was the forced divorce of Uhwudong due to allegations of infidelity and immoral conduct. She underwent a trial in 1480, being accused of engaging in adultery with many male partners and subsequently sentenced to execution.

<sup>137</sup> For more detailed information see Soon-Hyung Kwon, "Did People Divorce in the Joseon Period?" in *Everyday Life in Joseon-Era Korea: Economy and Society*, (ed.) Michael D. Shin, Global Oriental, Leiden, 2014, pp.189-195; Sang-soon Shin, "The Way Koreans Kept Intergender Distance", *GwangjuNews*, (August 3, 2019). Retrieved from <https://gwangjunewsgic.com/arts-culture/korean-culture/the-way-koreans-kept-intergender-distance/>; "Gender in Confucian Philosophy", *Stanford Encyclopedia of Philosophy*, 27 February 2023. Retrieved from: <https://plato.stanford.edu/entries/confucian-gender/>.

<sup>138</sup> Yang, "A Journey of Family Law Reform in Korea", p. 89.

was a “dichotomy of both continuity and discontinuity”<sup>139</sup> with the past between the legacy of its colonial experience and the new postwar order.

Additionally, as pointed out by Marie Seong-Hak Kim, the distinction between Korean custom, which was considered as the expression of Korean cultural values, and “the colonial creation of Korean customary law” became blurred in postcolonial Korea as jurists incorporated colonial judicial precedent into the corpus of Korean customary law.<sup>140</sup> According to Bi Hwan Kim, provisions stemming from colonial legacies were frequently implemented because, immediately after independence, nothing traditional was left for the rapid reorganisation of the society, which needed to have its foundations on some stable principles and ideas.<sup>141</sup>

Even if it is true that, to a large extent, Japan was the origin of the head of the family system, it was also constructed according to ideals that were central to the Korean tradition. Because of this, establishing and implementing the post-independence *Hoju System*, which limited women’s legal rights, was conceivable and easily permeated Korea. It is important to note that women had been campaigning for abolishing this system as early as the 1950s, long before the first government measure aimed at doing so was approved by the National Assembly in 1957.<sup>142</sup>

The *Hoju system* (호주제, 호주 meaning “the head of the family”) was the “traditional” household system established in South Korea, based on the principle that a male had priority over a female to access the role of the house head and only the direct male descendants inherited the position. Everyone in the family was registered under the Head’s name, keeping the records under family units. Additionally, it only acknowledged, once again, the patrilineal lineage. When the Hoju died, within a month, the title had to be transferred following a hierarchical order in which the first in line was the male descendant of the former Hoju. This system naturalised the inferior status of women as passive family members without decision-making capacity.<sup>143</sup> Yang Hyunah emphasised

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<sup>139</sup> Ki-young Shin, “The Politics of the Family Law Reform Movement in Contemporary Korea: A Contentious Space for Gender and the Nation”, *The Journal of Korean Studies*, 2006, Vol. 11, No. 1, p. 95.

<sup>140</sup> Marie Seong-Hak Kim, “Customary Law in Modern Korea”, in *Law and Custom in Korea*, Cambridge University Press, 2012, p. 268.

<sup>141</sup> Bi Hwan Kim, “Qualitative Defects of Korean Constitutional Democracy and Political Rationalism as a Confucian Legacy”, in *Confucianism, Law, and Democracy in Contemporary Korea*, (ed.) Sungmoon Kim, Rowman & Littlefield International, 2015, p. 138.

<sup>142</sup> Hee-Kang Kim, “Locating Feminism beyond Gender and Culture: A Case of the Family-Head System in South Korea”, in *Confucianism, Law, and Democracy in Contemporary Korea*, (ed.) Sungmoon Kim, Rowman & Littlefield International, 2015, p. 86.

<sup>143</sup> Hyunah Yang, “Colonialism and Patriarchy: where the Korean family-head (*hoju*) system had been located”, in *Law and Society in Korea*, (ed.) Hyunah Yang, Edward Elgar, 2013, p. 45.

that the *Hoju* system, codified through a law that in Korea represented “the miniature of the socio-historical landscape,”<sup>144</sup> exemplified how “the colonial legacy could be transformed as the sacred site of ‘tradition’ in the context of postcolonial society,”<sup>145</sup> with the institution serving as the means to preserve the patrilineal family system that was male-centric and son-preferred.<sup>146</sup>

In the 1970s and later in the 1990s, the *Hoju* system was gradually weakened, and the original authority to determine who could and could not enter or leave the family, order departure from the family, define the family’s place of residence, and more substantially decreased. Following these reforms, only some of these powers remained.<sup>147</sup>

Whether constitutionally challenged laws or customary norms could be safeguarded based on their traditional origins became more critical than ever during the late 1990s and early 2000s. At that time, a dual debate arose, highlighting the household head system as both a manifestation of gender discrimination and a problem of colonial legacy.<sup>148</sup> In essence, some contended that the *Hoju* system was a component of Korean indigenous culture and did not originate from Japanese influence. However, those who opposed the system argued that the Japanese artificially reinforced the authority of the house head by superimposing their *Ie* (“household”) institution (Japanese family system) and labelling the resulting hybrid system as Korean custom.<sup>149</sup>

A few ideas have been proposed to explain how and why the abolition of the *Hoju* system and additional advancements to the concept of family have been achievable. Among these reasons, scholars have cited the role of feminist movements, the landmark Constitutional Court case of the *Same-Surname-Same-Origin Marriage Ban*, and, finally, the often-overlooked reason of the spread of the internet and cyberspaces where ordinary people could exchange information and become aware of discrimination cases, including those involving divorced and remarried women.<sup>150</sup>

Petitioners in the *House Head System case* were married women who divorced and established new families, and despite holding custody and raising the kids, they were still registered under the household of the former husband. After asking for the registration

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<sup>144</sup> *Ibid.*, p. 59.

<sup>145</sup> *Ibid.*, p. 46.

<sup>146</sup> *Ibid.*

<sup>147</sup> Yune, “Tradition and the Constitution in the Context of the Korean Family Law”, p. 199.

<sup>148</sup> Sungyun Lim, *Rules of the House: Family Law and Domestic Disputes in Colonial Korea*, University of California Press, 2019, p. 2.

<sup>149</sup> Kim, “Customary Law in Modern Korea”, p. 290.

<sup>150</sup> Yang, “A Journey of Family Law Reform in Korea”, pp. 85-86.

under their own households, the family registration office refused the request. Other petitioners wanted to register households without house heads, but the office did not accept the filing. After appealing to the court, the petitioners requested constitutional review, asserting that the house head system provisions were unconstitutional.<sup>151</sup>

The Constitutional Court issued a 6-3 decision of nonconformity (with one opinion concurring with the dissenting opinion). In this case, the Court stated that regardless of whether the Hoju system was a distinctive tradition coming from the history of Korean society, it cannot deviate from the superior force of the Constitution, which “no longer tolerate(s) the patriarchal and feudal order of marriage,”<sup>152</sup> and that an existing law that strengthens the gap between a constitutional norm and the real world should be amended since the supreme values of the current constitutions are gender equality and individual dignity.<sup>153</sup> Basically, the majority of justices ultimately attempted to avoid the controversy surrounding the “indigenoussness” of the household system by concentrating on the appropriateness or inadequacy of this practice in the contemporary era.<sup>154</sup>

The court also argued that traditions and cultural heritage are stated in Article 9 of the Constitution; however, these concepts must be defined according to their contemporary meanings based on the constitutional value order, shared values of humankind, justice, and humanity. In the court’s opinion, the house head system not only defined a family representative but also perpetuated the male lineage, creating a disparity between men and women. For this reason, it fuelled discrimination based on stereotypes related to gender roles. Due to this system, many families were “suffering inconvenience and pain.”<sup>155</sup> Therefore, the system did not comply with Article 36(1) of the Constitution since it did not allow individuals and families to decide how to manage marriage and family life.

Interestingly, among the dissenting and concurring opinions, two justices’ opinions were based on the idea that the principle of paternal lineage that came from the Joseon dynasty was a true heritage of Korea, and that family law can have strong traditional, conservative, and ethical features. In addition, they stated that there was a way to mitigate

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<sup>151</sup> Constitutional Court of Korea, 17-1 KCCR 1, 2001Hun-Ga9.10.11.12.13.14.15 and 2004Hun-Ga5(consolidated), February 3, 2005 (S. Kor.).

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Kim, “Customary Law in Modern Korea”, p. 291.

<sup>155</sup> Constitutional Court of Korea, 17-1 KCCR 1, 2001Hun-Ga9.10.11.12.13.14.15 and 2004Hun-Ga5(consolidated), February 3, 2005 (S. Kor.).

the imbalance caused by the family structure, and as a result, there was no breach of the right to individual dignity and Article 36 of the Constitution.

Despite the long-standing existence of this system, it is evident that a crucial aspect in these decisions is discerning whether a law derives from an authentic and well-established tradition within the country or is merely a derivative of a system adopted elsewhere and subsequently imported and modified in the nation. The justices who expressed dissenting opinions perceived the traditional cultural heritage of Korea as being embodied in the concept of the head of the household. For this reason, they believed that eliminating this “tradition” would not be the appropriate resolution for the country’s sake. The chances of overcoming rules in Korea are greater when they are not widely acknowledged as part of the country’s authentic tradition. Overcoming laws rooted in Neo-Confucian ideals, which have significantly influenced the growth and collective mindset of the nation, poses a considerable challenge due to the enduring legacy they have established.

#### *3.4. A Series of Considerations*

As evidenced by Rosa Kim, the main obstacle faced by women’s rights activists in Korea was the need to find a balance between a societal structure rooted in Confucian patriarchy and the democratic principle of gender equality, all within a context of fast-paced economic and political transformations.<sup>156</sup> In her work published in 2008, “A Journey of Family Law Reform in Korea: Tradition, Equality and Social Change”, Yang Hyunah described the history of family law in Korea as “a history of women’s movements”, with persistent feminist efforts for legal reforms.<sup>157</sup> For decades, it was nearly impossible to eradicate or diminish the fundamental function of the hoju system, despite the fact that it was not a legitimate Korean tradition. In the 1970s, women’s non-governmental organisations (NGOs) began to establish an alliance to coordinate their efforts for the removal of gender-based discriminatory provisions from the Family Act. The “Pan-Women’s Meeting to Facilitate the Revision of the Family Act” was attended by 61 women’s organisations. These groups proposed ten guidelines for amending the Family Act, with the abolition of the hoju system being the top priority due to its status as the most severe discriminatory structure in the Family Act. Women were able to

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<sup>156</sup> Rosa Kim, “The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law”, *Boston College Third World Law Journal*, Vol. 14, No.1 (1994) 145-162, pp. 145-146.

<sup>157</sup> Yang, “A Journey of Family Law Reform in Korea”, 78-79.

achieve their first victory after these collaborative endeavours, as they led to the amendment of the Civil Code to mitigate patriarchal elements. Regrettably, at that time, there were no modifications to the house head system.<sup>158</sup>

Anyways women were critical in challenging patriarchal definitions and unequal family law provisions. On this subject, Lee Tai-young's role was fundamental. After passing the National Judicial Examination in 1952, Lee Tai-young became the first female lawyer and judge in the history of South Korea. She proposed, along with her Federation of Korean Women's group, respect for the Constitution as an alternative jurisprudence to family law.<sup>159</sup> They stated that, for instance, the same-surname-same-origin marriage ban was not a natively practised Korean custom but one brought over from China. As a result, the reasoning which led some people to refer to it as a "beautiful Korean custom" was without foundation.<sup>160</sup> In addition, they contended that the house head system was the institutionalisation of a colonial law that had never before existed in Korea, and they envisioned new family structures to accommodate the new age.

As pointed out by Kim Hee-Kang, more than a clash of civilisations, as Hahm Chaibong has defined the relationship between Confucianism and feminism, Korean feminism would find its dimension in a context in which the traditional importance of family finds itself side by side with stronger protection of gender equality. This development would not lead to de-Confucianisation nor re-Confucianisation,<sup>161</sup> instead, it should start a process of reconstruction and reidentification of culture.<sup>162</sup>

Since the first Civil Code of Korea was established, it is without a doubt true that the social conditions of women have improved to a remarkable degree. However, the political climate in which changes occur is a crucial factor to consider. It is essential to keep in mind that, in a nation where Confucianism plays a significant role and where the government is conservative, this trend towards constant development can face setbacks and be delayed by underlying antagonistic Confucian beliefs. In fact, the most significant social improvements that have been made in the direction of gender equality have been implemented under regimes that were sympathetic to the principles of feminism. For

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<sup>158</sup> Hyo-Jean Song, *Gender Governance in Korea: A Case Study on the Abolition of Family Headship System*, Korean Women's Development Institute, Research Paper 7-3-4, 2015, p. 18.

<sup>159</sup> Ki-young Shin, "The Politics of the Family Law Reform Movement in Contemporary Korea: A Contentious Space for Gender and the Nation", *The Journal of Korean Studies*, 2006, Vol. 11, No. 1, pp. 99-100.

<sup>160</sup> *Ibid.*

<sup>161</sup> Kim, "Locating Feminism beyond Gender and Culture", p. 94.

<sup>162</sup> *Ibid.*, p. 96.

example, the Ministry of Gender Equality was founded in 2000; however, the present administration has recently decided to abolish it.<sup>163</sup>

Concerning this topic, there is a lot more to discuss about women's role in today's society. For instance, it is essential to be aware that the low birth rates in Korea result from a wide range of variables, and this decline has been exponential.<sup>164</sup> In March 2023, it was reported that the conservative People Power Party, which will be discussed in greater detail in the fourth chapter, was looking into unorthodox methods to increase births again, with the possibility of a potential change in the regulation governing Korean men's mandatory military service.<sup>165</sup> In the plans, which have never been finalised, authorities wanted to opt to exclude males from required duty if they have three or more children before the age of thirty.<sup>166</sup> The revelation sparked indignation since, first and foremost, it would have forced young women to have more children so that the husband could have avoided military duty.<sup>167</sup> Essentially, instead of providing incentives to families or prospective mothers, this proposal would have only benefited the male at the expense of the woman, assigning a prominent role to the husband, even in this case. This prospective legislation highlights, once again, the historic distinction between the roles of husband and wife, which resonates with Confucian values still prevalent in society.

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<sup>163</sup> See Clara Delhaye, "President Yoon Suk Yeol's Decision to Abolish the Ministry of Gender Equality: A Reflection of a South Korean Society Plagued by Growing Anti-Feminism", *Institut Du Genre En Géopolitique*, (January 23, 2023). Available at <https://igg-geo.org/en/?p=10776&lang=en>.

<sup>164</sup> Gender inequality prevalent in South Korean culture has played a role in the emergence of the so-called *sampo generation*, which contributed to the current issues the country has to face in terms of birth rates. Sampo generation 삼포세대 *samposedae* ("three giving up generation") refers to a specific generation in South Korea known for their decision to give up on dating, marriage, and having kids. This decision is influenced by circumstances such as the exorbitant cost of living and the scarcity of job prospects, leading individuals to deviate from the "traditional life path."

<sup>165</sup> Myungil Kim, "30 세前 아이 셋 두면 병역면제·1 명당 2 억 지원...與, 저출산 대책 검토", *Chosun Ilbo* (March 22, 2023). Retrieved from: [www.chosun.com/politics/politics\\_general/2023/03/22/A2H7BGXQQJFBDA2W6RZSB2PS3M/](http://www.chosun.com/politics/politics_general/2023/03/22/A2H7BGXQQJFBDA2W6RZSB2PS3M/).

<sup>166</sup> "Having Three Children May Get South Korean Men out of Military Service", *Time*, (March 24, 2023). Retrieved from: <https://time.com/6265842/south-korea-birth-rate-military-service-exemption/> (Accessed August 29, 2023).

<sup>167</sup> See Constitutional Court of Korea, 2019Hun-Ma423, September 26, 2023 (S. Kor.). 병역법 제 3 조 제 1 항 전문 등 위헌확인, 대한민국 국민인 남성에게 대한 병역의무 부과 사건 [Decision on the Constitutionality of Article 3, Paragraph 1 of the Military Service Act], September 26, 2023: The implementation of such a strategy appears highly improbable to be enforced, given that the Constitutional Court unsurprisingly reaffirmed, on September 26, 2023, its decision on the mandatory service for male citizens who are required to perform it dutifully. Within that framework, the Court ruled that enlistment in the military is obligatory for males only, while women are permitted to volunteer for active or reserve service. Given that only a limited number of nations employ conscription systems to compel women to perform military service, the court ruled in its decision that the action in question is not in violation of the right to equality and does not contradict the Constitution. Nevertheless, the matter of weak birth rates has prompted the Court to contemplate the potential for military system reform in the future.

Approximately one year after this proposal, in January 2024, the situation has remained unchanged, if not exacerbated, and the country has failed to implement any enduring policy regarding this issue. Furthermore, the National Assembly speaker has requested a resolution to address the declining population and low birth rate. One potential solution to promote democracy is to incentivise individuals to have children by improving the welfare system and public education. Another option is expanding the opportunity for dual or multiple citizenships, which is currently somewhat restricted.<sup>168</sup>

#### **4. Analysis of the Confucian Principle of Filial Piety in Criminal Law and the Role of the Constitutional Court of Korea**

As previously said, filial piety is one of the Confucian ideals that are still relevant and vital in the daily lives of Koreans. Described as the “Greatest Heritage of Korea”<sup>169</sup> in a 2008 article in the *Korea Times*, it was introduced in Asia by Confucian thinkers, and it has been taught to people from a very young age for hundreds of years.<sup>170</sup>

According to Confucianism, filial piety is a fundamental human value and one of the most critical components of human behaviour.<sup>171</sup> From a family-based perspective, filial piety refers to the manner in which offspring acknowledge and express gratitude for the nurturing and attentive care received from their parents throughout their formative years.<sup>172</sup> Additionally, filial piety could be viewed from a society-based perspective, according to which society, including the government, should function as a big family for the elders in the country, sharing responsibilities and caregiving duties over the senior population.<sup>173</sup> Despite socio-economic and demographic changes and a rise in urbanised families, respect for elders based on filial piety is still solid and widespread.<sup>174</sup> Nevertheless, there have been notable changes in the implementation of this principle,

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<sup>168</sup> Min-kyung Jung, “Birth rate-boosting bills should be passed: Assembly Speaker”, *The Korea Herald*, (January 4, 2024). Retrieved from: <https://www.koreaherald.com/view.php?ud=20240104000558> (Accessed January 7, 2024).

<sup>169</sup> Ga-hoon Kim, “Filial Piety: Greatest Heritage of Korea”, *The Korea Times*, (August 20, 2008). Retrieved from: [https://www.koreatimes.co.kr/www/news/special/2008/08/181\\_29719.html](https://www.koreatimes.co.kr/www/news/special/2008/08/181_29719.html) (Accessed August 22, 2023).

<sup>170</sup> *Ibid.*

<sup>171</sup> Duong Thi Nhat Anh, Gyesook Yoo, “A Cross-National Investigation into the Filial Piety and Motivations for Parenthood among Vietnamese and Korean College Students”, *Fam. Environ. Res.*, Vol. 54, No. 6, December 2016, p. 577.

<sup>172</sup> Ik Ki Kim, “Population aging in Korea: social problems and solutions”, *Journal of Sociology and Social Welfare*, Vol. 26, No. 1, 1999, p. 119.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

exemplified by the differing levels of assistance provided by younger generations to their older family members.<sup>175</sup> Instead of providing material and practical help, younger generations are more engaged in expressive filial piety, consisting of emotional involvement, concern, and sympathy.<sup>176</sup>

Upon assessing the importance of this principle within society, it is essential to examine its pertinence in the context of legal matters. According to Hahm's analysis, it is observed that the Constitutional Court generally tends to adopt a democratic approach when the concept of filial piety is not under consideration.<sup>177</sup> In contrast, it is possible to analyse that the Court consistently adopts a more conservative stance in cases involving the traditional Confucian concept in question, typically determining the provision's legitimacy. As Kim stressed, the Court's jurisprudential discussion and historical analysis were crucial in determining whether a law was a "genuine Korean tradition,"<sup>178</sup> a Korean indigenous practice, or an imposed or imported custom. However, it was impossible to present an argument regarding filial piety because it is unquestionably considered as a traditional human virtue.<sup>179</sup>

Both Japan and Korea have been significantly influenced by Confucianism and the Tang Code, a penal code that originated in China. These influences have shaped their respective criminal law systems, incorporating elements from both Legalist and Confucian perspectives on the interpretation and application of law. Unlike Japan, which had been greatly influenced by this principle on heavier punishments for crimes against lineal ascendants<sup>180</sup> in the past but has now abolished all four provisions, Korean Criminal Law still includes many provisions influenced by filial piety.<sup>181</sup>

It is essential to mention, for example, Article 250(2), which states: "A person who kills one's own or any lineal ascendant of one's spouse shall be punished by death, imprisonment for life or for not less seven years".<sup>182</sup> Nearly all these provisions, such as

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<sup>175</sup> Anh and Yoo, "A Cross-National Investigation into the Filial Piety and Motivations for Parenthood among Vietnamese and Korean College Students", p. 577.

<sup>176</sup> *Ibid.*

<sup>177</sup> Hahm, "Constitutional Court of Korea", p. 151.

<sup>178</sup> Kim, "Confucianism that Confounds", p. 65.

<sup>179</sup> *Ibid.*

<sup>180</sup> The expression "lineal ascendant" encompasses all members of the defendant's and their spouse's lineal ascendants, including parents, parents-in-law, grandparents (both maternal and paternal), and grandparents-in-law.

<sup>181</sup> Woo-Jung Jon, "The Influence of Confucianism on the Criminal Laws of Korea and Japan", *Korea University Law Review*, Vol. 9, (2011) 21-42, 22.

<sup>182</sup> Criminal Act of the Republic of Korea, Art. 250(2).

Article 257 entitled “Inflicting bodily injury on other or on Lineal Ascendant”,<sup>183</sup> demonstrate a clear distinction between one’s ascendants and other relatives or individuals who are not related, as evidenced by the allocation of two separate paragraphs to these different categories. Typically, the first paragraph outlines the general punishment, whereas the subsequent paragraph delineates the more severe sentence imposed when the identical offence is perpetrated against a direct ancestor. In the example of Article 257, the first paragraph states: “A person who inflicts a bodily injury upon another shall be punished by imprisonment for not more than seven years or suspension of qualifications for not more than ten years or by a fine not exceeding ten million won.”<sup>184</sup> The second paragraph of the same Article claims: “When the crime as referred in paragraph (1) is committed on a lineal ascendant of the offender or of his spouse, one shall be punished by imprisonment for not more than ten years or a fine not exceeding fifteen million won.”<sup>185</sup>

In the context of criminal law, it is interesting to draw a comparative analysis between North and South Korea, considering their similar historical background rooted in Neo-Confucianism during a period of unity and shared legal framework. The Criminal Code of North Korea does not contain explicit provisions for enhanced penalties concerning offences involving one’s direct ancestors. Relatives are specifically referenced only in Article 19, which pertains to the legal responsibility for committing offences against family members in a general sense. This Article stipulates that individuals who perpetrate crimes against a family member or relative should not be subject to criminal liability if the victim or the victim’s family requests forgiveness. Nevertheless, this principle does not extend to a range of severe offences, such as homicide and manslaughter.<sup>186</sup>

After this brief analysis, it is possible to conclude that South Korea seems most influenced by these principles. In order to gain a deeper comprehension of this notable divergence and the decision-making process of the Constitutional Court regarding these provisions, it would be beneficial to engage in a comprehensive examination of the various cases in which petitioners have raised constitutional questions on criminal issues associated with filial piety.

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<sup>183</sup> Criminal Act of the Republic of Korea, Art. 257.

<sup>184</sup> *Ibid.*, Paragraph 1.

<sup>185</sup> *Ibid.*, Paragraph 2.

<sup>186</sup> The Criminal Law of the Democratic People’s Republic of Korea (2015), Article 19. It is important to note that, compared to the same provision included in Article 18 of the 2009 Criminal Law, Article 19 of the 2015 Criminal Law of the DPRK contains a more extensive list of crimes against family members for which criminal liability shall be imposed.

#### *4.1. Manslaughter of a Lineal Ascendant of the Offender or His Spouse Resulting from Bodily Injury Case*

According to the Criminal Act of South Korea, individuals who cause the death of a victim by the infliction of injuries are subject to a minimum imprisonment term of three years as a form of punishment. According to the instant statutory provision, if an individual commits the same offence against a direct ancestor of the offender or their spouse, they shall be subject to a penalty of either life imprisonment or a minimum of five years of imprisonment.<sup>187</sup>

In the case examined in this section, the complainant, whose situation fell within the second condition, filed a petition to the Court seeking constitutional review of the provision. The request made by the plaintiff was not granted by the Court, leading to the subsequent submission of the instant constitutional complaint. In 2002, the Court unanimously affirmed the constitutionality of the provision. The Court asserted that the principle of equality, as outlined in Article 11 of the Constitution, does not necessitate absolute equality. Instead, it indicates the prohibition of differential treatment only in cases with no reasonable basis in legislation. Consequently, the Court did not consider inequality with a reasonable basis to violate the principle of equality.<sup>188</sup> The Court added that the provision only discriminates against the lineal descendant and not the other way around, and this is possible because:

Respect and love are the pillars of relationship between relatives formed by marriage or blood. A lineal ascendent rears his descendent to become a successful member of the society, and takes upon legal and moral responsibilities for the descendent's action. A descendent, on the other hand, shares the responsibilities of the lineal ascendent as a family member, pays respect and strives to requite for the ascendent's sacrifice. Such is the natural and overarching morality dominant in the historically and socially confirmed family relationships.<sup>189</sup>

The Court's judgement also acknowledged the concerns raised by critics regarding the imposition of compliance with a moral standard by including such a provision in legislation. According to the source, the instant statutory provision does not impose

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<sup>187</sup> Criminal Act of the Republic of Korea, Art. 259.

<sup>188</sup> Constitutional Court of Korea, 214-1 KCCR 159, 2000Hun-Ba53, March 28, 2002 (S. Kor.).

<sup>189</sup> *Ibid.*

mandatory adherence to the concept, resulting in greater criminal liability due to the increased scale of the immoral nature.<sup>190</sup> This case serves as an empirical demonstration of how societal traditions and underlying values can be employed to justify a lack of equality that would otherwise be impossible, particularly within the framework of a judicial ruling.

#### 4.2. *The Case of Prohibition of Filing a Complaint against Lineal Ascendants*

In the *Prohibition of Filing a Complaint against Lineal Ascendants Case*,<sup>191</sup> the question presented was whether Article 224 (limitation of complaint) of the Criminal Procedure Act, which does not allow a person to file a complaint against their lineal ascendants, violated the principle of equality guaranteed by Article 11 of the Constitution. The Court determined that traditional moral values are crucial to family concerns.<sup>192</sup> Notwithstanding the assimilation of contemporary Western values, the Court has determined that certain aspects of the Confucian legacy embraced by the nation continue to constitute integral components of Korean ethical principles.<sup>193</sup> In ruling on the legitimacy of discrimination, the justices emphasised again that lineal ascendants play an essential role in their descendants' mental and physical upbringing, ensuring their well-being and protection.<sup>194</sup> Descendants must acknowledge their obligation to collectively assume responsibility as members of a family unit and demonstrate a genuine sense of gratitude and reverence towards their ascendants. The fundamental nature of these interactions seems to be universally applicable across all societies. Nonetheless, the dynamics of these connections are significantly influenced by the unique cultural and moral customs that have been consciously adopted and acquired by the people of a given nation and their society, alongside universal values and ethical principles.<sup>195</sup> The judges supporting the constitutionality of the provision also added that:

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<sup>190</sup> *Ibid.*

<sup>191</sup> Constitutional Court of Korea, 23-1(A) KCCR 12, 2008Hun-Ba56, February 24, 2011 (S. Kor.).

<sup>192</sup> *Ibid.*: "With regard to family matters, traditional morality plays a more important role, and such traditional morality is inherently affected by the nation's distinct cultural and moral traditions, which have been chosen and accumulated by the people of the nation and society, as well as universal values and ethics. Parts of the Confucian tradition, which our country adopted and made part of our tradition over a long period of time, still remain as an innate part of our morality."

<sup>193</sup> *Ibid.*: "Law inevitably shares a certain common ground with morality, and at the bottom of our legal mindset, individualism affected by modern western ideals and Confucian tradition centered on community and blood relationship coexist."

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

In regulating relationships among blood relatives where realization of self-regulating ethics is emphasized, abstract and open-ended Confucian norms have played a more important role than detailed and specific statutory provisions, among which, respect for one's parents has been considered as the highest moral virtue above anything else. Thus, it is natural that a statute regulating relationship between lineal ascendant and descendant in our society accepts this 'Hyo' tradition, or the filial duty of children to take care of and respect one's parents.<sup>196</sup>

From this perspective, the provision appears reasonable in its differential treatment in preventing a descendant from filing a complaint against their linear ascendant(s), maintaining the filial duty of children to care for their parents, and protecting the country's traditional norms.<sup>197</sup>

It is noteworthy to observe that, in this particular instance, there exists a disparity between the final decision and the prevailing opinion, as the majority of judges concurred with the view of unconstitutionality, believing that a violation of the fundamental right occurred due to the denial of the right to register complaints for specific victims. Nevertheless, as the total count of judges who issued the decision of unconstitutionality amounted to five, the minimum need of six or more judges necessary to determine constitutionality was not met.<sup>198</sup>

In this context, mitigating filial piety in favour of more equitable provisions is a contentious issue since it is one of the most challenging aspects of the Confucian legacy to modify in Korea's legal system. Nevertheless, due to the prevailing opinion among the judges about the infringement of individuals' rights, it is plausible to anticipate forthcoming modifications in the subject matter, accompanied by a re-evaluation of the significance attributed to this Confucian principle within the realm of law.

#### *4.3. Aggravated Punishment on Parricide*

The question presented in this case was once again related to the differentiated punishment for people killing a family ascendant or a stranger. In this case, the question was related to the potential violation of the principle of equality by the provision concerning the imposition of enhanced punishments for individuals who commit the act

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<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*; Constitutional Court Act, Article 23 (Quorum for Adjudication).

of killing a lawful lineal ascendant, as contrasted to the punishment prescribed for general murder as outlined in Article 250 Section 2 of the Criminal Act.

In the case above, the complainant faced charges related to the homicide of his father, who had a history of recurrently subjecting his mother to physical abuse while under the influence of alcohol. In 2011, the complainant engaged in a physical dispute with his father in an effort to prevent him from committing acts of violence towards his mother. Subsequently, the complainant attempted to reconcile with his father, but he inadvertently caused his father's death during another fight. The individual who filed the complaint received a prison sentence of ten years from the Seoul Central District Court and seven years from the Seoul High Court. Following the submission of an appeal to the Supreme Court and the subsequent filing of a motion to request a constitutional review of the previously mentioned Article, which was ultimately denied, the petitioner filed a constitutional complaint.<sup>199</sup>

The judgement in this case started with explaining the legislative history and purpose of the provision, stating that in Joseon, following the Confucian values emphasising filial duty, parricide was considered one of the ten worst crimes, punished with decapitation or dismemberment. The 1905 Criminal Code included a provision that prescribed capital punishment by hanging for murdering one's lineal ascendants. Furthermore, it has been asserted that the elimination of this clause underwent deliberation during the third revision of the Criminal Act. However, this possibility was ultimately rejected due to the provision's integral role within the country's longstanding legal culture. Regarding the issue of the breach of the principle of equality, the Court specified, even in this case, that "discrimination based on reasonable ground is not against the principle of equality".<sup>200</sup> The Court further emphasised that in establishing the severity of punishment, the legislature engages in a comprehensive assessment that takes into account several factors, such as the cultural and historical context of the country, the values held by its members, and their legal consciousness. Moreover, the Court asserted that implementing adequate safeguards for lineal ascendants constitutes a reflective benefit, which is justifiable in light of prevailing moral values:

Descendants' respect and love for ascendants are core values constituting essential elements of our social morals, rather than a cultural heritage of the feudal family

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<sup>199</sup> Constitutional Court of Korea, 25-2(A) KCCR 82, 2011Hun-Ba267, July 25, 2013 (S. Kor.).

<sup>200</sup> *Ibid.*

system. It is especially emphasized in our nation that has succeeded and developed traditional cultures based on Confucian ideas.<sup>201</sup>

Ultimately, the Court rendered a decision affirming the Provision's constitutionality, supported by a 7-2 majority ruling. The analysis of the dissenting opinion expressed by Justice Lee Jin-Sung, who subsequently assumed the position of President of the Constitutional Court, and Justice Seo Ki-Seog presents a compelling subject for examination. According to the two dissenting justices, the provision in question should have been deemed unconstitutional due to its unequal treatment compared to killing someone who is part of other legally recognised relationships, such as descendants or spouses, or killing an individual with no legal tie. Moreover, it is noteworthy that the two justices expressed the view that the legislative history of this provision suggests its lineage from a bygone era when law and morality were not distinct entities. Confucianism had a significant role in the development of the Joseon era, where it was employed to uphold the hierarchical social structure rooted in the patriarchal system. This resulted in the perpetuation of unequal power dynamics in the realms of father-child interactions, marital unions, and gender relations, with fathers exerting authority over their children, husbands over their wives, and men over women. The justices who dissented also noted that this regulation fails to account for circumstances involving custody, as it solely relies on legal relationships and does not provide distinct treatment for other relationships of equal significance. This aligns with feudal notions of discrimination, which served to uphold authoritarian and paternalistic family structures.<sup>202</sup>

Acts such as killing a spouse or descendant are classified as general murder under this regulation. The justices who expressed dissent further argued that the discriminatory practices are inconsistent with the fundamental principles of the Constitution, as well as the democratic structure and familial system. The two judges also drew a parallel with other nations, highlighting the lack of equivalent provisions in comparative law:

Not only common law countries, including the United Kingdom and the United States, but also Switzerland, Denmark, Norway, Russia, and China do not provide aggravated punishment for parricide. Germany and Austria abolished the aggravated punishment for parricide, in 1941 and 1974, respectively. Countries that provide

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<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

aggravated punishment for parricide, including France, Italy, Argentina, and Taiwan, also provide aggravated punishment for murder of descendants or spouses, as well as murder of ascendants.<sup>203</sup>

According to their perspective, the aforementioned prejudice is deemed unjustifiable and constitutes a violation of the concept of equality.

#### 4.3.1. A Comparison between Korea and Japan

The comparison of differentiated treatment between parricide and the murder of a descendant or a stranger with the Japanese context is particularly interesting. Notably, the distinction in punishments for the murder of a direct ancestor and a general homicide did not exhibit a substantial disparity in the country. Nevertheless, in 1973, the Supreme Court rendered the provision on this issue (Article 200 of the Japanese Criminal Law) unconstitutional in the renowned *Aizawa case*.<sup>204</sup> The Supreme Court of Japan had to determine the constitutionality of the provision in the Criminal Code, which imposed a harsher penalty for killing a direct ancestor than a regular murder offence. It had to assess whether this provision violated Article 14 of the Constitution, which guarantees equal protection under the law and prohibits discrimination.<sup>205</sup> The Court was confronted with two primary concerns in the case in question. Firstly, it had to determine whether family status, despite not being explicitly enumerated as a protected category under Article 14 of the Constitution, should be encompassed within the scope of prohibited grounds for discrimination. Secondly, the Court had to assess the presence of justifiable grounds for the discriminatory treatment of individuals who commit acts of violence against their ascendants.

In its ruling, the Court concluded that the elements encompassed within the non-discrimination rules are elucidatory rather than confining, allowing for the inclusion of familial status within the scope of Article 14. Regarding the second issue, the Court determined that *prima facie*, the Article did not appear to be instantly unreasonable. This determination was based on the consideration of social morality and spontaneous respect

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<sup>203</sup> *Ibid.*

<sup>204</sup> Jon, "The Influence of Confucianism on the Criminal Laws of Korea and Japan", p. 30.

<sup>205</sup> Charles Qu, "Parricide, Equality and Proportionality: Japanese Courts' Attitudes Towards the Equality Principle as Reflected in *Aizawa v Japan*", *Murdoch University Electronic Journal of Law*, Vol. 8, No. 2 (2001).

as a rationale. Nevertheless, the Court declared the Article invalid due to the disproportionate nature of the mandated punishment under Article 200. The Court found that this imbalance rendered the discrimination unjustified in relation to fulfilling the relevant legislative goal.<sup>206</sup> In this case, many justices agreed with the decisions but not entirely with the reasoning. Regarding Confucianism and the societal significance of filial piety, the insights provided by Justice Kotaro Irokawa are quite intriguing. The justice stated that

[...] the virtue of “Filial piety” had come to be regarded as if it were an eternal and universal ethics. However, it was nothing more than a mere illusion; the idea was fostered in the back ground of the special family system in a certain period of history, and conversely, constituted its spiritual prop of the system; it should not be regarded to be morals of the natural law unchangeable through all ages and countries.<sup>207</sup>

As also pointed out by Charles Qu, it is hard to argue that killing a neighbour is more ethical than killing one’s ascendant. This assertion is particularly pertinent when considering that filial piety, which underpins the moral obligation towards one’s ancestors, is not universally embraced due to its cultural specificity. Furthermore, the justices reached a consensus, acknowledging that the 1947 Constitution had effectively dissolved the family system. It was widely recognised that the implementation of Article 200 could only be justified on the grounds of preserving filial piety, which was closely tied to the aforementioned system.<sup>208</sup>

According to the analysis conducted by Jon Woo-jung, it is possible to identify specific variables that contributed to divergent outcomes in South Korea and Japan. To begin with, it is notable that Korea has had a more extensive and direct impact from Confucianism. In contrast, as briefly mentioned in the initial chapter, Japan’s exposure to Confucianism was primarily mediated by Korean scholars, resulting in a more flexible adaptation of traditions due to its geographically isolated position. China’s geographical proximity and the resulting impact and pressure exerted by the nation were not strongly perceived.<sup>209</sup>

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<sup>206</sup> *Ibid.*

<sup>207</sup> Saikō Saibansho [Sup.Ct.], Judgment upon case of constitutionality of Article 200 of the Penal Code providing killing an Ascendant, Case Number 1970 (A) 1310, (Japan). Retrieved from: [https://www.courts.go.jp/app/hanrei\\_en/detail?id=38](https://www.courts.go.jp/app/hanrei_en/detail?id=38)

<sup>208</sup> *Ibid.*

<sup>209</sup> Jon, “The Influence of Confucianism on the Criminal Laws of Korea and Japan”, p. 30.

Moreover, Shintoism had a significant role in Japan,<sup>210</sup> with its influence on Koreans mainly being a consequence of Japan's ideological use of traditional folk customs. In summary, the historical association between Japan and Confucianism has exhibited distinct characteristics, as it was not seen as a fundamental component of classical moral principles. As a result, the perspective on upholding the norms associated with this philosophical tradition differed from the Korean one.

#### *4.4. The Most Recent Development in Criminal Law on Family-related Values: The Case on Impunity for Crimes against Relatives*

Upon examining the criminal law regulation rooted in traditional principles that remain unaltered, it is crucial to direct attention towards the significant and forward-thinking ruling of the Constitutional Court in June 2024. This ruling paves the way for future modifications and rekindles the discussion on the conflict between traditional values and safeguarding individual rights.

Under Article 328(1) of the Criminal Act, property crimes were not punishable if committed against family members. The Article, referring to Art. 323 on the crime of obstructing the exercise of a right,<sup>211</sup> stated that “When the crime of Article 323 is committed against lineal blood relatives of the offender, the spouse, relatives living together, family members living together or their spouses, punishment therefor shall be remitted.”<sup>212</sup> Essentially, the crimes listed in that provision (such as theft, embezzlement, and fraud) could not be legally punished if they were committed against a spouse, a direct family member (such as a parent, grandparent, or child), a relative or a sibling and their spouse who live together. When financial disputes arose among family members, they could file civil lawsuits against each other. However, the legal system included significant restrictions on the punishment that could be imposed under criminal law. According to Seung Jae-hyun, a researcher at the Korean Institute of Criminology and Justice, and as reported by the *Korea Times*, a swift transformation is occurring where a focus on individual values is replacing the emphasis on traditional family values.<sup>213</sup>

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<sup>210</sup> Nicolas Levi, “The Impact of Confucianism in South Korea and Japan”, *Acta Asiatica Varsoviensia*, No. 26, 2013, p. 15.

<sup>211</sup> See Criminal Act of the Republic of Korea, Art. 323.

<sup>212</sup> Criminal Act of the Republic of Korea, Article 328 (Crimes and Complaints among Relatives).

<sup>213</sup> Hyo-jin Lee, “Laws restricting family members from criminal liability face calls for revision”, *The Korea Times*, (October 11, 2022). Retrieved from: [https://www.koreatimes.co.kr/www/nation/2024/07/113\\_337621.html](https://www.koreatimes.co.kr/www/nation/2024/07/113_337621.html) (Accessed July 29, 2024).

In this case, all the instances brought in front of the court involved embezzlement or fraud committed against a family member. An individual with disabilities filed a lawsuit against their uncle and others, another claimant sued their stepfather, a petitioner who was representing their father, who suffers from Parkinson's disease, sued the father's children, and another petitioner sued their younger brother and their spouse for embezzling funds in the name of the petitioner's deceased mother.<sup>214</sup>

The Constitutional Court of Korea made a significant decision on June 27, 2024, unanimously declaring the "special exception to relatives" clause in domestic criminal law, which pardons property crimes committed within families, as nonconforming to the Constitution.<sup>215</sup> The court ruled that this practice was excessively unreasonable and unfair, as it exceeded the limits of legislative discretion and violated the constitutional rights of criminal victims to take part in trials and make a statement.<sup>216</sup> Moreover, the court emphasised the importance of acknowledging transformations in family structures and economic dynamics. It specifically pointed out the transition from extended, agricultural family units to smaller nuclear families and individuals living alone (single-person households), as well as the evolving nature of economic activities.<sup>217</sup>

Furthermore, in order to avoid causing social upheaval, this ruling does not automatically render the law invalid. However, the court has established a specific date by which the amendment must be made. The court has mandated the National Assembly to amend the law by December 31, 2025, and to temporarily halt the enforcement of this provision until that time.<sup>218</sup>

## 5. The Importance of the Role of Judges

The judiciary must make decisions impartially and in compliance with legal principles. Nevertheless, it is imperative to discuss certain aspects of the responsibilities of the justices. In analysing topics pertaining to a particular cultural setting, it is necessary to give due consideration to dissenting opinions. While it is accurate to assert that they lack

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<sup>214</sup> Constitutional Court of Korea, Summary of the Decision, 12020Hun-Ma468, 2020Hun-Ba341, 2021Hun-Ba420, 2024Hun-Ma146 (consolidated), June 27, 2024 (S. Kor.).

<sup>215</sup> *Ibid.*

<sup>216</sup> Constitution of the Republic of Korea, Art. 27(5).

<sup>217</sup> Geuk-ryeol Bang, Su-hyeon Park, "Korean court strikes down family crime immunity clause: Constitutional Court ends 71-year-old property crime exemption for relatives", *The Chosun Daily*, (June 28, 2024). Retrieved from: <https://www.chosun.com/english/national-en/2024/06/28/DE2H6H6LNFGGXC2NXDOPSY6ITY/> (Accessed July 29, 2024).

<sup>218</sup> *Ibid.*

binding authority and are not considered part of the case law, their potential utility in discerning the perspectives of segments of society not represented by the majority view when addressing a comparable problem is worth noting. Furthermore, the number of judges who articulate a dissenting viewpoint is a crucial aspect to consider. When examining problems on tradition, such as those discussed in this chapter, it is essential to ascertain if provisions concerning cultural and traditional values continue to have broad support or if their backing has diminished compared to the past. During the early 2000s, consensus was easily reached regarding the concept of filial piety. When revisiting identical matters a decade later, it is evident that the Court witnessed a reduction in the size of the majority.

These empirical cases exhibit similarities to legal realism, a theoretical perspective that posits that law is derived from prevailing social interests and public policy, as opposed to legal formalism, which maintains that legal rules should be distinct from social interests. However, these concrete instances align with legal realism less radically. The civil law system in South Korea exhibits a distinctive framework that underscores the significance of culture in various aspects, including the issuance of legal opinions by judges, the consideration of cultural variables in the process of judicial decision-making, and the determination of the contents of such decisions.

Numerous empirical investigations have been conducted to examine the potential relationship between the social background of justices and its potential impact on their decision-making process. When considering the South Korean judicial system, it is crucial to bear in mind that the judges share the same social background as other citizens of Korea. From this particular standpoint, as highlighted by Mautner, one may readily grasp the normative and descriptive reasoning inherent in legal realism. This perspective perceives the judge as a human actor who possesses the capacity to modify the legal outcome in a given case.<sup>219</sup>

## **II. Conclusions**

Upon initial examination of judicial review in the East Asian region, it becomes evident that the South Korean situation reveals distinct characteristics in implementing constitutional review and establishing the Constitutional Court. The country in question

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<sup>219</sup> Menachem Mautner, “Three Approaches to Law and Culture”, Symposium: The Future of Legal Theory, *Cornell Law Review*, Vol. 96, No. 4, (2011) p. 857.

shows several essential differences from the Taiwanese case despite both nations having a Constitutional Court. In fact, the underlying motives that led to the establishment of these courts differ significantly. Furthermore, several prominent disparities exist between South Korea and Japan, where constitutional adjudication is not entrusted to a distinct court but falls under the authority of the Supreme Court, which has been criticised for its perceived excessive moderation.

A notable finding in the preceding phase of the study pertained to the necessity of differentiating between liberal democracies and those that continue to be governed by authoritarian regimes. As evidenced in the initial chapter, conventional Buddhist and Confucian customs tend to emphasise, albeit with a mechanism of checks and balances, the role of the ruler. In Confucian tradition, this role is conferred through the Mandate of Heaven. As noted in Chapter 1, authorities “in office” have distorted the significance of traditional values in justifying authoritarian control to reinforce their own narrative.<sup>220</sup> Nevertheless, a significant number of countries in the region, which were previously under the control of authoritarian or military leaders before the 1980s, initiated their transition towards democracy during that particular decade.<sup>221</sup> Some countries, known for having “constitutions without constitutionalism,”<sup>222</sup> have managed to break free from this situation and successfully developed into fully-fledged democratic nations.

In contrast to nations such as South Korea, non-liberal countries exhibit a distinct approach to the judiciary. In these contexts, the judiciary, which should be responsible for rendering judgements, resolving conflicts, examining legality, and implementing the rule of law through the interpretation and application of laws and judicial review, assumes a negligible role and is susceptible to internal or external influence. Given this framework, there appears to be a notable disparity within that specific geographical region. Nevertheless, the system in liberal democracies in East Asia can be considered highly comparable to other liberal democracies worldwide featuring autonomous judiciaries. In fact, it is essential to note that the Constitutional Court is an integral part of the process of transplanting Western legal systems, as discussed in detail in the previous chapter.

Moreover, as Tom Ginsburg highlighted, applying the judiciary’s power in such contexts illustrates that cultural factors do not pose “insurmountable obstacles to judicial

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<sup>220</sup> Ginsburg, “Constitutional Courts in East Asia”, p. 81.

<sup>221</sup> *Ibid.*

<sup>222</sup> See Chen, “The Achievement of Constitutionalism in Asia”, p. 1.

review.’<sup>223</sup> It is indeed accurate to assert that the establishment of democratic institutions has been accepted and acknowledged rather than resisted by “Asian values” and traditional beliefs in the majority of States. However, it is necessary to note that local forces play a pivotal role in shaping the progress of this region. For example, it is important to consider that although the United States impacted most countries throughout the transition period, none of them (apart from Japan) created a decentralised system similar to the one in the U.S.

Unlike governments in other regions, the judicial role in East Asia possesses a distinctive characteristic whereby courts are confronted with legal matters on Confucian principles, which continue to be integral to the legal traditions of these nations. From this standpoint, comprehending and differentiating indigenous culture from imported customs and the legacy of colonialism (e.g., the *hoju* system) has been fundamental.

The Constitutional Court of Korea has demonstrated its significant role in reconciling traditional values with contemporary demands, as evidenced by the various examples presented in this chapter. Since the democratisation process, citizens have been provided with a platform to express their opinions and concerns. The Court has consistently adopted a forward-thinking stance in family law, invalidating numerous laws deemed excessively aligned with patriarchal and patrilineal ideologies, rendering them incompatible with contemporary societal norms. Nevertheless, the recent ruling on marriage within the eighth degree of kinship suggests that the Court maintains particular adherence to conventional notions in contrast to other nations, including those with comparable historical traditions, such as China. Notably, the new government’s plan emphasises upholding traditional habits, a topic that will be further examined in the last chapter.

However, in cases concerning criminal law and the imposition of more severe penalties for individuals who commit offences against their direct ascendants (as outlined in the Neo-Confucian influenced Code of Joseon), the Court still appears unwilling to embrace modernity fully, and it continues to adopt a strongly conservative stance. Nevertheless, it is crucial to emphasise that the Constitutional Court has recently made significant achievements in addressing property crimes committed by family members, somehow departing from traditional beliefs.

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<sup>223</sup> Ginsburg, “Constitutional Courts in East Asia”, p. 95.

In this context, it is intriguing to draw a comparison between South Korea and Japan once again. Despite both nations having historically embraced a moderate approach to judicial review and being influenced by the Confucian tradition, Japan managed to distance itself from such cultural norms due to religious and geographical factors. The variation observed among countries within this region, but sharing comparable historical backgrounds, adds an intriguing dimension to the legal and jurisprudential analysis of South Korea.

To sum up, as argued by Marie Seong-Hak Kim: “[...] the Constitutional Court of Korea has performed a delicate balancing act between the competing demands to preserve traditional culture on the one hand and to protect individual liberty on the other”.<sup>224</sup> Despite being only marginally present in the legislative heritage of the country, Confucian ideas persist and form an integral component of Korean society and the daily lives of its people. The consequence of their influence can be recognised in the regulations concerning specific areas, such as family and criminal law. The Court has played a crucial role in advancing the protection of citizens’ rights when legislation stemming from Confucian tradition has inadvertently hindered constitutionalism and democratisation.

While it is indeed accurate to state that, two decades ago, the court would adjudicate cases on the clearly defined responsibilities of ascendants and offspring within the familial structure, it is equally valid to assert that in recent times, there has been a frequent emergence of contrasting viewpoints questioning the relevance of these old-fashioned legal provisions. Notably, the shift within family structure and the growing emphasis on individual rights rather than traditional values have led to the first changes in the perception and legal protection of family members in criminal law. Additionally, the shift in perspective has sparked a debate regarding the essential function of judges as custodians of tradition while also considering alternative potential outcomes in such cases and envisioning a novel trajectory for South Korea’s jurisprudence.

Following an examination of the influence of Confucianism on family law and criminal law through the Constitutional Court’s decisions, the forthcoming chapter will undertake a comprehensive investigation into the impact of Confucianism on the development and postponement of legislation about safeguarding intellectual property rights.

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<sup>224</sup> Kim, “Confucianism That Confounds”, p. 57.

# CHAPTER III

## Confucian Traces in Law

### Part II

# Intellectual Property and Confucianism: An In-Depth Analysis of the Relationship with the Constitution, Democracy and Human Rights and the Role of Traditional Values in Hindering Legal Developments

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## I. Introduction

After examining the influence of Confucianism on family and criminal law through the fundamental role of the Constitutional Court of Korea, it is necessary to delve more in depth into the third branch of law that is part of this analysis in order to obtain a more comprehensive understanding of the legal environment in relation to traditional Confucian principles. As mentioned in the second chapter, the analysis of Intellectual Property Law and Confucianism is not only a groundbreaking subject matter, but it also necessitates an examination that is diametrically opposed to the approach applied to the previous section of this work.

In contrast to formal laws originating from the Joseon era or other significant periods in Korean history, which bestowed legitimacy upon certain provisions ultimately leading to their codification as regulations in the present-day legal system, the impact of Confucianism on intellectual property has been manifested in an entirely different way. In this particular instance, the search for the Confucian legacy does not have to be confined to written codes and court decisions; rather, it must encompass the legal voids and shortcomings that the nation has encountered and continues to confront to a certain extent. Indeed, the development of this set of laws has been significantly and predominately impeded by the Confucian tradition, which has correspondingly obstructed safeguarding the rights of creators, authors, and writers.

While the extent to which Confucianism influenced these laws may differ substantially from what was examined in the preceding chapter, it is important to highlight a degree of convergence from two perspectives. To begin with, the historical era in which the foundations of both concepts were established is exactly the same. With the exception of the *Hoju System*, which was implemented in South Korea after its introduction from Japan, most Confucian-based norms incorporated in the criminal and family law date back to the Joseon period. In a similar vein, the lack of intellectual property protection, which also broadly influenced China's system, was substantially affected by Confucian ideals and the hierarchical structure that had historically been predominant in the Joseon society, as will become evident in the subsequent analysis. In both of these cases, the nation's approach to democratisation and modernisation constitutes the second point of convergence, with an essential role covered by courts. Within the domain of family law, for instance, the judiciary has contributed to the nation's departure from specific

conventional values that impeded the safeguarding of the rights of every citizen. Likewise, within the realm of intellectual property law, the Supreme Court of Korea's intervention in cases deemed ambiguous and subsequent implementation of new regulations and addition of further details, among other measures, have contributed to the formation of a more exhaustive and precise set of rules. Simultaneously, similar to the domain of criminal law, intellectual property laws in Korea continue to face challenges in breaking away from the country's historical and traditional norms. Despite notable advancements, the path towards establishing a fully matured IP system without weaknesses remains long.

From this perspective, it can be argued that the development of intellectual property law occupies a middle ground in terms of overall modernisation compared to the two branches discussed in the previous chapter. Family law has successfully distanced itself from Confucian tradition over time, while criminal law continues to be heavily influenced even today. The country's development of a legislative framework for intellectual property indicates a deliberate effort to move away from Confucian tradition and safeguard artists' rights.

The intellectual property system in Korea today includes patents, utility, trademarks, design, and copyright. However, despite the country's long history, the development of mechanisms to protect the intellectual property of individuals took a very long time to be implemented, moved by both economic and social reasons. Repeatedly ranked among nations with a poor and inadequate protection system on the international level for many years, the nation has struggled to maintain pace with developments in this field, even in recent years.

This case study is highly intriguing as it serves as an additional illustration that reinforces the contrast between the nation's longstanding traditions and its remarkable progress in recent decades. On this matter, Choi Yunjeong notes that Korea has experienced a "near quantum leap in modernization process"<sup>1</sup> but reaffirming that its traditional values continue to permeate virtually every aspect of its society.<sup>2</sup>

In order to gain a deeper understanding of this subject and grasp the potential consequences within a Confucian framework, this chapter will thoroughly explore the relationship, if any, between the preservation of human rights and the protection of intellectual property rights, trying to comprehend to what extent those two concepts can

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<sup>1</sup> Yunjeong Choi, "Development of Copyright Protection in Korea: Its History, Inherent Limits, and Suggested Solutions", *Brook. J. Int'l L.*, Vol. 28, No. 2, (2003) 643-673.

<sup>2</sup> *Ibid.*

be overlapped, in what, borrowing the term from hard sciences, will later be defined as the “*superimposability* of rights”. This chapter will initially conduct a theoretical analysis of the two concepts and explain the prevailing schools of thought. Subsequently, it will present a series of comparisons to highlight the significant distinctions between common law and civil law countries, with a focus on South Korea and its tradition, and also discuss the traditional way of resolving disputes.

Furthermore, this study will examine the Constitutional foundation for the establishment of intellectual property and incorporate insights from the Constitutional Court. It will then elucidate South Korea’s approach to the issue of the late development of this set of laws by considering it within the framework of Confucian tradition. Following the first theoretical analysis, this study will provide an in-depth account and evaluation of the empirical case of Korea.

The analysis will be divided into three distinct periods, beginning with the Joseon era. As previously discussed in earlier chapters, the Joseon era was characterised by the widespread dissemination of Neo-Confucian ideals across unified Korea. This initial phase provides valuable insights into the historical context surrounding the deficiency in intellectual property protection. The subsequent period, characterised by the Japanese occupation, offers more understanding of previously discussed concepts and serves as the foundation for intellectual property in Korea. The final section will focus on the present-day framework and draw conclusions regarding the current state of Intellectual Property in South Korea. The second and third sections will specifically examine two prominent instances that exemplify the interplay between human rights and intellectual property. The initial case pertains to the first patent in Korea, which remains relatively obscure in Western literature and is primarily documented through Korean sources. It is a valuable example of how intellectual property protection can help fight against an authoritarian regime or foreign rule. The second example pertains to the advancements made during the pre-democratisation period. To sum up, this chapter will primarily address three key subjects about intellectual property rights: the interrelation between the moral rights of authors and human rights, the constitutional basis of intellectual property in Korea, and the impact of Confucianism on this issue.

## 1. Intellectual Property Rights and Human Rights: Are They Correlated? A First Analysis of the Issue

Several prominent academicians have researched the correlation between intellectual property rights and human rights. In this regard, it is crucial to assess the degree of *superimposability*<sup>3</sup> between the two concepts, as well as to determine whether the level of overlap between them can be deemed universal or if it becomes distinct when examined in various settings.

Paul Torremans identifies two primary methodologies for examining this correlation.<sup>4</sup> The initial approach is conflictive, arguing that prioritising robust intellectual property protections could potentially clash with core human rights. This paradigm suggests that the reconciliation of incompatibility can be achieved by recognising the utmost significance of human rights in disputes. Nevertheless, this approach overlooks the specific factors implicated in the interaction.<sup>5</sup> The second approach claims a fundamental equilibrium exists between human and intellectual property rights. This “fundamental equilibrium”<sup>6</sup> refers to the effort to harmonise public and private rights, ensuring harmony between these two elements.

Recognising that copyright and human rights have more connections than previously envisioned is crucial. A clear correlation may be shown between the two in the notion of moral rights granted to authors, which is closely tied to their distinctive creativity and personality. From this perspective, since these rights go beyond exploitative rights, are personal, and non-pecuniary, they can be considered inseparable from human rights.

The protection of these rights is explicitly granted by copyright laws in numerous nations, with a more comprehensive and specific method observed in countries following the Continental European tradition. On this matter, the specific case of South Korea will be analysed later.

Furthermore, copyright, as a kind of property rights, is protected under Article 17 of the Universal Declaration of Human Rights, which asserts that “Everyone has the right to own property alone as well as in association with others”. According to Jens Bammel, the former Secretary General of the International Publishers Association, copyright law

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<sup>3</sup> The ability for an object to be placed over another object, usually in such a way that both will be visible.

<sup>4</sup> Paul L. C. Torremans, “Is Copyright a Human Right?”, *Michigan State Law Review*, No. 1 (Spring 2007), p. 272.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, p. 273.

serves as a mechanism to address the clash between human rights and policy obligations and has a significant influence on freedom of expression.<sup>7</sup>

Based on the findings from this study, it is reasonable to conclude that the perspective arguing for the complete absence of a human rights dimension in intellectual property is inaccurate. It appears evident that how creative works, cultural assets, and scientific information are transformed into property has significant consequences for human rights.<sup>8</sup>

Several international agreements on human rights have explicitly acknowledged the significance of intellectual property and authors' rights as manifestations of human creativity and dignity.<sup>9</sup> An example of this can be found in Article 27(2) of the Universal Declaration of Human Rights (UDHR), which safeguards the moral and material interests arising from the authorship of scientific, literary, and creative works. This article seems to closely resemble Article 2(1) of the Berne Convention,<sup>10</sup> which was formed in 1886 to address the protection of artistic and literary works. The Republic of Korea became a signatory to this convention in 1996.<sup>11</sup>

In comparison with the first provision in paragraph 1 of Article 27 of the UDHR, which affirms the right of individuals to freely engage in cultural activities, appreciate artistic works, and get involved in scientific progress and its advantages, it is evident that paragraph 2 does not serve as an implementation of this initial clause. Instead, it functions as a supplementary provision, acknowledging the status of human rights for copyrights.<sup>12</sup>

It is important to note that in 1986, the Assembly of the Berne Union, with its Solemn Declaration, highlighted the intrinsic connection between copyright and human rights, pointing out the fact that copyright is based on human rights and justice and authors are

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<sup>7</sup> International Publishers Association, *Copyright and Human Rights*, An IPA Special Report, July 8, 2015.

<sup>8</sup> Audrey R. Chapman, "Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)", in *Approaching Intellectual Property as a Human Right*, UNESCO Copyright Bulletin, Volume 35, July-September 2001, UNESCO Publishing, p. 5.

<sup>9</sup> *Ibid.*

<sup>10</sup> Berne Convention for the Protection of Literary and Artistic Works, Article 2(1): "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

<sup>11</sup> WIPO, Berne Notification No. 175, Berne Convention for the Protection of Literary and Artistic Works, Accession by the Republic of Korea. Retrieved from: [https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_175.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_175.html)

<sup>12</sup> Torremans, "Is Copyright a Human Right?", p. 276.

“creators of beauty, entertainment and learning” deserving the universal recognition and protection of their rights, both within their own nation and on the globe.<sup>13</sup>

Both the Universal Declaration (1948) and the UN Covenant (1966) mark the French vision of literary and artistic property, which is somehow contrasting with the mercantilist view that can be found in the TRIPS and is typical of the Anglo-American world,<sup>14</sup> which has been predominantly based on utilitarian justifications provided by the Constitution.<sup>15</sup> The application of this viewpoint to this particular treaty can be attributed to the political and economic pressure exerted by the United States on the countries that signed the agreement in 1994 during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). The objective of this round was to establish a predominantly economic accord, making personal incentives incongruous with a treaty designed to promote international trade.<sup>16</sup>

It is important to note that, in general terms, the nature of moral rights is unclear. The most challenging point to understand is if they are separate from economic rights with a different nature or if they are just one aspect of the unitary set of authors’ rights, considered a property right, a right of personality or *sui generis* right.<sup>17</sup> Civil law countries are often associated with the category of personality rights, which include the right to privacy, the right to honour and the right to one’s name.<sup>18</sup> These rights are generally protected under the country’s Civil Code.

### *1.1. Approaches to Moral Rights Protection*

The notion of moral rights comes from the French *droit moral* (저작인격권 in Korean) but, as pointed out by Christopher S. Yoo, best described using the German term that refers to this concept *Urheberpersönlichkeitsrecht*, which literally means “the author’s

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<sup>13</sup> Duncan Matthews, “Intellectual Property Rights, Human Rights and the Right to Health”, in *Intellectual Property and Human Rights - A Paradox*, (ed.) Willem Grosheide, Edward Elgar Publishing, 2009, pp. 1-21.

<sup>14</sup> François Dessemontet, “Copyright and Human Rights”, in *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram*, (ed.) Jan J. C. Kabel, Kluwer, 1998.

<sup>15</sup> Orit Fischman Afori, “Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law”, *Fordham Intell. Prop. Media & Ent. L.J.*, Vol. 14, No. 2 (2004) 497-565, p. 498.

<sup>16</sup> Elizabeth Schéré, “Where is the Morality? Moral Rights in International Intellectual Property and Trade Law”, *Fordham International Law Journal*, Vol. 41, No. 3 (2018) p. 774.

<sup>17</sup> Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press, 2016, pp. 339-340.

<sup>18</sup> *Ibid.*

rights of personality”.<sup>19</sup> The notion was developed in continental Europe around the mid-1800s, and it derives from personhood-based theories by prominent philosophers such as Kant and Hegel, intending to protect the inherent link between an author and his or her intellectual creative work and which is the theoretical basis for the justification of intellectual property in general and copyright in particular.<sup>20</sup> They protect the special relationship between the author and the product of the author’s work as a ‘spiritual offspring of the author’.<sup>21</sup> In the aftermath of the French Revolution, the tradition of seeing the *oeuvre* (literally the complete works of an artist, writer, or painter), the fruits of a writer’s thought, started for the protection of their good name, reputation and work.<sup>22</sup>

Moral rights are the personality rights of the author, non-pecuniary and protect personality development through the work. Essentially, one can regard them as a special expression of broader personality rights. This leads to the understanding that they are separate from the economic copyright rights, which can be bought and sold. Contrarily, the presence of moral rights relies upon the notion that a distinct connection between the artwork and the creator transcends mere financial compensation.<sup>23</sup> However, some countries may allow artists to waive their moral rights.

As pointed out by Kweon Tae-Sang, the right to publish, for example, can be considered an implementation of the constitutional freedom of expression.<sup>24</sup> This right is not limited to the possibility of expressing an opinion, encompassing the selection of a medium and how the creator intends to disseminate their work. Furthermore, it encompasses the prerogative to stay silent by refraining from publishing or distributing a work, as well as the option to limit its distribution to a selected audience or specific geographic region.<sup>25</sup>

In contrast to civil law jurisdictions, common law countries, rooted in the Anglo-American legal tradition, tend to assign less importance to the moral rights of authors,

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<sup>19</sup> Christopher S. Yoo, “Rethinking Copyright and Personhood”, *2019 U. Ill. L. Rev.* 1049, Penn Carey Law: Legal Scholarship Repository (2019) 1039-1078, p. 1041.

<sup>20</sup> Kamina, *Film Copyright in the European Union*, pp. 339-340.

<sup>21</sup> *Ibid*, pp. 338-339.

<sup>22</sup> Mike Holderness, “Moral Rights and Authors’ Rights: The Keys to the Information Age”, *Journal of Information, Law and Technology*, (1998), p. 2.

<sup>23</sup> Albert Fang, “Let Digital Technology Lay the Moral Right of Integrity to Rest”, *Connecticut Journal of International Law*, Vol. 26, (Spring 2011) 457-476, p. 459.

<sup>24</sup> See Tae-Sang Kweon, “A Study on the Nature and Contents of Moral Rights - Focusing on the relationship with general personality rights”, *The Korean Association of Civil Law*, Vol. 87 (2019), 189-225.

<sup>25</sup> Copyright and Human Rights, An IPA Special Report, July 8, 2015.

which typically expire with the author's death.<sup>26</sup> This kind of system is expected in these countries since copyright law is viewed as a mechanism to provide financial incentives to authors for their creative efforts.<sup>27</sup> Very differently, in European tradition, moral rights are generally perpetual, without any temporal constraints for their claim (except in the case of Germany). Typically, these rights encompass the right to the integrity of the work, the right of attribution and the right to have a work published anonymously. Moral rights protect the personality, which the work is considered part of,<sup>28</sup> and the creator's reputation.<sup>29</sup>

In most civil law countries, moral rights are inalienable, eternal, and inviolable. They pass to the author's heirs or administrator upon death, but the author or legal successors may not otherwise transfer or sell them. Any agreement to waive an author's moral rights is void, even if the author cannot be compelled to protect moral rights to the work and can always refrain from exercising them.

More generally, authors have both economic and moral rights. These rights can be understood as the outcome of their "moral interests," which pertain to the preservation of their reputation and honour, as well as their "material interests," covering the financial rewards<sup>30</sup> derived from their creative works, giving authors control over copyrighted material and ways to earn compensation from exploited works. Anglo-American countries, which operate under a common law system with a strong emphasis on business, prioritise the economic value of creative works, and moral rights are very limited in scope. In contrast, European countries, influenced by a civil law tradition, place less emphasis on market consequences and instead focus on protecting the interests of the weaker party in a contract through legal intervention. Europe's judicial system also possesses technical mechanisms to extend authors' rights.<sup>31</sup> On the other hand, the United States' adherence to the Berne Convention, which it joined in 1989, has frequently been questioned due to

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<sup>26</sup> In Canada they generally expire 70 years after the death of the author, in Cyprus they last for the life of the author.

<sup>27</sup> Stefan Bechtold, Christoph Engel, *The Valuation of Moral Rights: A Field Experiment*, Max Planck Institute for Research on Collective Goods, 2017, p. 1.

<sup>28</sup> "Moral rights: works and films, Personal Rights of Authors", *The University of Sydney Library*. Retrieved from: <https://www.library.sydney.edu.au/help/copyright/moral-rights.html#:~:text=Moral%20rights%20recognise%20that%20works,of%20their%20works%20and%20films> (Accessed September 4, 2023).

<sup>29</sup> Claudia Roggero, "Colourisation and the Right to Preserve the Integrity of a Film", *DANDI*, (December 16, 2014), Retrieved from: [www.dandi.media/en/colourisation-right-preserve-integrity-film-comparative-study-civil-common-law/](http://www.dandi.media/en/colourisation-right-preserve-integrity-film-comparative-study-civil-common-law/) (Accessed August 3, 2023).

<sup>30</sup> Kamina, *Film Copyright in the European Union*, p. 339.

<sup>31</sup> *Ibid.*, p. 343.

the country's extremely restrictive conception of moral rights. Essentially, the more moral rights belonging to authors and creators are protected compared to economic rights, and the more intellectual property rights converge with the broad concept of human rights.

One noteworthy aspect of the Republic of Korea in this regard is its general adherence to the intellectual property concepts commonly linked to copyright in Continental Europe. However, the formulation of the first article of the Copyright Act in South Korea also reflects elements of the American system, which views intellectual property as a social right.

## 2. A Constitutional Approach to Intellectual Property in Korea

The Korean approach to copyright protection has been significantly shaped by Japanese Law, which in turn has been impacted by German Law. As a result, the Korean method of safeguarding intellectual property is more closely aligned with the Continental European approach rather than the American one,<sup>32</sup> even if, as it will be seen in this section, it shares some similarities with the Anglo-American utilitarian model in the way the recognition (which does not overlap with a proactive implementation, and the enactment of a first Korean Copyright Act did not happen contextually)<sup>33</sup> of copyright as a legal entitlement occurred in 1948 with the proclamation of the Constitution of the First Republic of Korea.<sup>34</sup>

The Korean Copyright is founded upon Article 22(2) of the Constitution, which states, "The rights of authors, inventors, scientists, engineers and artists shall be protected by law." Thus, it can be reaffirmed that the Korean copyright system is solidly founded on human rights principles. Article 1 of the Korean Copyright Act is enacted to promote the enhancement and advancement of culture and related industries.<sup>35</sup> From this standpoint,

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<sup>32</sup> Darren QX Bean!, Yuna Lee, "Royalties? Not Joseon Dynasty Kings — A Comparative Analysis of Copyright and Music Licensing Groups in the United States and Korea", *Journal of Korean Law*, Vol. 13, (December 2013) 69-137, p. 86.

<sup>33</sup> See Kyu Ho Youm, "Copyright Law in the Republic of Korea", *UCLA Pacific Basin Law Journal*, Vol. 17, No. 2-3 (1999) 276-300, p. 276: "The copyright history of our country is very short. A copyright act was enacted in 1957, but it was like a dead law because it was almost never enforced. It was not until the copyright law was wholly revised in December 1986 and it went into force on July 1, 1987, that Koreans started to be aware of copyright."

<sup>34</sup> Choi, "Development of Copyright Protection in Korea", p. 647.

<sup>35</sup> 제 1 조(목적) 이 법은 저작자의 권리와 이에 인접하는 권리를 보호하고 저작물의 공정한 이용을 도모함으로써 문화 및 관련 산업의 향상발전에 이바지함을 목적으로 한다. <개정 2009. 4. 22.>

it is considered a form of social rights that serves the public interest, similar to the U.S. concept of intellectual property as a means to benefit society as a whole.

### *2.1. Copyright in South Korea According to the Constitutional Court*

An interesting 2002 ruling by the Constitutional Court of Korea<sup>36</sup> emphasised the country's dual objectives and competing intellectual property interests, as outlined in the constitution. These goals include both beneficial effects on society and the reward for artists.<sup>37</sup> In that case, the Court pointed out that:

헌법 제 22 조 제 2 항은 “저작자·발명가·과학기술자와 예술가의 권리는 법률로써 보호한다.”고 규정하는데, 여기서 “법률로써”의 의미는 사회전체의 이익과의 조화를 고려하여 지식재산권의 보호범위를 개별입법으로 정하도록 되어 있어 개별 법령이 정하는 한도 내에서 지식재산권을 보호하는 것이다. 이를 전제로 우리나라의 지식재산권법제를 보면, 등록 기타 요건을 충족하는 자에게 권리를 독점적으로 부여함으로써 발명 등의 동기를 부여함을 원칙으로 삼는 동시에, 국가의 산업·문화발전의 촉진을 위하여 일반 소유권에 비하여 공공적인 제한을 보다 많이 가하고 있다. [Article 22, Paragraph 2 of the Constitution stipulates that “the rights of authors, inventors, scientists, engineers, and artists shall be protected by law”. Here, “by law” means that intellectual property rights are protected in consideration of harmony with the interests of the entire society. The scope of protection is determined by single separate legislation, so intellectual property rights are protected within limits set by individual laws. On this premise, Korea’s Intellectual Property Act makes it a principle to motivate people who meet the requirements to induce invention while at the same time imposing more public restrictions than general ownership to promote the development of industry and culture in the country].<sup>38</sup>

Based on this standpoint, it is necessary to consider both the economic and social aspects of intellectual property protection, along with the Continental European perspective that strongly

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<sup>36</sup> Constitutional Court of Korea, 2001Hun-Ma200, April 25, 2002 (S. Kor.), Case Book 14-1, 382 [Dismissed].

<sup>37</sup> Darren QX Bean!, Yuna Lee, “Royalties? Not Joseon Dynasty Kings”, p. 88.

<sup>38</sup> Constitutional Court of Korea, 2001Hun-Ma200, April 25, 2002 (S. Kor.) [Translation to English by the author].

advocates for the human rights aspect of intellectual property through strong and broad protection of the moral rights of individuals.

## *2.2. Moral Rights in Korea: a Confucian Way of Resolving Disputes?*

Authors' moral rights are now included in the acts related to authors' rights of almost every country, which can implement a more detailed list of rights. For example, the Copyright Law of the Republic of Korea, in Chapter 2, Section 3, provides several articles on the author's moral rights. Article 11 provides for the right to decide whether he or she wants to make a work public. Article 12 states that the author has the right to use his or her real name or a pseudonym. Article 13 is about the right to maintain the integrity of the content, form, and title of his or her work. Article 14 highlights the inalienability of the author's moral right, stating that those rights belong exclusively to the author, and Article 15 includes the provision related to the moral right to joint work, which may not be exercised without the parties' agreement.<sup>39</sup>

According to Kyu Ho Youm, while the moral rights provisions in Korea resemble those in Germany and Japan, they should not be regarded as mere transplantation. Once more, it is noteworthy that the Korean situation cannot be viewed as a cut-and-paste operation of imported and transplanted ideas despite establishing particular legal frameworks and institutions. In fact, Professor Youm argues that these rights are culturally and legally aligned with Korean society.

According to Lee Ilhyung, at least until the end of the 1990s and 2000s, it was possible to observe a harmonious coexistence between tradition and the admiration of the scholar/author. This reverence has expanded in modern times to encompass previously marginalised groups, including producers and musicians, who were historically regarded as entertainers and occupied a lower position within the hierarchical structure of Joseon society.<sup>40</sup> For several decades since the independence of Korea, there has been a prevailing trend influenced by Confucian values that places significant emphasis on the respect and honour of an author's reputation. As a result, copyright issues in Korea have typically been resolved by conciliation rather than resorting to litigation, with criminal sanctions considered the best form of punishment against the breach of an author's moral rights. On a negative note, this framework allowed a high level of piracy that – despite

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<sup>39</sup> Copyright Act of the Republic of Korea, Section 3 (1957).

<sup>40</sup> Ilhyung Lee, "Culturally-Based Copyright Systems?: The U.S. and Korea in Conflict", *Washington University Law Quarterly*, Vol. 79 (2001) 1103-1159, p. 1119.

advancements – has not found a definitive solution yet. As elucidated in a preceding section of this work, the recourse to litigation has never been the favoured approach for resolving conflicts according to Confucian thought, which was the basis for Korean people’s preference for compromise.<sup>41</sup> Based on Confucian tradition, engaging in litigation was strongly discouraged due to the negative consequences it brought upon both parties involved. It not only brought dishonour but also showed others that the parties could not maintain harmony.<sup>42</sup>

In general, moral education instils in individuals a commitment to obey laws due to the recognition of such behaviour as virtuous. The application of legal regulations as a means of punishment primarily served as a deterrent, as the act of publicly litigating private conflicts was considered disgraceful and had the potential to tarnish the reputation of the parties concerned, so attracting attention to controversial matters. Hence, the promotion of dispute settlement through mediation was widely advocated by judges familiar with Confucian principles.<sup>43</sup>

This analysis held particularly true prior to the democratisation of the country, which coincided with a newfound appreciation for the value of individual creative work, encompassing economic profit and remuneration. This led to a significant shift in how intellectual property protection should be carried out compared to when these factors were not as important, and the sole focus was on the author’s personality.

### 2.3. *A Series of Considerations on the Democratisation Process*

Based on Kyong Whan Ahn’s analysis, the main driving force for the rise in judicial activism in Korea can be attributed to a shift in the Korean populace’s perception of litigation, coupled with the fundamental features of the Constitution. This phenomenon is characterised by a significant surge in the volume of lawsuits following the nation’s democratisation, as well as a “silent revolution towards participatory democracy”<sup>44</sup> facilitated by the application of constitutional petitions. This new system of petitions,

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<sup>41</sup> Gyoocho Lee, *In Search of the Optimal Tort Litigation System: Reflections on Korea’s Civil Procedure through Inquiry into American Jurisprudence*, Doctoral Thesis, Washington University, May 1998, p. 54.

<sup>42</sup> Richard E. Vaughan, “Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property?” A Lockean, Confucian, and Islamic Comparison”, *ILSA Journal of International and Comparative Law*, (1996) 307-369, p. 343.

<sup>43</sup> Grace Lee, “Taming the Beast: Confucianism as the Key to Reforming Korea’s Chaebol System for the Common Good”, *Fordham International Law Journal*, Vol. 45, No. 1 (2021), p. 170.

<sup>44</sup> Kyong Whan Ahn, “The Influence of American Constitutionalism on South Korea”, *Southern Illinois University Law Journal*, Vol. 22, No. 1 (Fall 1997) 71-116, p. 85.

extensively described in Chapter 2, has prompted individuals to submit – among other complaints – petitions pertaining to trivial matters and issues that occurred several decades before.<sup>45</sup> While this reason alone may not fully explain the change in approach to copyright in Korea, Professor Youm also highlights the transition to democracy as a crucial milestone in shaping the function of Courts. Courts operate and are consequently observed by the public, instilling greater confidence in the prospect of having their rights safeguarded by a fully independent judiciary. On the matter, the author stated that:

The accelerated social and cultural transformation of Korea in recent years has contributed enormously to the now heightened status of copyright in Korea. Koreans are more willing to assert their rights through the judicial process. This is in sharp contrast with the unwillingness of Koreans previously to turn to courts to vindicate their injured interests. One plausible explanation is that in the past Koreans rarely expected their court to be institutionally competent to exercise their rule-of-law authority in ruling on their claims. The Korean judiciary, which has been traditionally controlled by the executive branch, was viewed as being unduly influenced by the ruling class, including media organizations.<sup>46</sup>

Furthermore, the author highlights in several writings that there is now widespread recognition that Korean courts have strengthened their independence as a distinct and independent branch within Korea's steadily flourishing democracy since 1987. Koreans have gained an enhanced awareness of the increasing possibility that Korean courts are no longer controlled by the "established leadership" in the country during their legal proceedings. An illustrative instance of this transformation is the courts' growing tendency to invoke the right of judicial review with more frequency.<sup>47</sup>

In simple terms, it can be asserted that intellectual property protection and democratisation have mutually impacted one another to some degree. The demand for enhanced safeguarding of one's artistic creations has been closely linked to the call for broader safeguarding of human rights while democratic concepts were being established in the years leading up to the transition to democracy. Upon reaching its peak, the democratic process has engendered a newfound sense of confidence and reliance among citizens. This is primarily due to the establishment of a judicial system, including a

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<sup>45</sup> *Ibid.*

<sup>46</sup> Youm, "Copyright Law in the Republic of Korea", p. 298.

<sup>47</sup> *Ibid.*

Constitutional Court, which truly safeguards individual rights, including the rights related to creative works. As a result, individuals now feel significantly more secure and validated when presenting their concerns before a court of the Korean judicial system.

### **3. A Brief History of the Development of Intellectual Property in Korea and the Impact of Confucianism**

It would be imprecise to claim that ancient East Asia completely lacked any form of “trademarks”. In fact, Chinese manufacturers employed distinctive trademarks to differentiate their products from others.<sup>48</sup> More than two millennia ago, they exported goods with their unique marks to the Mediterranean region.<sup>49</sup> In East Asia, a seal adorned with Chinese characters was utilised to verify one’s identity on documents, contracts, artwork, or other items where the attribution of authorship had significance.<sup>50</sup>

However, on the matter of copyright, the only works somehow protected from unauthorised copies were the ones claimed as the exclusive property of the Kingdom, for example, scientific writings. Works like poetry were not granted the same kind of protection because giving ordinary people personal protection of something that is supposed to be owned by the State would have meant challenging the sole authority of the ruler.

Regarding the impact of Confucianism on safeguarding these rights, it is noteworthy that divergent perspectives exist. The consensus among the limited number of academics who specifically study the intersection between Confucianism and contemporary legal issues is that Confucianism has been a detrimental influence and fundamental source of hindrance in the realm of intellectual property. Nevertheless, specific authors have contended that Confucianism should not be regarded as the fundamental reason for the lack of legal safeguards. They argue that since Korea is a nation influenced by Neo-Confucianism, which places great emphasis on hierarchy in its social and political

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<sup>48</sup> Vaughan, “Defining Terms in the Intellectual Property Protection Debate”, pp. 344-345.

<sup>49</sup> WIPO, WIPOD – International Trademark System Talks, “A History of Trademarks: From the Ancient World to the 19th Century”. Retrieved from: [https://www.wipo.int/podcasts/en/madrid/transcripts/international\\_trademark\\_system\\_talk\\_01.html](https://www.wipo.int/podcasts/en/madrid/transcripts/international_trademark_system_talk_01.html)

<sup>50</sup> Respect for trademarks, “History of Trademarks”. Retrieved from: <https://respectfortrademarks.org/tricks-of-the-trademark/history-of-trademarks/>

structure, these principles should actually enhance the Korean government's capacity to enforce laws.<sup>51</sup>

While it is true that there is a recurring hierarchical structure that can be found in the "Five relationships" of Confucianism, Amy Choe, the author who, in 1999, presented this alternative interpretation of the role of Confucianism, argued that Koreans fully adhere to societal norms of submitting to authority, with the state possessing unlimited power.<sup>52</sup> Assuming this as a given can be a mistake from two distinct perspectives in this analysis. Advocates of the notion that Confucian traditions impeded the establishment of laws designed to safeguard authors' rights do not entirely disregard the influence of the government and those in the upper ranks of society in the absence of protection. Conversely, many provided detailed descriptions of the government's involvement in authorship matters. Furthermore, it is critical to consider Confucian principles in their entirety. It is indisputable that, although a solid hierarchical structure that demands reverence exists, Confucianism, as widely explored in the previous chapters, also offers mechanisms for oversight and accountability regarding the ruler's role and ways to potentially overthrow an unjust one.

In their insightful research, Im, Campbell, and Cha presented a new interpretation of the interaction between Korea and new Western institutions. Despite many scholars' perception of the traditional Korean administrative philosophy as unsophisticated (evidenced, for example, by its inability to resist colonial power in the nineteenth century) and the long-standing association of the political culture with negative terms like "emotive" and "hierarchical," the successful adoption, adaptation, and transplantation of Western institutions was made possible by the fact that these changes "were as much a return to traditional governance principles as they were a transformation".<sup>53</sup>

Many scholars have argued that Korea could have been the first organised society to recognise the proprietary interest in authors' works;<sup>54</sup> however, it did not follow that path. The reasons why South Korea's intellectual property development was delayed are intriguing, and they come from different phases of the country's history. Above all,

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<sup>51</sup> Amy Choe, "Korea's Road toward Respecting Intellectual Property Rights", *Rutgers Computer & Technology Law Journal*, Vol. 25, No. 2 (1999) 341-74, p.358.

<sup>52</sup> *Ibid.*

<sup>53</sup> Tobin Im, Jesse W. Campbell, Seyeong Cha, "Revisiting Confucian Bureaucracy: Roots of the Korean Government's Culture and Competitiveness", *Public Administration and Development*, Vol. 33, 2013, pp. 286-287.

<sup>54</sup> See Lee, "Culturally-Based Copyright Systems?", 1103-1159.

several elements impeded the progress of copyright protection in Joseon Korea. Two factors stand out as particularly significant and valid: the exertion of governmental authority over the publication and distribution of works and the influence of the Confucian tradition, which neither endorsed the concept of remuneration for literary creations<sup>55</sup> nor regarded copying as a transgression but rather as a form of homage to the original author's work.

For example, it is not widely known that Korean print was invented approximately a hundred or two hundred years before the Gutenberg printing press.<sup>56</sup> The lack of knowledge related to this matter is because the general public did not use print before the nineteenth century, and Korea could not enforce intellectual property rights on innovations and inventions.

The absence of appropriate regulation on protection also occurred in China, which led to the economic collapse of the Song dynasty. The roots of this disadvantageous situation lay in the profound difference with European countries on the matter of intellectual property rights, which, contrary to Asian ones, always provided a sort of protection for artists and creative works. A clear example is the Renaissance in Italy. During that time, a form of protection called *privilegio* helped publishers, painters, and others to protect their commercial interests over their works. For example, a *privilegio di stampa* (printing privilege) gave an author or publisher the authority to be the sole holder of the right to sell and print a work inside a country's borders for a specific time (usually five years). However, this cannot be considered a forerunner of the modern concept of copyright because it was a policy more focused on the printer's economic interest than on the author's rights, and there was no codification of the relationship between the two.

Nevertheless, Western countries understood very early that protecting intellectual property also meant protecting the individual rights of everyone who put effort into it. An example is the protection of geographical indications<sup>57</sup> in countries like France. This provision was undoubtedly made to protect the economy of some specific regions, creating added value locally. GIs can also help contribute to the promotion of intangible

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<sup>55</sup> Choi, "Development of Copyright Protection in Korea", p. 646.

<sup>56</sup> Some sources state that the first ever printed with metal type was a Confucian text titled "Detailed Text for Rites of the Past and Present" in (around) 1234.

<sup>57</sup> A geographical indication (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.

cultural heritage.<sup>58</sup> At the same time, the law protects every farmer and entrepreneur and their rights.

To better understand the fundamental influence played by Confucianism in hindering IP developments in the country throughout the centuries, this part of the work will focus on three main periods of Korean history: the Joseon era (1392-1910), the Japanese rule (1910-1945) and contemporary South Korea. Despite the fact that some of these historical periods have already been extensively studied in the previous chapter, it will be intriguing to examine them from a different perspective and look into a different aspect of those ages.

### 3.1. Joseon Era

In Asian countries where Confucianism developed widely, establishing property law rights has been a real challenge. In China, for example, creative and non-creative works are intended as belonging to the people. Rights over these works do not lie in natural human rights but come from the State. Confucianism saw the act of copying as a respectable behaviour to honour the original artist. In order to acquire family values and show reverence to ancestors, young people were required to memorise and replicate classical works. Simultaneously, repetitive copying guaranteed success in the imperial civil service examinations. In other words, reproducing a scholar's book under established principles was not considered offensive.<sup>59</sup> Conversely, it demonstrated a strong enthusiasm for acquiring knowledge and improving one's position within society:

[...] the copying and sharing of intellectual works purportedly serve a culturally inspired educational purpose of fulfilling “a passion for learning.” This attitude stems from the elevated status that scholars enjoyed in the hierarchical social and legal strata of traditional Confucian society. Perhaps the copying and distribution of scholars' works allowed members of the lower classes to emulate those above. Although formal classes have long been abolished, the Confucian influence has left

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<sup>58</sup> Gyooho Lee, “The legal protection of intangible cultural heritage: The inadequacy of intellectual property in the Republic of Korea”, in *Transboundary Heritage and Intellectual Property Law: Safeguarding Intangible Cultural Heritage*, (ed.) Patricia Covarrubia, Routledge, 2022, p. 84.

<sup>59</sup> For the citation from the *Analects*, see William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford University Press, 1995, p. 18: “The Master [Confucius] said: I transmit rather than create; I believe in and love the Ancients.”

a deeply status-conscience society in Korea, with the highly educated enjoying commensurate status.<sup>60</sup>

Bringing back the case of European intellectual property developments, it is interesting to notice the total contrast when comparing Confucian views to the Statute of Anne (or Copyright Act 1710), the stepping stone of modern copyright. The document was enacted in Great Britain in 1710, and its full name was *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*. Different from Confucian teachings, it focused on the idea that the work of the writers and the job of the printers had to be protected to encourage authors to write valuable books.<sup>61</sup>

Furthermore, it is necessary to consider that Confucianism was a philosophical way of thinking; for this reason, the most relevant class in this kind of society was formed by scholars and philosophers who had no interest in doing what was good for “ordinary people”. Confucianism places great importance on family values and collective rights, which have historically hindered the development of individual rights in countries that have adopted this philosophy. Individual rights, such as innovation and creativity as individual property, are not recognised as personal attributes in these societies.<sup>62</sup>

In addition, Confucianism has low regard for financial gain, associating it with something only those with poor moral character want to achieve and devaluing the concept of material compensation, a fundamental part of the economic rights protected by intellectual property law. This viewpoint originates from the *Analects*, where Confucius describes the lack of value placed on profit. He asserts that a person of noble character understands the importance of moral principles, whereas a person of low character only understands the pursuit of profit.<sup>63</sup> On this matter, Richard Vaughan mentions that the South Korean Ambassador in the U.S. in 1986 stated that:

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<sup>60</sup> Lee, “Culturally-Based Copyright Systems?”, p. 1125.

<sup>61</sup> The Statute of Anne (April 10, 1710). Retrieved from [https://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](https://avalon.law.yale.edu/18th_century/anne_1710.asp)

<sup>62</sup> Peter K. Yu, “Intellectual Property and Confucianism”, in *Diversity in Intellectual Property: Identities, Interests, and Intersections*, (eds.) Irene Calboli, Srividhya Ragavan, Cambridge University Press, 2015, pp. 248-249.

<sup>63</sup> See Vaughan, “Defining Terms in the Intellectual Property Protection Debate”, p. 342: “Confucius expressed his low regard for profit in his *Analects*: ‘The noble-minded man comprehends righteousness, the low-minded man comprehends profit’.”

“[h]istorically, Koreans have not viewed intellectual discoveries or scientific inventions as the private property of their discoverers or inventors. New ideas or technologies were “goods” for everybody to share freely. Cultural esteem rather than material gain was the incentive for creativity.”<sup>64</sup>

During the Joseon era, until the beginning of the twentieth century, a rigid social hierarchy placed educated scholars and gentry in the minority noble (*yangban*) and upper middle (*jungin*) social classes.<sup>65</sup> According to Park Byoung-ho, the *yangban* were considered the “nucleus of government,” establishing themselves as the privileged and dominant social class. They held leadership positions in politics, economics, and society, and had exclusive control over Confucian scholarship, lawmaking, and law enforcement.<sup>66</sup>

The government guided education, and the publication and distribution of print material were either strictly controlled by the government or monopolised by the noble class.<sup>67</sup> Even if this was the period in which Korea started surpassing Japan and China in many areas of technological development, this social hierarchy system consistently hindered the dissemination of information. At that time, reading books was part of the journey to become a complete human being.<sup>68</sup>

The first mention of copyright happened in 1884 in the *Hanseong Sunbo*, the first modern newspaper of Korea, published by the government of Joseon, specifically by the Office of Culture and Information,<sup>69</sup> and in which copyright was cited as

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<sup>64</sup> *Ibid.*, p. 335.

<sup>65</sup> In accordance with the Confucian system, individuals were categorised into distinct social classes. The highest social class in Joseon Korea was known as the *yangban*, or scholar-gentry class. As seen in the previous chapters, this elite group had significant political power and played a crucial role in upholding societal morals and ethical standards. Directly below the group of scholars, there was a class referred to as the *jungin*, or “middle people.” This category encompassed individuals who held professional positions and served as functionaries. Notably, members of the *jungin* were privileged with access to educational resources and held a certain level of political prominence. Following the hierarchical structure, the subsequent tier consisted of the *sangmin* or *sangin*, the social class of ordinary people encompassing individuals such as merchants, farmers, and craftsmen, who were the predominant portion of the populace. The last and most inferior social class was that of *cheonmin*, frequently referred to as the “low-born,” encompassing individuals employed as domestic workers, practitioners of sorcery and shamans, and public entertainers.

<sup>66</sup> Byoung-ho Park, “The Role and Function of the Yangban(兩班) in the Development of the Legal Culture in Korea”, *법학*, *Seoul National University Law Research Institute*, Vol.24 No. 4 (1983) 25-34, p. 25.

<sup>67</sup> Edward Choi, “With Great Power Comes Great Responsibility: Korea’s Role in the War against Online Piracy”, *San Diego International Law Journal*, Vol. 10 (2009) 555-59, p. 561.

<sup>68</sup> Sang-Hyun Song, Seong-Ki Kim, “The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea”, *UCLA Pacific Basin Law Journal*, Vol. 13, No. 1 (1994) 119-139, p. 120.

<sup>69</sup> Called *Bangmunguk* *박문국* in Korean, it is a very interesting Office since it is the starting point of Korea’s modern publishing history. Despite already discovering printing, which was strictly controlled by

출판권 *chulpankwon*. This word addresses this concept with the meaning of the right of publication or publication rights. In the article, the publication right was described as a right that allowed the government to prevent others from copying the books written and the foreign books translated by people who were capable of doing so, enabling those people to profit from their work and translation and enlighten the society through their efforts.<sup>70</sup>

To sum up, Lee Ilhyung provided a comprehensive analysis of culturally-based copyright systems, whereby he delineated the distinct cultural factors that have influenced the Korean perspective on copyright. The author initially referenced the enduring societal attitudes characteristic of the Confucian heritage, which have persisted in Korea for more than five centuries under the Joseon dynasty and were very difficult to eradicate even after independence.<sup>71</sup>

Furthermore, the Confucian system implemented a societal structure characterised by class divisions, wherein those from the upper class, namely the gentry and scholars, exclusively held positions of political authority. Intellectual creations were regarded as public goods in the public domain that needed public dissemination rather than private exploitation by their creators. In this particular setting, copying was not considered a transgression but a “recommended activity.” The authors themselves ultimately came to prioritise the esteemed recognition associated with authorship over the materialistic reward that was condemned by Confucian principles.<sup>72</sup>

### 3.2. *Intellectual Property in the 1900s and the Japanese Rule*

The enactment of the Patent Law, Design Law, and Trademark Law on August 12, 1908, can be regarded as the initial written legislative measures implemented in Korea to safeguard industrial property rights, which were the same implemented in Japan.<sup>73</sup> Basically, Korea’s exposure to the concept of copyright was amplified during the Japanese occupation, after the recognition of copyright through the treaty between the

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the government and never acknowledge by the general public, with the establishment of this office the Western-style printing machines and movable types were finally imported to Korea.

<sup>70</sup> Choi, “Development of Copyright Protection in Korea”, pp. 646-647.

<sup>71</sup> Lee, “Culturally-Based Copyright Systems?”, pp. 1121-1122

<sup>72</sup> *Ibid.*

<sup>73</sup> Keun Lee and Yee-kyoung Kim, “IPR and Technological Catch-Up in Korea”, in *Intellectual Property Rights, Development, and Catch Up: An International Comparative Study*, (eds.) Hiroyuki Odagiri, Akira Goto, Atsushi Sunami, Richard R. Nelson, Oxford University Press, 2010, p. 9.

U.S. and Japan ratified in 1908 on the Protection of Industrial Property in Korea, considering those Japanese statuses, at that time, were going to be applied in Korea as well. The treaty ensured that copyright protection was equally granted to individuals from the United States, Korea, and Japan. In this context, the late-Joseon administration adopted the copyright Act enforced in Japan through compliance with an Imperial Ordinance. Nevertheless, one could contend that during that period, the Japanese colonial authority was not concerned about intellectual property regulations, primarily due to its preoccupation with other pressing matters.

Moreover, the government did not perceive Korea as being sufficiently prepared from a cultural standpoint to acknowledge copyright as a fundamental right.<sup>74</sup> Interestingly, despite the imposition of Japanese intellectual property rules on Korea until the Second World War,<sup>75</sup> which were intended to exert dominance over the nation, it is evident that these initiatives occasionally proved damaging for Japan. A groundbreaking example is the case of the first patent of Korea under the Japanese occupation, which will be addressed in the next sub-paragraph.

### *3.2.1. The Case of the First Patent of Korea: When IP Meets the Needs for Human Rights*

An example that is not very well known in the West, and is also challenging to find in English written texts, is the case of the first patent in Korea. In 1908, Japan and the United States promulgated a Treaty addressing the protection of inventions, designs, trademarks, and copyright to protect their homeland technology. On August 29 of the same year, the Korean Patents Order introduced a patent system. It was abrogated two years later, and the Japanese Patent Act was directly implemented in the country.

The first patent ever registered in Korea, long before the establishment of the Patent Institute, was the so-called Jeong In-ho's horsehair hat, or 정인호의 말총모자 in Korean (Picture 1). It was registered in 1909 and declared the Patent n. 1 of Korea by the Korean Intellectual Property Office (KIPO).

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<sup>74</sup> Choi, "Development of Copyright Protection in Korea", p. 647.

<sup>75</sup> Lee and Kim, "IPR and Technological Catch-Up in Korea", p. 9.



Picture 1. The horsehair hat advertisement in the daily newspaper of August 24, 1909. Photo retrieved from Seoul Public News, 한국인 1 호 특허가 정인호 선생, ‘말총모자’ 민족기업 육성해 독립운동 앞장, available at <https://go.seoul.co.kr/news/newsView.php?id=20190807016001>

Jeong In-ho (1869-1945) served, in 1899, as governor of Cheongdo County, North Gyeongsang Province. He later became an activist for independence during the Japanese colonial period (he was defined as “독립운동의 숨은 조력자” a hidden facilitator of the independence movement).<sup>76</sup>

He devoted himself to the independence movement, believing that people’s education and industrial promotion were the only ways to save the country. He wrote elementary school textbooks on topics such as Korean history, widely contributing to the 민족 교육 진흥 운동, the Movement for the Promotion of the National Education, which arose against the colonial education system<sup>77</sup> in order to provide a more Korean-oriented education for students.<sup>78</sup>

What is very interesting in this case is that with the profit from the patent registration under the Japanese system, Jeong In-ho financed the Sam-il Movement and, more in general, the Korean Independence Movement. In fact, after the March 1st Movement in 1919, he formed the Korean Independence Salvation Army, and he supported the independence by providing military funds to the Provisional Government of Shanghai. He was sentenced to 5 years in prison for supporting activities favouring the Independence Movement.

<sup>76</sup> See Jun-ho Choi, “한국인 특허 1 호는 일제시대 독립운동가 정인호 선생의 말총모자”, *JoongAng Ilbo* (August, 13, 2019). Retrieved from <https://www.joongang.co.kr/article/23550896#home>.

<sup>77</sup> See Hung Kyu Bang, *Japan’s Colonial Educational Policy in Korea 1905-1930*, Doctoral Thesis, The University of Arizona, 1972: On this topic, Bang Hung Kyu wrote in 1972 that the superficial reasoning for applying the Japanese system was to “civilize and enlighten” Korea’s educational system through the imported educational policy, with the final aim of making Korean children loyal and obedient to the wishes and ideals of the Japanese government, strengthening the empire and disguising the imperialistic goals.

<sup>78</sup> National Institute of Korean History, “일제의 식민지 문화 정책과 국학 운동의 전개, 민족 교육 진흥 운동”. Retrieved from: [http://contents.history.go.kr/front/ta/view.do?levelId=ta\\_h71\\_0070\\_0050\\_0020\\_0040](http://contents.history.go.kr/front/ta/view.do?levelId=ta_h71_0070_0050_0020_0040).

In an article, Park Won-joo, the former head of the Korean Intellectual Property Office, stressed the paradox behind the first Korean patent. It was granted under the Japanese system, but it eventually led to financial support for independence, helping national enterprises and funding the provisional government of Korea.<sup>79</sup>

### *3.3. From the mid-1950s to the Present: Confucian Traces in Contemporary Korea IP Law and the Changing Role of Rights*

The road to effective and adequate intellectual property protection in post-liberation South Korea has been lengthy and cannot still be deemed fully complete. From the 1950s to the present, the country has been marked by two significant turning points: the pre-democratisation demand for rights and the post-democratisation economic crisis. It is important to note that the two periods have also been characterised by the different meanings attached to the concept of human rights. In fact, it is important to stress that, after the 1987 watershed, human rights have been associated with the traditional notion as a last resort against the state's repression with what can be defined as the institutionalisation of human rights.<sup>80</sup> However, before that time, the idea of human rights had a way more 'revolutionary' meaning because they were considered the means to reach democracy.<sup>81</sup> However, as stated by Cho, the internalisation and socialisation of the human rights concept was already present following the country's liberation, making the post-democratisation era only the 'second wave' of this process.<sup>82</sup>

Notwithstanding these two primary moments, which shall be thoroughly examined in the following paragraph, the intellectual property dilemma became evident in modern-day Korea well before the 1970s. During the era of the US military administration (USAMGIK), from 1945 to 1948, there was a need for a legal framework to govern industrial property rights in the southern part of the Peninsula. As a result, the US administration enacted the Patent Law in 1946, the first modern IP law in Korea, which remained in effect until 1961.<sup>83</sup> Besides that, after the end of the colonial rule and the

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<sup>79</sup> See Jun-ho Choi, "한국인 특허 1 호는 일제시대 독립운동가 정인호 선생의 말총모자", *JoongAng Ilbo* (August, 13, 2019). Retrieved from: <https://www.joongang.co.kr/article/23550896#home>.

<sup>80</sup> Hyo-Je Cho, "Two Concepts of Human Rights in Contemporary Korea", *Development and Society*, Vol. 39, No. 2, Institute for Social Development and Policy Research (ISDPR), December 2010, p. 304.

<sup>81</sup> *Ibid.*, p. 302.

<sup>82</sup> *Ibid.*, p. 304.

<sup>83</sup> Lee and Kim, "IPR and Technological Catch-Up in Korea", p. 9.

independence from Japan in 1945, Korea did not enforce the Japanese copyright laws, nor another Act enacted by the National Assembly in 1957, considering the subject of copyright and IP protection more in general, as a “nonissue” for many years.<sup>84</sup> It is essential to emphasise that, as Song Sang-Hyun and Kim Seong-Ki pointed out, in the aftermath of World War II, it became even more evident that merely passing legislation was not synonymous with the guarantee of intellectual property rights (IPR) comprehensive safeguarding because societal understanding and attitudes towards this set of rights did not undergo a contextual transformation, influencing, among others, law-enforcing institutions.<sup>85</sup>

One of the previously mentioned fundamental moments in Korean contemporary history that directly or indirectly influenced the perception of intellectual property is the demand for democracy and human rights protection. In the late 1970s, South Korea joined the WIPO. In most cases, once a country starts developing a form of intellectual property protection, the above-mentioned “ordinary people” are concurrently protected to a certain extent. Being entitled to this kind of privilege leads those people to ask for the protection of other rights.

After the nation successfully underwent the process of democratisation, a new economic-related rationale emerged related to the necessity of strengthening the protection of intellectual property rights. In the real world, Southeast Asian nations were undergoing rapid development at the time, attracting foreign investors’ interest. To encourage investors to return, the Korean government recognised that they required enhanced protection for intellectual property, strengthening this set of rights throughout the nation.<sup>86</sup> However, even after further advancement in copyright law in the 1980s, the acceptance and improvements of such norms have been very slow.

Intellectual property (IP) refers to a brand, invention, design, or other kind of creation over which a person or business has legal rights. Common types of IP include copyrights, patents, designs, and trademarks.<sup>87</sup> Intellectual property can also be registered or unregistered. The former case includes copyright, unregistered design rights, common law trademarks and database rights, confidential information and trade secrets, and the owner automatically gets rights over their creation. The latter includes all the types of IP

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<sup>84</sup> Lee, “Culturally-Based Copyright Systems?”, pp. 1119-1120.

<sup>85</sup> Song and Kim, “The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea”, pp. 120-121.

<sup>86</sup> *Ibid.*

<sup>87</sup> Intellectual Property Office, *Intellectual Property Rights in the Republic of Korea*, p. 3.

in which it is necessary to apply to an authority such as the Intellectual Property Office to have the rights recognised, otherwise others could freely exploit the creation. In this case, patents, registered trademarks and registered design rights are included.<sup>88</sup>

It is crucial to highlight that a significant Copyright reform in Korea<sup>89</sup> took place in 1986<sup>90</sup> and took effect in 1987. This reform coincided with the culmination of the democratisation process, which resulted in the constitutional amendment and the establishment of an operational Constitutional Court. According to Professor Kyu Ho Youm, who cites Paik Syeunggil, this reform may be seen as a manifestation of the government's attempts to address societal and economic transformations. It is noteworthy that the field of Korean law has had more significant changes since that time compared to others.<sup>91</sup>

In the 1970s, two main events related to intellectual property happened in South Korea: the establishment of the Korean Intellectual Property Office as an independent office under the Ministry of Commerce, Industry and Energy in 1977 and the entry into the WIPO (1979). At the same time, in that decade, Koreans started getting involved in protests and demonstrations, which, over time, led to the democratisation of the country and the development of its own intellectual property legal framework.

The Republic of Korea has signed some international IP agreements that, under the Constitution, have the same legal effect as laws enacted by legislative bodies at any level of government in the country.<sup>92</sup> Among others is the Paris Convention (1980), under which any person from a signatory state can apply for a trademark in any other signatory state and will be given the same enforcement rights and status as a national of that country. The Bern Convention for the Protection of Literary and Artistic Works (1886) only

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<sup>88</sup> *Ibid.*

<sup>89</sup> See *2022 Annual Report on Copyright in Korea*, White Paper, Korea Copyright Commission, pp. 20-23: Since its enactment in 1957, the Copyright Act of Korea has undergone amendments over thirty times, including, besides the 1986 one, the full revision in 2006. The objective of the amendments has been to proactively accommodate and respond to the advancement of digital technology, the changing environment for using copyrighted works, and international trends of copyright protection.

<sup>90</sup> It is crucial to emphasise that 1986 was a pivotal year in Korea's intellectual property history from a variety of perspectives. Agrochemical and pharmaceutical products patented in the United States but not yet marketed in South Korea and the United States were to be manufactured and sold exclusively by companies designated as U.S. patent holders. Korea and the United States reached an agreement on this point during that year. These negotiations served the purpose of implementing the anticipated changes in Korea that were expected by foreigners. In essence, they mirrored the transplantation, adoption, and adaptation process that marked South Korea constitutional history after its liberation.

<sup>91</sup> Youm, "Copyright Law in the Republic of Korea", p. 276.

<sup>92</sup> Constitution of The Republic of Korea (1987), Article 6(1): "Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law shall have the same effect as the domestic laws of the Republic of Korea."

entered into force in Korea in 1996, under which each member state recognises the copyright of the authors from other Member States in the same way as the copyright of its own nationals. The Madrid Protocol, a central system for obtaining a bundle of national trademark registrations in different jurisdictions through a single application. The Patent Cooperation Treaty (1984) that works like the Madrid Protocol, but it applies to patents.<sup>93</sup> The Hague Agreement (2014) concerning the international registration of industrial designs.<sup>94</sup>

Additionally, The Republic of Korea joined the World Trade Organization in 1995, and WTO members must include IP protection in their national laws.<sup>95</sup> As part of the WTO, countries are required to establish IP laws in line with minimum standards, making IP law systems very different from one country to another.

It is important to underline that various intellectual property-related difficulties have persisted over the years even if more specific laws have been adopted after the 1986 watershed on the matter of IP protection. This helps to illustrate how South Korea, compared to China, has handled issues like piracy to date, enabling more thorough conclusions on this interaction between Confucianism and intellectual property.

#### **4. When Confucian Tradition Contributes to Modern Problems: A Comparison between South Korea and China**

Over the past decades, many have attributed Asia's widespread piracy and counterfeiting issues to cultural factors. Discussions often revolve around how Asian cultures, especially Confucianism, have hindered intellectual property reforms.<sup>96</sup>

Confucianism exerted a significant influence on the Chinese people for over two millennia. As noted by Peter Yu, they regarded the past not only as a mirror of present-day society, but also as a manifestation of cultural and social ideals. Intellectual property rights enable a small number of people to have exclusive control over valuable historical material, thereby hindering the masses from comprehending their own life, culture, and society. Consequently, these rights contradicted traditional Chinese moral principles.<sup>97</sup>

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<sup>93</sup> Intellectual Property Office, *Intellectual Property Rights in the Republic of Korea*, p. 4.

<sup>94</sup> Hyung-Gun Kim, *Overview and Historical Development of Intellectual Property Laws in South Korea*, Korea Legislation Research Institute, 2015, p. 11.

<sup>95</sup> *Ibid.*

<sup>96</sup> Peter K. Yu, "The Confucian Challenge to Intellectual Property Reforms", *The WIPO Journal*, Vol. 4, No. 1, 2012, p. 3.

<sup>97</sup> Peter K. Yu, *Causes of Piracy and Counterfeiting in China*, 2008, p. 1.

At the end of the twenty-first century's first decade, many experts saw China as "a special case" when protecting intellectual property. This was related to the fact that China was the most significant source of counterfeit goods and had many problems with protecting intellectual property rights due to the weak enforcement of intellectual property laws.<sup>98</sup> According to Zimmerman and Chaudhry's analysis, the lack of progress in protecting intellectual property rights in the country can be attributed, among other features, to political and traditional cultural factors:

Looking at the history of IP in China, it is clear that Chinese political culture did not lend itself to the concept of ownership of IP. Confucianism required control of information, and a traditional Chinese belief is that inventions draw on past knowledge that belongs to all citizens. The basic beliefs of communism dovetailed with these traditional attitudes. Censorship was more important than copyrights, and inventions belonged to the state.<sup>99</sup>

However, particular academics have suggested that Confucianism does not significantly impede the progress of copyright system development in this regard. Confucianism should not be considered one of the factors impeding intellectual property protection, as countries that have managed to "construct a well-functioning intellectual property law system"<sup>100</sup> – despite their historical association with the philosophical system – may have author protection rights in place today. On this matter, it is important to note that South Korea and Taiwan are cited as successful examples of nations that have overcome intellectual property's absence and piracy issues. Furthermore, the preceding analysis in this dissertation has shown that both nations have formulated effective constitutional frameworks reliant on the judiciary. This undoubtedly demonstrates that notwithstanding the presence of Confucian tradition, those nations overcame those challenges by allowing citizens to witness their rights being upheld in courts under a system centred primarily on the impartiality of the judiciary.

However, from this point of view, it is critical to acknowledge that Confucianism, along with various other factors, did impede intellectual property progress. In fact, despite

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<sup>98</sup> For more details on the issue see Alan Zimmerman, Peggy E. Chaudhry, "Protecting Intellectual Property Rights: The Special Case of China", *Journal of Asia-Pacific Business*, Vol. 10, 2009, pp. 308-325.

<sup>99</sup> *Ibid.*, p. 309.

<sup>100</sup> Rogier Jaak Eugeen Helena Creemers, *Explaining audiovisual media piracy in China. Media control, enforcement and globalisation*, Doctoral Thesis, Maastricht University, 2012.

concerted efforts to enhance the safeguard of intellectual property-related rights and the legal framework on the matter, South Korea, as it will be analysed later, has been classified as a country with inadequate intellectual property regulations for approximately ten years since the turn of the millennium. Furthermore, certain aspects of its regulations have remained outdated in more recent times. Therefore, it may be argued that South Korea has been significantly impacted by Confucianism, resulting in its delayed establishment of intellectual property protections. Nevertheless, the implementation of intellectual rights protection was not motivated by the insignificance of tradition. Instead, it is more accurate to say that it occurred in an environment that gradually allowed for democracy and individual rights *despite* the historical influence of Confucianism.

#### 4.1. *The Case of Online Piracy*

It is interesting to note that, even after the implementation of new regulations on the matter of intellectual property, from 1989 until 2009, South Korea was included on the Priority Watch List or Watch List of the International Intellectual Property Alliance (IIPA) among the countries with a weak intellectual property regime. Coming from the previously mentioned Confucian background, the government did not seriously press for copyright enforcement until it finally recognised the need to protect authors' works.<sup>101</sup>

The government is making rapid progress through initiatives like the revision of the Copyright Act and the surge in applications under the Patent Cooperation Treaty. Nevertheless, the extent of the piracy and counterfeiting issues in Asia has long perplexed many scholars until recent times, with both online and offline piracy activities continuing to pose a significant concern in the country.

Digital piracy refers to the unauthorised replication or dissemination of copyrighted content on the Internet. It has a detrimental impact on the creative sectors, including film, television, publishing, music, gaming, computer software, sound, and video recording. An illustrative instance pertaining to this matter is the *Hangul Office* case. *Hangul Office* is a proprietary word processing application published by the South Korean office suite developer Hancom Inc. The company almost faced bankruptcy due to the widespread use of illegal copies. In a 2011 article in the *Korea Times*, Yoon Ja-Young voiced apprehension about the significant harm caused by the absence of intellectual property

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<sup>101</sup> Choi, "With Great Power Comes Great Responsibility", pp. 565-566.

safeguards to software, which was subjected to an unprecedented increase in online piracy. The article cited the Hancorn incident to illustrate the extent of online piracy, which was beyond all previous levels. Furthermore, the author noted that Koreans exhibited significant “insensitivity” regarding the matter.<sup>102</sup>

One of the most notable cases related to the spread of online piracy and subsequent infringement of copyright in South Korea is the *Soribada Case*. This case is crucial because it helped define digital copyright law in Korea after multiple lawsuits and software revisions to comply with the law.

Established at the turn of the twenty-first century, Soribada (소리바다, “Ocean of Sound” in Korean) was the leading peer-to-peer (P2P) file-sharing platform in Korea. Following a lawsuit filed by the Recording Industry Association of Korea (RIAK), formerly the Korean Association of Phonographic Producers (KAPP), the defendant was brought in front of the Suwon District Court in 2002.

In January 2005, the Seoul High Court, on appeal, confirmed the decision that the operators of Soribada had violated copyrights and ordered the Korea Music Copyright Association to receive 19 million in compensation. The Seoul Central District Court dismissed Soribada’s operators of criminal charges in a distinct trial that was conducted during the same month. The Court’s decision specified that the users, not the platform, violated copyrights since Soribada’s function was file transmission and not distribution.

In August 2006, the Seoul Central District Court denied an application for a preliminary injunction against the newly updated Soribada version 5. Despite evidence that there had been a continuing, widespread unauthorised file sharing for titles for which the operators of Soribada 5 had not requested a license, the decision marked an overbroad application of the immunity granted to online service providers (under what at that time was Article 77-2 of the Copyright Act of Korea, Restriction on Responsibility of On-Line Service Providers).<sup>103</sup> In that case, Soribada service providers claimed the action to cease infringement was technically impossible, invoking the CAK’s online service provider immunity.

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<sup>102</sup> Ja-Young Yoon, “Software Piracy Reaches Five-year High” *The Korea Times*, (March 7, 2011). Retrieved from: [www.koreatimes.co.kr/www/tech/2023/12/129\\_82635.html](http://www.koreatimes.co.kr/www/tech/2023/12/129_82635.html). (Accessed December 12, 2023).

<sup>103</sup> Copyright Protection and Enforcement Around the World, IIPA’s 2007 Special 301 Report (February 12, 2007), p. 422.

In January 2007, the Supreme Court upheld – in the civil case on assisting liability based on ISP’s negligence<sup>104</sup> the decision of the Seoul High Court (January 2005), stating that Soribada had violated civil copyright law.<sup>105</sup> Despite not directly violating copyrights, the platform operators were fully aware of the unlawful downloading activities but took no action to prevent it.<sup>106</sup> The Court, among other things, ruled that:

The “Soribada” service providers are accountable for aiding and abetting since they had *dolus eventualis* of, or at least could have expected, the circumstances by which the service would enable users to violate the neighboring copyrights of a number of music producers, yet they developed and distributed the “Soribada” program free of charge, operated the “Soribada” server, provided users with the connection information of other users, and facilitated the infringement of neighboring copyrights by letting the users share and copy MPEG-1 Audio Layer-3 (MP3) files converted from music CDs by use of the Peer-to-Peer (P2P) method.<sup>107</sup>

The service providers were held accountable for copyright infringement assistance based on negligence and the *dolus eventualis* principle.<sup>108</sup> They developed and distributed the programme without charge, operated the server, and supplied users with the connection information of other users, knowingly ignoring and facilitating the infringement of neighbouring copyrights. In other words, they were aware of the circumstances under which the service would enable users to violate the copyrights of several music producers.<sup>109</sup>

Despite the inclusion of essential legal safeguards, such as agreements with local music companies, in the most recent version of Soribada, the Seoul High Court ordered the shutdown of Soribada’s server due to the continued uploading of unauthorised files.<sup>110</sup> Soribada returned with another version (number 6) and continued to fulfil its obligation of securing legal licenses.<sup>111</sup>

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<sup>104</sup> Gyooho Lee, *Online and Offline Copyright Infringement in Digital Environment: An Overview of Korean Case Laws*, 2009, pp. 4-6.

<sup>105</sup> Choi, “With Great Power Comes Great Responsibility”, p. 569.

<sup>106</sup> See Supreme Court of Korea, 2005Da11626, January 25, 2007 (S. Kor.).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> Choi, “With Great Power Comes Great Responsibility”, p. 569.

<sup>111</sup> *Ibid.*, p. 570.

The Korean government has amended its Copyright Act on multiple occasions over the past several decades in an effort to strengthen the legal framework governing the copyright industries' efforts to stop digital music piracy. For example, the December 2006 Amendment – effective from June 2007 – introduced provisions on the limited liability of online service providers, including “safe harbours”<sup>112</sup> and the regulation of P2P services, requiring service providers to take the necessary measures for the interruption of illegal transmissions.<sup>113</sup> What is interesting is that Korea was the first country in the world to introduce legislation that required P2P operators to take necessary measures to block the illegal transmission of copyrighted materials upon copyright holders' requests.<sup>114</sup> Nevertheless, despite the overall improvement in the situation, there have been reports of minor problems even in more recent years. For example, the IIPA 2022 Special 301 report stated that:

South Korea's ISP liability framework (including safe harbors) is outdated and susceptible to abuse by user uploading services and other online infringers, and it should be modified to ensure that safe harbors apply to only passive and neutral intermediaries that do not contribute to infringing activities.<sup>115</sup>

This instance is a case study to illustrate that East Asia, particularly South Korea, has been influenced by the Confucian tradition. Indeed, the nation continues to encounter challenges in keeping up with developments about the issue of piracy. Nevertheless, the nation has been putting in significant effort, and the circumstances have improved considerably. From this particular standpoint, the Courts have performed a pivotal and unparalleled function.

## **II. Conclusions**

Even though Confucianism and traditional principles and culture can be one of the features that explain the late appreciation of copyright notions in the country, it is essential

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<sup>112</sup> Art. 102 of KCA (2006).

<sup>113</sup> Art. 104 of KCA (2006).

<sup>114</sup> International Federation of the Phonographic Industry (IFPI), *South Korean Music Market - A Case Study*, March 2011, p. 2.

<sup>115</sup> IIPA, *IIPA 2022 Special 301 Report on Copyright Protection and Enforcement* (January 31, 2022), p. xi.

to highlight that society has evolved, and, in the age of technological development, tradition can be found – with relation to this kind of issue – as a residual part of historical significance. It is fundamental to avoid considering traditional beliefs as the only fundamental factor behind the country’s developments on the matter. As pointed out by William Alford in his groundbreaking work *To Steal a Book Is an Elegant Offense*, it is necessary to be mindful of any possible “avowedly cultural explanations”<sup>116</sup> and that it is necessary to always consider that, at no point in time, the culture of a society remains monolithic. Remaining too attached to a factor that cannot give hard evidence of its role may lead to the expression of a judgement rather than a fact.<sup>117</sup> Given these premises, it is fundamental to avoid blaming the outcome on cultural assets only; instead, it is important to consider culture within a broader set of contingencies that contributed to any development over time.

Notwithstanding its weaknesses and drawbacks, South Korea’s safeguarding of intellectual property has been pivotal on multiple occasions. A fascinating element to consider is how its operation has, at times unwittingly, intersected with the citizens’ demand for liberty and rights, thereby assuming a crucial position in a variety of circumstances, including the fight against the Japanese occupation, long before the development of South Korea’s own IP system. In recent years, the democratisation process and a stronger Intellectual Property framework have been simultaneously advancing.

Before the 1980s, there existed an evident limited safeguarding of both human and intellectual property rights, which this analysis demonstrates to be closely linked. As individuals began advocating for a more democratic nation, they concurrently initiated a campaign to safeguard their personal liberties. It is noteworthy that in 1986, the Copyright Act underwent a modification. This reform aimed to align with international copyright protection practices and adapt to social developments within the country. Following the democratisation process, as confidence in the courts increased, individuals began presenting their cases to the judiciary, contributing to the enhancement of legislation by providing additional clarification when needed.

In this context, it is crucial to carefully examine and highlight the frequently disregarded correlation between human rights and intellectual property rights in the

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<sup>116</sup> Alford, *To Steal a Book Is an Elegant Offense*, p. 6.

<sup>117</sup> *Ibid.*

specific context of South Korea. The traditional reluctance of South Korea to enact legislation on intellectual property rights has played a major role in the country's delayed development towards human rights. Indeed, it is imperative to underscore that the concept of human rights as a fundamental characteristic of each person was not customary in pre-modern Korean legal culture. During that era, specific obligations were assigned to Korean citizens in accordance with their social and political status. Within this specific context, the individual's feeling of duty and accountability involved the anticipation that the other person recognised a responsibility to react politely, irrespective of their higher social status in relation to the person they were engaging with. At present, the concept of human rights, which emerged as a component of indigenous governance following the decline of colonialism and the achievement of independence after 1945, is more extensively incorporated than the competing Confucian norms.

Although the Constitutional Court has had limited involvement in intellectual property disputes, the issue of intellectual property protection is crucial when examining the relationship between Confucianism and democracy. Although some scholars argue against the notion that Confucianism is responsible for problems like piracy, it is undeniably true that Confucianism has significantly influenced the perception of intellectual property rights, which also encompasses a component of human rights, among the Korean population. Although implemented in 1957, copyright legislation was commonly seen as a "dead law"<sup>118</sup> for a long time since it was rarely enforced, and the Korean courts paid little attention to this topic. However, even after the 1986 Copyright law amendment, the acceptance of this kind of regulations has been very slow.<sup>119</sup>

Today, South Korea is actively attempting to safeguard the rights granted to individuals over their intellectual creations, continuously improving the legislation on these rights.<sup>120</sup> From this perspective, it is safe to say that South Korea is undergoing an efficient modernisation process. However, there are still opportunities for enhancement, particularly in the legal safeguarding and advancement of intangible heritage and traditional knowledge.<sup>121</sup>

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<sup>118</sup> Youm, "Copyright Law in the Republic of Korea", p. 276.

<sup>119</sup> Lee, "Culturally-Based Copyright Systems?", p. 1122.

<sup>120</sup> For the most recent information see IIPA, *IIPA 2024 Special 301 Report on Copyright Protection and Enforcement* (January 30, 2024).

<sup>121</sup> See Lee, "The legal protection of intangible cultural heritage", 2022.

# CHAPTER IV

## **Civil Society, Politics and Confucianism: A Virtuous Influence of Traditional Principles on South Korean People?**

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## **I. Introduction**

Upon conducting a theoretical examination of the compatibility between Confucianism, constitutionalism, and democracy and presenting a positive response to the inquiry, this study has demonstrated that while it is accurate to assert that Confucianism has, to some extent, endured the democratisation process in South Korea, it has mostly had an adverse impact on the country's legal system. When examining Confucianism in the context of family law, it has become apparent that certain principles originating from the Joseon Neo-Confucian tradition or resulting from the colonial legacy persistently impeded the realisation of individual liberties and principles, such as non-discrimination, even in recent years. The situation has changed thanks to the historic and essential intervention of the courts.

Following that study, the analysis shifted to the incorporation of Confucian ideals into criminal law. The circumstance exhibited a notable similarity to the one that was prevalent in Japan in the past. Compared to Japan, however, Korea's case presents considerable differences; in fact, departing from those principles – that have been repeatedly accepted and reinforced over the years – is exceptionally difficult, although there is a chance of future developments on the subject. Based on the Confucian doctrine of filial piety, punishments for criminal offences committed against a direct ascendant are notably different from those imposed in circumstances involving an individual who is either not a member of the family or a family member with a different kind of kinship from the aforementioned one.

The final case examined so far, and the most original one, concerns the influence of Confucianism on Korean legislation as it relates to the protection of intellectual property rights. This instance represents a third distinct method of influence. Indeed, the legacy bequeathed by Joseon, in this case, was not founded upon norms but rather on the absence of them since the concept of safeguarding a creative work was deemed irrational in the wake of Confucianism, where copying was viewed as a virtue, and the author's creation was regarded as a public good rather than a means to generate revenue.

This analysis, however, does not, from an objective standpoint, support the conclusion that Confucianism has solely had a detrimental effect on Korean legislation. The notion that this influence is merely damaging stems from the prejudice created by the belief that the Western transplanted method of lawmaking is the only correct one. When it is

assumed that South Korea has embraced most, if not all, of the globally acknowledged principles, such as the traditional notion of safeguarding human rights, as a component of democratisation, the term “Confucianism” inherently takes on a negative meaning in present-day legislation.

At this point, it is legitimate to wonder whether Confucianism has features that have indisputably and unequivocally contributed positively to South Korean democracy, considering its democratic framework built upon Western-inspired institutions. In order to answer this question, it is crucial to understand the unintended influence of the Confucian tradition on individuals. This influence extends beyond their personal behaviour, such as interactions with family, and also affects how their actions are reflected in legal and political matters. Additionally, it impacts how they behave as a collective group, including civil society and social mobilisation. Ultimately, this influence contributes to the development of new policies and political advancements.

This chapter will examine three significant recent events: the Candlelight Protests and President Park’s impeachment; the role of public diplomacy, focusing on the management of the Covid-19 pandemic and the resulting transformation of South Korea’s international image and nation branding; and, finally, the most recent presidential elections, which were won by the currently in office president, Yoon Suk Yeol.

Geir Helgesen drew attention to the fact that cultural differences, despite not being the sole influence on the political sphere, can either strengthen or weaken a nation’s political culture.<sup>1</sup> It is crucial to initially acknowledge that the connection between politics and culture is not deterministic. According to determinism, which is a perspective that asserts preceding factors cause all events, the cultural environment would have been regarded as the exclusive determinant of the political landscape. Furthermore, in constitutional developments and the establishment of democracy, it is essential to note that the relationship with the cultural context is not one-sided. Politics also influences culture through political socialisation in the educational system and political authorities’ promotion of values and norms. It is crucial to grasp how individuals interact within a particular cultural context to comprehend the connection between leaders and followers as a political style. From this perspective, it is vital to avoid assessing the political sphere of one culture using the standards and measures of another.

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<sup>1</sup> Geir Helgesen, *Democracy and Authority in Korea: The Cultural Dimension in Korean Politics*, Routledge, New York, 1998, p. 9.

For example, as previously observed, while Asian countries that have transitioned to democracy share a common experience with Western countries like the ones in Latin America and Central Eastern Europe, how this process has been executed varies not only between regions but also from country to country. For this reason, the analysis should not only focus on the democratisation process as a turning point, but it should also consider previous and subsequent events in the history of South Korea to comprehend the significant role of politics and political culture within its specific cultural context.<sup>2</sup>

According to Helgesen, Sangsop Park (in his work “Obstacles to democracy: some peculiar features of Korean political society”) observed in the late 1990s that even after the re-establishment of democracy in South Korea, some internal political procedures still resembled those of the past when traditional culture had significant importance. In this sense, he held Western academics accountable for upholding an overly simplistic interpretation of the political landscape that pits democracy against authoritarianism and holds that modernity simply entails removing the past through applying Western principles.<sup>3</sup> Additionally, Park interestingly dismissed the notion that the persistence of cultural factors and the presence of a pre-existing cultural dimension meant that South Korea was unprepared to adopt an effective democratic system.<sup>4</sup>

Just a few years before Park’s analysis of the restored democracy in the country, Kihl asserted in the 1990s that “strategies of action” in contemporary Korean society are influenced, in part, by Confucian norms and values. As the authors emphasise, it is crucial to recognise that Confucianism is not the only aspect of traditional culture that continues to influence the nation. In addition to Buddhism and shamanism, contemporary Christianity impacts and influences human behaviours and institutions in South Korea. Collectively, these attributes coexist with the concepts of liberal democracy and nationalism, and collectively, they constitute the distinctiveness of present-day South Korea.<sup>5</sup>

The opening section of this chapter will provide a comprehensive overview of Confucianism in the political landscape of post-liberation South Korea, followed by an analysis of the role of impeachment proceedings in the democratic history of the country. Subsequently, it will focus on the specific case of Park Geun-hye, who became the first

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, p. 19.

<sup>4</sup> *Ibid.*

<sup>5</sup> Young Whan Kihl, “The Legacy of Confucianism Culture and South Korean Politics and Economics: An Interpretation”, The Academy of Korean Studies, *Korea Journal*, Vol. 34 No. 3 (1994), p. 40.

President to be effectively impeached by the Constitutional Court following the initiation of the impeachment proceedings by the National Assembly. This part will mainly focus on the specific domains that may influence the success of the impeachment motion that Hannes Mosler has conceptualised and summarised.<sup>6</sup> The purpose is to reiterate the essential influence of traditional values, as primarily seen in Chapter 2, in shaping policies and decisions from the perspectives of the judiciary and civil society.

### **1. A Brief History of Confucianism in the Political Landscape of Post-liberation South Korea**

Yong Chen notes that the democratisation process in a traditional Confucian state has been complicated for reasons that extend far beyond the theoretical level, including the inextricable connection between Confucianism and Korean politics.<sup>7</sup> It is crucial to acknowledge that this exceedingly difficult-to-sever relationship has resulted in virtually exclusively adverse repercussions within the domain of politics. From this viewpoint, the government of a state founded on the Confucian tradition is not only obligated to adhere to a particular political structure but must also fulfil further obligations. In Chen's words, "the sovereign of a traditionally Confucian state is not just seen as an executive of government but rather inundated with expectations far beyond the political sphere."<sup>8</sup>

While acknowledging the compatibility of Confucian values with democracy and the potential for overlap between them in a few instances, it is also crucial to recognise the significant discrepancies between the pre-democratic Joseon era and Japanese rule and the subsequent transplantation of a fully democratic constitutional system in Western style. As highlighted by Chang Yun-Shik, initially, the democratic political process in Korea was shaped by traditional norms, as the political institutions outlined in the constitution were significantly different from the actual experiences during the Joseon dynasty and the subsequent Japanese rule. Therefore, it can be said that "democracy first became Koreanized rather than Korea becoming democratized".<sup>9</sup> The stark disparity

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<sup>6</sup> See Hannes B. Mosler, "The Institution of Presidential Impeachment in South Korea, 1992-2017", *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, Vol. 50, No. 2, (2017) 111-134.

<sup>7</sup> Yong Chen, "The Presence of Confucianism in Korea and its General Influence on Law and Politics", in *Corea. Una visión jurídica y geopolítica en el siglo XXI*, Arturo García Oropeza (Coord.), Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2021, p. 87.

<sup>8</sup> *Ibid.*

<sup>9</sup> Yun-Shik Chang, "Mutual Help and Democracy in Korea", in *Confucianism for the Modern World*, (eds.) Daniel A. Bell, Hahm Chaibong, Cambridge University Press, 2003, p. 102.

exists between the Korean person-oriented traditional norms and the constitutional norms prioritising rules' supremacy over individuals. Thus, the establishment of “constitutional democracy”, juxtaposed with the successive rise of three autocratic presidents, can be explained.<sup>10</sup>

To thoroughly comprehend the chronological sequence and presidential changes in South Korea, the following table will list the presidents since independence. The analysis excludes those who only served as acting president for a short period. The table will further incorporate the length of their tenure and their political affiliation:

1	Syngman Rhee	1948 - 1960	National Association / Liberal Party 자유당
2	Yoon Bo-seon	1960 - 1962	Democratic Party 민주당 / New Democratic
3	Park Chung-hee	1962-1963 (acting), 1963-1979	Democratic Republican Party 민주공화당
4	Choi Kyu-hah	1979 (acting) 1979 - 1980	Independent
5	Chun Doo-hwan	1980-1981 1981-1988	Military Democratic Justice Party 민주정의당
6	Roh Tae-woo	1988-1993	Democratic Justice Party 민주정의당/ Democratic Liberal/ Independent
7	Kim Young-Sam	1993-1998	Democratic Liberal Party 민주정의당 / New Korea / Independent
8	Kim Dae-jung	1998-2003	National Congress for the New Politics 새정치국민회의 / Millennium Democratic Party 새천년민주당/ Independent
9	Roh Moo-hyun	2003-2008	Millennium Democratic Party 새천년민주당 / Independent / Uri Party / Independent
10	Lee Myung-bak	2008-2013	Grand National ( <i>Hannara</i> ) Party 한나라당/ Saenuri 새누리당
11	Park Geun-hye	2013-2017	Saenuri 새누리당 / Liberty Korea 자유한국당
12	Moon Jae-in	2017-2022	Democratic Party of Korea 더불어민주당
13	Yoon Suk Yeol	2022-Present	People Power Party 국민의힘

For an in-depth understanding of the context, it is crucial to provide a concise overview of the chronological sequence of events in post-liberation South Korea, spanning from the establishment of the First to the Sixth Republic:

<sup>10</sup> *Ibid.*

First Republic	August 15, 1948-April 1960	It was established after the transition from the US military administration. Syngman Rhee assumed the presidency of the Republic of Korea following the 1948 general elections. In that same year, the first Constitution of the country was officially promulgated, establishing the presidential system. This era was marked by Rhee's authoritarian governance and staunch opposition to communism. The April Revolution in 1960 marked the conclusion of this period, ultimately leading to Rhee's resignation.
Second Republic	1960-1961	It was established during the April Revolution and marked the only instance in South Korea's history when a parliamentary government was formed under President Yoon Bo-seon. During this era, a liberal democracy emerged, and a comprehensive economic improvement plan was being developed. However, the period was characterised by the failure of this strategic plan and further instability and political factionalism. The Republic was overthrown by Park Chung-hee and the South Korean Army in a <i>coup d'etat</i> after thirteen months, leading to the replacement of the government with a provisional military one.
Military Rule (1961-1963)		
Third Republic	1963-1972	The beginning of this period may be traced back to the election of Park Chung-hee as the president in the 1963 presidential elections. In theory, the transition marked a restoration of civilian governance through the National Assembly. However, it emerged as a dictatorship under Park's rule. In 1967, he was elected again, and by a constitutional amendment, he gained the opportunity to seek a third term. Consequently, he was re-elected for the third time in 1971. In the same year, he proclaimed a state of emergency, and in 1972, he imposed martial law and dissolved the National Assembly with the intention of formulating a new Constitution. The period ended with the endorsement of the <i>Yushin</i> Constitution at the Constitutional referendum of 1972.
Fourth Republic	November 1972-March 1981	It was established upon the adoption of the <i>Yushin</i> Constitution (see Chapter 2 for further information), granting Park <i>de facto</i> dictatorial powers. Park was assassinated in October 1979, leading to a subsequent period marked by political instability under Choi Kyu-hah and the imposition of martial law following Park's passing. Chun Doo-hwan unofficially ousted Choi's authority in December 1979. Following the <i>coup d'etat</i> of May Seventeenth, 1980, he extended the imposition of martial law nationwide, resulting in the closure of colleges and the prohibition of political activities. In May 1980, an uprising initiated by students and people in Gwangju was brutally suppressed by the military junta, resulting in the loss of numerous civilian lives. Chun implemented a military dictatorship, thereby disbanding the National Assembly. The dissolution of the Fourth Republic occurred upon the promulgation of the 1980 Constitution.

Fifth Republic	March 1981-December 1987	The Fifth Republic functioned as a <i>de facto</i> dictatorship and one-party system to implement reforms to democratise the nation. Roh Tae-woo was elected as a result of the growing opposition from pro-democracy groups, including the June Democracy Movement of 1987. The dissolution occurred shortly after the election, establishing the foundations for the democratic framework of the Sixth Republic.
Sixth Republic	1987-present	In June 1987, Roh Tae-woo announced the June 29 declaration, advocating for direct presidential elections and restoration of civil rights. The revised Constitution was ratified in October. The democratic transition that commenced the Sixth Republic and continues to this day has witnessed the interchange of eight presidents.

Following the liberation, so way before the start of the democratisation process as a part of the “third wave,”<sup>11</sup> South Korea largely disregarded Confucianism as an official component of the governmental framework. As defined by David I. Steinberg, post-liberation parties were characterised by intense factionalism, with a focus on the role of the leader, and loyalty was not institutionalised but personality-based, leading to the creation of what was defined by Koreans themselves as “imperial presidency.”<sup>12</sup> As Shin Eui Hang pointed out, this idea of an “imperial presidency” reflects strong similarities with the idea of success and failure of the political leadership of a Joseon monarch.<sup>13</sup>

Nevertheless, as Kim Bun-woong highlighted in 1977 in his work “Korean Political Tradition and Democratic Elitism,” the political culture<sup>14</sup> of Korea continued to be

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<sup>11</sup> See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, 1991, pp. 13-23: The third wave of democratisation refers to the widespread process of democratisation that occurred in numerous nations, mostly in Southern Europe, Latin America, and Asia, beginning in the early 1970s. In his renowned publication *The Third Wave: Democratization in the Late Twentieth Century*, Sam Huntington defines a wave of democratisation as “a group of transitions from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period of time. A wave also usually involves liberalization or partial democratization in political systems that do not become fully democratic”. Furthermore, the initial two waves were succeeded by a contrasting pattern of authoritarian governance. According to Huntington’s classification, South Korea was first categorised as part of the second wave of democratisation, which occurred between 1943 and 1962. Subsequently, South Korea experienced the second reverse wave of democratisation (which generally includes the years between 1958 and 1975). Subsequently, South Korea was once again included within the group of nations experiencing the third wave of democratisation, which commenced in 1974.

<sup>12</sup> David I. Steinberg, “The Evolution of the Political Party System and The Future of Party Politics in the Republic of Korea”, in *ROK turning point*, (ed.) Alexandre Y. Mansourov, Asia-Pacific Center for Security Studies, Honolulu, 2005, p. 3.

<sup>13</sup> Eui Hang Shin, “The Role of NGOs in Political Elections in South Korea: The Case of the Citizens’ Alliance for the 2000 General Election”, *Asian Survey*, Vol. 43, No. 4, July/August 2003, p. 700.

<sup>14</sup> Political culture encompasses deeply rooted, widely-held beliefs, emotions, and principles on the essence of political systems, which can provide a connection between citizens and their government.

influenced at that time by the lasting effects of Confucianism, Buddhism, and Taoism.<sup>15</sup> Despite the significant impact of Westernisation (which he defined as the “trauma of Westernization”), the fundamental values that have defined Korea for centuries had remained largely unaltered by the cross-cultural dialectics.<sup>16</sup> At the time of the release of Kim Bun-woong’s work, these statements held particular validity due to the prevailing presence of centralised elitist governments in the country and the continuing underlined reference to traditional culture in order to gain consent. That said, the author and other scholars, even if they recognise the peculiarity of the Korean case, perceived traditional culture and historical legacies as an obstacle to the democratic process,<sup>17</sup> since they promoted an authoritarian political culture focused on a centralised bureaucracy, potentially leading to democratic elitism.<sup>18</sup> Indeed, it is accurate to assert that during certain periods of post-liberation history, the nation displayed a tendency towards authoritarian regimes; nevertheless, relying exclusively on the narratives of Confucian tradition to elucidate the impediments to the democratisation process – caused by a succession of authoritarian or military regimes – is not only incorrect but also runs the risk of a superficial examination of the unique circumstances surrounding Korea.

Michael J. Pettid has emphasised the issue of constructing distinct Confucian narratives that emphasise particular characteristics, both in the past and in the present:

Confucianism can be construed in contrasting ways depending on which aspects one wishes to stress. If one were to cite the universality of sagehood found in some Confucian texts, Confucianism could reach across gender and economic boundaries to be an all-encompassing ideology for all people. Conversely, if one were to stress the traditional four classes of Confucianism, one could easily argue that this ideology is anti-capitalist and will not function in the modern world. Confucianism continues to have multiple applications in today’s Korea just as it did in premodern Korea: today, emphasizing the importance of education in Confucian teachings explains the pursuit of education in contemporary South Korea; if criticizing gender inequality

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<sup>15</sup> Bun-woong Kim, “Korean Political Tradition and Democratic Elitism”, *Korea Journal*, Vol. 17, No. 10, The Academy of Korean Studies, (1977), p. 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> See Sang Joon Kim, “Characteristic Features of Korean Democratization”, *Asian Perspective*, Vol. 18, No. 2, Fall-Winter 1994, p. 182.

<sup>18</sup> Kim, “Korean Political Tradition and Democratic Elitism”, p. 7.

and hierarchy that plague South Korea today Confucianism is a convenient and not entirely inaccurate scapegoat.<sup>19</sup>

Within the Korean context, it is essential to recognise two significant factors: firstly, Korean presidents have been relying on underlying Confucian attributes that may or may not be associated with an authoritarian stance, and secondly, the active participation of civil society.<sup>20</sup> Additionally, in retrospect, the notion that Korean tradition and legacy are incompatible with a fully flourishing democracy has been contradicted. In this regard, one intriguing aspect to examine is the tendency of presidents to make choices rooted in tradition, aiming to garner greater support without explicitly linking them to the nation's cultural history, but rather making the rule connect with the populace, gaining their trust.

In the past, consolidation of the authority's position was underpinned by the underlying support of Confucian beliefs and values, but the manner in which Confucian traditions and values have imperceptibly resurfaced does not necessarily correspond to the concept of submission to authority. In light of this, conducting a concise analysis of how certain presidents and rulers – who came into power after liberation – utilised cultural heritage and tradition to bolster the general public's trust in them or restore their image is essential.

### *1.1. Pre-democratisation Period*

It may be asserted that the first president assumed the role of a Confucian Monarch in order to establish his dictatorial authority.<sup>21</sup> Despite residing primarily in the United States and being Woodrow Wilson's student, Syngman Rhee (later defined as 국부, the father of the nation),<sup>22</sup> the first president of South Korea (1948-1960), has been recognised for exhibiting political tendencies reminiscent of the Joseon monarchy rather

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<sup>19</sup> Michael J. Pettid, "Confucianism in Korea", in *The Oxford Handbook of Confucianism*, (ed.) Jennifer Oldstone-Moore, Oxford University Press, 2023, p. 294.

<sup>20</sup> See Kim, "Characteristic Features of Korean Democratization", p. 187: For instance, this is in stark contrast to the democratic advancements in Taiwan, which were initiated by the governing government elite and were never confronted with significant opposition from the people.

<sup>21</sup> Pettid, Confucianism in Korea, p. 292.

<sup>22</sup> See Ho-Ki Kim, "The State and Civil Society in South Korea, 1987-1999: Civil Movements and Democratic Consolidation", *Asian Perspective*, Vol. 25, No. 1, Special Issue in Commemoration of the 25th Anniversary of Asian Perspective, 2001, p. 232: The President is considered the personification of the state. This directly links to the concept of the ruler as a patriarchal figure, in a state that symbolises the extreme extension of one's family, and the people represented the children.

than those of a president of the U.S.<sup>23</sup> When he came back from the U.S. and assumed his presidential role in 1948, he was dressed in what was defined by John Kie-Chiang Oh as a “flowing Korean attire of a Confucian gentleman of the Yi Dynasty [Joseon Era] period.”<sup>24</sup> Once again, during the ROK’s inaugural ceremony on August 15, he opted not to wear Western ceremonial clothing, instead choosing to wear Korea’s traditional attire. By doing so, particularly on significant occasions for the country, he deliberately aimed to project himself as a father figure for the nation.<sup>25</sup> Essentially, the first president had a mindset influenced by Western ideas and modern values; however, he certainly recognised the significance of Confucian traditional culture. It is important to note, however, that the foundation of his rule rested on the personal loyalty to the founding father of the nation, often known as personalism,<sup>26</sup> and in 1960, the United States declined to provide assistance to his civilian dictatorship, leading to his resignation and the subsequent transition to a democratic government.<sup>27</sup>

During the First Republic, the opposition to his government in the National Assembly was deemed ineffectual. In addition to his inclination towards intimidation, another contributing aspect to the ineffectiveness of the resistance was its inherent nature. The primary opposition group, namely the Democratic Party, was essentially an unstable coalition formed by two factions that had previously been adversaries. Although the official opposition proved ineffective in this setting, an unofficial opposition was gaining momentum inside the society.<sup>28</sup>

The educational level and literacy in urban areas experienced significant and rapid growth, mainly due to the widespread use of newspapers and magazines as a means of communication.<sup>29</sup> The press took on an antagonistic stance towards the government despite its attempts to restrict media freedom. As Eckert and other scholars noted, South Korea’s students were at the core of the dissatisfaction. According to the authors, students perceived themselves as guardians of state virtue in a manner consistent with Confucian principles.<sup>30</sup> Fundamentally, students’ (a status group, not a social class) political

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<sup>23</sup> Carter J. Eckert, Ki-baik Lee, Young Ick Lew, Michael Robinson, Edward W. Wagner, *Korea Old and New: A History*, Korea Institute, Ilchokak Publishers, Harvard University Press, 1990, p. 348.

<sup>24</sup> John Kie-Chiang Oh, “Adaptations in Korea: Confucianism, Democracy, and Economic Development”, in *Confucian Culture and Democracy*, (ed.) John Fuh-sheng Hsieh, 2015, pp. 92-93.

<sup>25</sup> *Ibid.*

<sup>26</sup> Eckert, et al., *Korea Old and New*, p. 348.

<sup>27</sup> Sunhyuk Kim, *The Politics of Democratization in Korea: The Role of Civil Society*, University of Pittsburgh Press, 2000, p. 3.

<sup>28</sup> Eckert, et al., *Korea Old and New*, pp. 352-353.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

activism came from the long Confucian history. During the Joseon era, scholars held a position of great respect and were entrusted with the moral duty of rigorously assessing state policies, as well as assisting the monarch in maintaining moral conduct alongside the royal court and officials.

University students represented in the 1950s-60s the embodiment of what Confucian scholars were until the beginning of 1900 in Joseon: a socially privileged status group morally expected to speak up against the dictatorship [the unjust ruler].<sup>31</sup> They associated this virtue, in 1960, with the principles of constitutional democracy that they had been taught since 1945 but had never seen implemented by their own government.<sup>32</sup> Eckert stated that:

Korea's first post-colonial generation come of age, they looked at the entrenched network of fraud, corruption, and coercion that linked Rhee and his party to the bureaucrats, police, and big businessmen and saw the decadence and failure of an older and less enlightened generation that needed to be swept away.<sup>33</sup>

This perspective is quite intriguing and serves as a fundamental basis for the study to be conducted in this chapter. To thoroughly comprehend the history of South Korea, one must study the fundamental Confucian ideals that were expected to control the government's behaviour and shape the civil society's view.

An additional remarkable illustration of the impact of Confucian traditional norms may be observed in how people perceived the difference between the governments of Park Chung-Hee (1962-1979)<sup>34</sup> and Chun Doo-hwan (1981-1988). Firstly, the leadership exhibited by Park, such as that of Deng Xiaoping in China and Chiang Kai-Shek in Taiwan, exemplified the intricacies of Confucian capitalism,<sup>35</sup> which Max Weber

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<sup>31</sup> Kim, *The Politics of Democratization in Korea*, p. 44.

<sup>32</sup> Eckert, et al., *Korea Old and New*, pp. 353-354.

<sup>33</sup> *Ibid.*

<sup>34</sup> See Kang Ro Lee, "Bureaucratic-mobilizational Regime: The Yushin System in South Korea", *Asian Perspective*, Vol. 14, No. 2 (Fall-Winter 1990), p. 195: Han Sung-joo categorised the duration of Park's leadership into three distinct stages. The initial regime was characterised by military-ruled authoritarianism, spanning from 1961 to 1963. The subsequent regime, from 1964 to 1971, was classified as semi-authoritarian. The third regime, which began in 1972, was characterised by a process of reauthoritarianisation.

<sup>35</sup> This component remains unexamined in greater depth due to its near-exclusive relevance to the economic development of the nation, a subject not addressed in the dissertation. For more details see Seok-Choon Lew, "Confucian Capitalism of Park Chung Hee: Possibilities and Limits", in *The Korean Economic Developmental Path: Confucian Tradition, Affective Network*, Palgrave Macmillan, 2013, pp. 101-103: Indeed, the dominant group selected capitalism as its model, which exemplified state-led industrialisation—the government regulated labour, controlled capital accumulation, and ordered market entrance and exit.

considered to be an implausible combination.<sup>36</sup> Like Park, Chun sought to establish his authority by condemning previous corruption (even though, years after stepping down from his presidency, he ended up arrested for treason, accused of owning slush funds) and pledging a future marked by economic advancement. In contrast to Park, Chun introduced a provision to the Constitution that limited the president to a seven-year term without a chance for renewal.<sup>37</sup> Additionally, he eased certain restrictions in effect since the Korean War, such as the curfew and the dress code for students, intending to obtain public approval. Despite these efforts, one characteristic that made their rules fundamentally different at their core was that Chun's term was characterised by his family scandals and arrogance, with a vast majority of people despising his attitude.<sup>38</sup>

On the contrary, Park's aura was distinctively unique and allowed him to gain the respect of people on a personal level. One of the contributing factors was that even those who disagreed with him and disliked him politically acknowledged his personal integrity. Furthermore, his family maintained an almost impeccable reputation during his time in office. In this regard, his family's reputation even improved significantly when his esteemed wife was tragically murdered, and their eldest daughter took on her mother's official duties. This act exemplified the Confucian principle of filial piety, resonating strongly with South Korea's profoundly Confucian society (or "Confucian public").<sup>39</sup> It is fundamental to observe that the very same society that held his personality and family in high regard, despite the opposition to his regime, was also the one that, on the premise of Confucian principles, demanded the impeachment of his daughter during her term.

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Regarding this issue, decisions were reached in accordance with conventional Confucian affective networks. A fundamental aspect of Asian capitalism that embodies characteristics distinctive of the Confucian tradition is the emphasis placed on business organisation and civil society. Differently from Western societies, emphasis was placed on strengthening emotional familial bonds, hometown, and school. The notion of "Confucian familism" was particularly evident in the *Chaebol* system of Korea, as well as the *Zaibatsu* system of Japan. Given this standpoint, it is critical to acknowledge the drawbacks associated with this type of system, namely the state's political intervention in competitive markets. This resulted in collusion between the government and private enterprises, which triggered a series of political controversies involving the Korean government that persisted for decades.

<sup>36</sup> Max Weber, *The Religion of China: Confucianism and Taoism*, 1951.

<sup>37</sup> Eckert, et al., *Korea Old and New*, p. 377.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

## 1.2. Post-democratisation Period

An additional reference to the underlying Confucian principles can be found in President Roh Tae-woo's (1988 – 1993) inaugural address, which was based on the goal of “national reconciliation.”<sup>40</sup> In addition to implying the use of Confucian-related concepts to resonate with the Confucian public, it is intriguing to note that in democratic politics, extremely conservative methods associated with Confucianism have been disregarded, thereby restoring the public's trust. From this standpoint, it is noteworthy to mention that Roh also distanced himself from other principles infused with Confucian influence, such as abolishing the custom of requiring subordinates to abstain from smoking or engaging in similar activities in the presence of their superiors as an expression of reverence.<sup>41</sup>

Another intriguing allusion to Confucianism is found in the oath of office of Kim Young-sam, delivered on February 25, 1993. His presidency is considered the beginning of the period of democratic consolidation. In his statement, he expressed the vision of a revitalised Korea as a free and more developed democratic society, attributing the country's struggles to a profound disruption of its value system. The essential tasks at issue were, once again, to eliminate corruption and improper conduct, reinvigorate the economy, and restore the nation's discipline. Essentially, the newly elected president desired a nation that upholds democratic principles and embraces a solid set of traditional values. Although not explicitly stated, it is apparent that the reference was to Confucian personal ethics, considering the historical setting of an East Asian nation founded on Confucian values for centuries.<sup>42</sup>

In addition, Kim Dae-jung (1998-2003),<sup>43</sup> whose views on the correlation between Confucianism and democracy will be further examined later concerning the right of revolution, published an article in the *Sin Donga* one year into his presidency. In this article, he claimed that Confucianism and democracy can coexist but emphasised the need

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<sup>40</sup> *Ibid.*, p. 387.

<sup>41</sup> Sam Jameson, “S. Koreans find new hope of democracy in Roh style”, *Los Angeles Times*, (March 13, 1988). Retrieved from: <https://www.latimes.com/archives/la-xpm-1988-03-13-mn-1809-story.html> (Accessed 31 December 2023).

<sup>42</sup> Oh, “Adaptations in Korea”, p. 102.

<sup>43</sup> See Sungmoon Kim, *Confucian Democracy in East Asia: Theory and Practice*, Cambridge University Press, Cambridge, 2014, p. 2: his election is very interesting from the perspective of the functionally and effectively democratised country. In fact, he was a prominent opposition leader who ran for the presidency on four separate occasions. His political career serves as tangible evidence that after the transition to democracy in 1987, candidates from opposition parties have finally had an authentic chance to secure victory in the elections.

to revitalise cultural traditions within a democratic framework. For instance, according to his viewpoint, the underlying principle of filial piety should shift from being centred around authoritarian rulers and patriarchs to including citizens, one's spouse, or neighbours. He believed that the Confucian heritage might be adapted to confront the challenges posed by modernity, such as the democratisation of Korea in the twenty-first century.<sup>44</sup>

This instance underscores the dichotomy of the Confucian tradition in contemporary politics, wherein the influence of Confucian concepts, terminology, and ideas has been an undertone that has persisted subtly despite their exclusion from the official political sphere.

## **2. Impeachment in South Korea's History: The Analysis of the Confucian Civil Society and the Right of Revolution**

As put into words by Hannes Mosler, the institute of Presidential impeachment can be defined as “a means of defence against an incumbent's malpractice actions that violate the constitution or other laws or betray the trust of the people”.<sup>45</sup> Quoting the work of Kim Jongcheol, he also added that it is still considered an “ultimate check on the power of a chief executive in a presidential system, and therefore a fundamental democratic element of these systems” and a last resort, with presidents rarely removed from office after a motion of impeachment.<sup>46</sup>

Mosler's analysis identifies four primary domains of variables that can potentially impact the impeachment process. The first factor pertains to the constitutional conditions grounded in the rule of law. This encompasses aspects such as interpreting the impeachment process and guaranteeing that the legal framework applies fairly to all individuals, including the president. Based on this concept, impeachment is a mechanism that can be used to remove a democratically elected president if they threaten democracy. In countries like South Korea, where the Constitutional Court has the authority to make final decisions on such matters, impeachment can legitimise political choices.<sup>47</sup> Additional elements to be considered pertain to the political environment of a particular

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<sup>44</sup> Chen, “The Presence of Confucianism in Korea and its General Influence on Law and Politics”, pp. 86-87.

<sup>45</sup> Mosler, “The Institution of Presidential Impeachment in South Korea”, p. 111.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* p. 115-116.

context at a specific moment, comprising the historical conditions, dynamics, and legacies, as well as the allocation of power among and within political parties.<sup>48</sup> The third area pertains to the attributes of the impeachment grounds, namely the manner in which the reasons for initiating impeachment proceedings emerged. This domain includes the public disclosure of the offences and the president's response to the allegations. From this standpoint, it is crucial to analyse society's moral sensibility and the incumbent president's morality and ethics. These factors can also undermine the president's credibility among the legislative, the judiciary, and the public.<sup>49</sup> In Mosler's words:

[...] these factors are closely related to the variable of public opinion because grounds for impeachment that are hardly convincing will probably cause the citizens to be less in favor of an impeachment, while credible suspicions about dubious behavior of the president and her aides are likely to trigger the public's discontent towards the president.<sup>50</sup>

The fourth group of factors pertains to the reactions shown by the general population, and it is strongly interconnected with the preceding category. This relates to the notion of popular sovereignty and the fact that the authority of a state and its government is established and maintained by the consent of its people, who are *de jure* the legitimate source of all political power.<sup>51</sup> During an impeachment, the people exercise their sovereignty indirectly through their representatives. This means they have the right to express their discontent through demonstrations and remove the president from office, even if they initially granted him or her this authority with a positive outcome in the elections. This is done in the first phase of impeachment through the representative unicameral legislature of Korea, the National Assembly, which has the power to initiate impeachment proceedings.<sup>52</sup>

Therefore, summarising the two latter groups of factors, it may be inferred that the public's perception of malfeasance, abuse of power, or other accusations may worsen

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<sup>48</sup> *Ibid.* p. 116-117.

<sup>49</sup> *Ibid.* p. 117-118.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Constitution of the Republic of Korea (1987), Art. 65(2): "A motion for impeachment prescribed in Paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: Provided, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly."

depending on how the particular conduct that resulted in a “breach of trust” is regarded inside that specific democratic society. Once a behaviour violates democratic values to the extent that it is considered unacceptable by the citizens, they can make a fundamental contribution to revoking those powers granted in a representative democracy through their representatives. As explained in previous chapters, the Constitutional Court considers public opinion to a certain extent because, even if judges always have to judge and act impartially, they do so within a society at a specific moment in time. On the matter, Mosler added that:

In particular, the Korean Constitutional Court is known for decisions in salient cases that have the tendency to generally follow public opinion reflected in surveys, media reports (incl. new media), election outcomes, and demonstrations, which can potentially erode the legitimacy of the president and at the same time empower or mobilize legislators to challenge the executive, or vice versa.<sup>53</sup>

### *2.1. President Roh Moo-hyun Case*

From its inception, the Constitutional Court of Korea has always regarded itself as the guardian of constitutional ideals, as extensively discussed in Chapter 2. However, prior to the early 2000s,<sup>54</sup> the process of removing a president from office was considered a violation of the fundamental principles of free democracy, and so, the functions of the Constitutional Court were never pursued to such an extent.<sup>55</sup> The case of President Roh Moo-hyun exemplified this type of interaction. In 2003, President Roh departed from the

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<sup>53</sup> Mosler, “The Institution of Presidential Impeachment in South Korea”, p. 118.

<sup>54</sup> Before that time there had been only two cases of proceedings or attempts to start proceedings against Presidents and former Presidents in democratic South Korea, which did not fall under the category of Presidential impeachment. The first one was the case of Chun Doo-hwan, president from 1980 to 1988 which was accused of charges such as bribery and treason, but the proceedings started only a few years after the end of his presidency. The second one was the case of Roh Tae-woo (president from 1988 to 1993). In 1992, lawmakers in Korea seriously considered his impeachment for the first time but they eventually desisted from initiating a motion on the grounds that the corruption and other malpractice during the Fifth Republic were not investigated thoroughly and later on the ground that he violated his duty for neutrality and the election law, asking for support for a candidate of his Democratic Justice Party. In 1990 he was accused again, by Kim Dae-jung on the ground of misuse of presidential power and violation of the election law. After postponing the governors’ elections in 1992 even the civil society started asking for his impeachment, however in the end Kim Dae-jung decided to refrain from carrying out the impeachment motion for the sake of political stability and democracy, acknowledging that it would have been counterproductive during the upcoming presidential elections. However, he was later accused of treason and corruption after taking bribes during his presidential term.

<sup>55</sup> Sungmoon Kim, “From Remonstrance to Impeachment: A Curious Case of “Confucian Constitutionalism” in South Korea”, *Law & Social Inquiry*, Vol. 44, No. 3 (August 2019), p. 587.

Millennium Democratic Party and established a new political party known as the *Yeollin Uri Party* (열린우리당). Right before the National Assembly elections (March General Elections), he openly endorsed the latter party, so breaching the Constitutional requirement of presidential impartiality,<sup>56</sup> which is required of every public servant, including the Head of the State.

In March 2004, President Roh Moo-hyun was impeached by the National Assembly, resulting in the immediate suspension of his presidency. After a period of two months, the Constitutional Court dismissed the impeachment. The proceedings concluded with the dismissal of the petition for impeachment adjudication<sup>57</sup> due to the failure to meet the requisite number of judges, as required by Article 23(2) of the Constitutional Court Act, necessary for his removal from office.<sup>58</sup> At the time, the announcement of the decision, supported by most of the public opinion, was broadcast on television, and it received positive reviews by the media, which essentially agreed that this “decision committed to both the spirit of the Constitution and the will of the public reflecting the Court’s completed mission as the final bulwark of the Constitution.”<sup>59</sup> Additionally, this was considered a fundamental case in modern constitutionalism history because it was the first time a judicial body reinstated a president after being impeached by a legislative body.<sup>60</sup>

## 2.2. *Candlelight Protests and the Impeachment of President Park Geun-hye (2013-2017)*

A few years after Roh’s case, following the 2016-2017 Candlelight Demonstrations, South Korea experienced another impeachment case, this time with a radically different conclusion. Candlelight protests are collective gatherings South Koreans use to peacefully express political dissatisfaction. These protests are considered a landmark

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<sup>56</sup> Constitution of the Republic of Korea (1987), Art. 7(2): “The status and political impartiality of public officials shall be guaranteed as prescribed by Act.”

<sup>57</sup> The then President of the Constitutional Court, Yoon Young-chul stated that “Impeachment means stripping the President of his democratic justification endorsed by the people through elections. It risks causing political turmoil, a leadership vacuum, national costs and social divisions. Thus, impeachment charges should be significant enough to match the importance of the effects of impeachment”.

<sup>58</sup> Constitutional Court of Korea, *Impeachment of the President (Roh Moo-hyun) Case*, 2004Hun-Na1, May 14, 2004 (S. Kor.).

<sup>59</sup> *Ibid.*

<sup>60</sup> Youngjae Lee, “Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective”, *The American Journal of Comparative Law*, Vol. 53, No. 2, Oxford University Press (Spring 2005) 403-432, p. 407.

political event and the first nationwide political battle of citizens against undemocratic and corrupted governments since the June Democratic Uprising (or June Democratic Struggle) of 1987, when a nationwide pro-democracy movement started mass protests from mid to the end of June 1987.<sup>61</sup> The candlelight protest is a victory for the citizens over the country's political past characterized by "accumulated evils" (적폐 *jeokpye*, deep-rooted evil) that prevented the country from advancing into a truly democratic society.<sup>62</sup> "Accumulated evils" could be summarised as the things that should not happen under a fair and just ruler.

In the 2016-2017 protests, Koreans were demonstrating against President Park Geun-hye. The historical impact and shadow of Park Chung-hee's presidency did not entirely fade with the transition to democracy. In fact, the after-effect was a revival of those ideas in the early twenty-first century with Park Geun-hye, General Park's daughter, who temporarily led a wave of nostalgia for her father and won the elections in 2012.<sup>63</sup> Under Park Geun-hye's presidency, many of those actions considered as accumulated evils were carried out by the president herself: abuse of power, extortion of money from industrial conglomerates (*chaebol*), which were forced to donate lots of money to newly established foundations aimed at the promotion of Korean sports and culture,<sup>64</sup> illegal admission of the daughter of her personal confidant into a prestigious school. Choi Soon-sil, the President's personal friend and civilian – considered an acting shadow president<sup>65</sup> – was charged with abuse of power,<sup>66</sup> interference in state matters, and the unlawful accumulation of millions of dollars.<sup>67</sup>

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<sup>61</sup> The demonstrations led to the end of the Fifth Republic of Korea – established six years earlier by Chun Doo-hwan after a military coup in which he declared martial law, also setting up a concentration camp for purificatory education. After the protests, the government was forced to hold new elections with the institution of democratic reforms, and the Sixth Republic of Korea was subsequently established. In those circumstances, the citizens managed to fight a corrupt and unjust regime, starting a real process of democratisation that included the establishment of the Constitutional Court, as we know it today.

<sup>62</sup> Sungmoon Kim, "Candlelight for Our Country's Right Name: A Confucian Interpretation of South Korea's Candlelight Revolution", *Religions*, Vol. 9, No. 11 (2018), p. 1.

<sup>63</sup> Kyung Moon Hwang, *A History of Korea*, Palgrave Essential Histories, 2017, p. 213.

<sup>64</sup> Kim, "From Remonstrance to Impeachment", pp. 588-589.

<sup>65</sup> Hyunjin Seo, *Networked Collective Actions: The Making of an Impeachment*, Oxford University Press, 2022, p. 1.

<sup>66</sup> See Jin-wu Kim, Seo-yeong Kim, "[Choi Soon-sil Scandal] Republic of Korea in Panic over Choi Soon-sil", *Kyunghyang Shinmun*, (October 26, 2016). As reported in the article of the *Kyunghyang Shinmun* published in October 2016: "A 'secret heavyweight' had monopolized state administration. At such an unprecedented scandal in the history of our Constitution – hard to witness in world history – the ruling and opposition parties voiced their grief and criticism."

<sup>67</sup> Kan Kimura, "Betraying Democratization?: Media Narratives, Mass Protest and Presidential Impeachment in South Korea", *Journal of International Cooperation Studies*, Vol. 28, No.1, July 2020, p. 36.

The discontentment with President Park began to emerge far before the corruption scandal, stemming from the inadequate management of the 2014 *Sewol* ferry accident,<sup>68</sup> a significant peacetime catastrophe in Korea that resulted in the loss of hundreds of Korean lives.<sup>69</sup> It is significant that, in response to growing dissatisfaction, the younger generation began referring to their country as *Hell Joseon* (헬조선), a derogatory term used to describe the socio-economic conditions of South Korea in the mid-2010s, comparing the society to the Neo-Confucian one developed for over five centuries and based, among other characteristics, on the ruling by a small elite and the deepening inequalities<sup>70</sup> despite the communitarian values and supposed egalitarianism. The spreading of this concept originated on the internet among individuals in private settings and then gained traction in the mainstream media.<sup>71</sup>

With around sixteen months remaining before ending the presidential term, protests erupted in Seoul on Saturday nights, swiftly extending to other cities<sup>72</sup> and with wide coverage by broadcasting channels.<sup>73</sup> Even though authorities said that the number of demonstrators did not exceed a few hundred thousand, during the peak days of the Candlelight Protests the media reported the presence of over 2 million participants,<sup>74</sup> with an average participation of 830,000 individuals in 20 rallies.<sup>75</sup>

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<sup>68</sup> During its voyage from Incheon to Jeju Island on April 16, 2014, the ferry *MV Sewol* capsized and 304 of 476 passengers and crew lost their lives. Most of the victims were Ansan City high school students. A broad social and political reaction followed in response to the Sewol disaster, with people expressing disapproval of the conduct of the captain, crew, and the South Korean government. President Park faced severe criticism for her handling of the disaster and for minimising the government's accountability for this catastrophe. Further discontent subsequently resulted in the wake of the government and media's initial spread of false information, as they prioritised image preservation over the well-being of hundreds of citizens.

<sup>69</sup> Seo, *Networked Collective Actions*, pp. 4-5.

<sup>70</sup> Youngmi Kim, "Hell Joseon: Polarization and Contention in a Neo-liberal Age", in *Korea's Quest for Economic Democratization: Globalization, Polarization and Contention*, (ed.) Youngmi Kim, Palgrave Macmillan, 2017, p. 2.

<sup>71</sup> *Ibid.*

<sup>72</sup> Hyunjin Seo, *Networked Collective Actions*, pp. 4-5.

<sup>73</sup> See Kimura, "Betraying Democratization?", pp. 36-37: Every Saturday night, South Korean TV stations, including KBS, MBC, SBS, but also minor cable news channels such as JTBC and YTN and conservative stations such as Chosun TV, covered the nationwide demonstrations in live broadcasts. Despite ideological differences, all media referred to the protests as a manifestation of the "order of the entire nation", calling for the president to resign.

<sup>74</sup> Paul Y. Chang, "Candlelight Protests in South Korea: The Legacies of Authoritarianism and Democratization", *Ewha Journal of Social Sciences*, Vol. 34, No. 1, (2018) pp. 5-18.

<sup>75</sup> See Seo, *Networked Collective Actions*, p. 2: Between October 2016 and March 2017 there had been 20 candlelight vigils in Seoul for the removal of President Park, 10 of which surpassed the million participants. According to Emergency Citizen Action the number of total participants was of around 17 million people, with a participation of protestants that reached the 4,5% of the total population of South Korea during the biggest demonstration.

Several aspects of these protests were noteworthy. Firstly, the protests were conducted peacefully and with discipline and respect for public order, creating a safe environment for all participants, including very young students and children. Furthermore, demonstrations encompassed non-traditional groups, which consisted of all citizen groups that did not typically participate in such activities (e.g., housewives and the elderly).<sup>76</sup> Secondly, civil society was able to incorporate opposition parties that were initially uninterested and reluctant to call for impeachment because they were not prepared for early presidential elections,<sup>77</sup> resulting in a strong partnership between civil and political society.<sup>78</sup> Lastly, it is necessary to highlight that the impeachment campaign consistently stayed within the boundaries of democratic procedures.<sup>79</sup>

When the President did not officially acknowledge her violations, the civil society pressured political parties to initiate impeachment proceedings.<sup>80</sup> This time, on March 9, 2017, the Constitutional Court of Korea upheld the impeachment motion. In addressing the grounds for impeachment, the Court stated that jurisdiction over adjudication on impeachment is given to the Court by the Constitution. For this reason, the process must be considered normative and not political.<sup>81</sup> The Court added that this system is established to realize the rule of law, according to which nobody is above the Constitution.<sup>82</sup> The Court also knew that removing a President from their functions would have had political consequences; however, it was necessary to protect the basic order of a liberal democracy.<sup>83</sup> To sum up, the Constitutional Court grouped the infractions committed by President Park into three main categories: the violation of the President's duty to impartiality and pursuit of public interest, the infringement of the conglomerate's property rights and their rights to operate their business freely, and the violation of the duty of confidentiality, since she disclosed many documents containing state secrets.<sup>84</sup>

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<sup>76</sup> Gi-Wook Shin, Rennie J. Moon, "South Korea after Impeachment", *Journal of Democracy*, Vol. 28, No. 4, October 2017, p. 120.

<sup>77</sup> Kimura, "Betraying Democratization?", p. 35.

<sup>78</sup> Chang, "Candlelight Protests in South Korea", pp. 5-18.

<sup>79</sup> Shin and Moon, "South Korea after Impeachment", p. 121.

<sup>80</sup> *Ibid.*

<sup>81</sup> Constitutional Court of Korea, 2016Hun-Na1, March 10, 2017 (S. Kor.).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Chaihark Hahm, "Constitutional Court of Korea: Guardian of the Constitution or Mouthpiece of the Government?", in *Constitutional Courts in Asia: A Comparative Perspective*, (eds.) Albert H. Y. Chen and Andrew Harding, Cambridge University Press, 2018, p. 160.

Kimura's analysis suggests that political events that have sparked protests in South Korea have usually not resulted in significant societal or political implications.<sup>85</sup> In most cases, social mobilisation only involves a small percentage of the population. The author presents several instances that distinguish this case as exceptional within the national context while also drawing parallels to similar circumstances encountered globally.<sup>86</sup>

From the international perspective, one of the suggested reasons for the comprehensive mobilisation in the Park case pertains to the disparity in opportunities caused, among other reasons, by the unjust admission of Choi's daughter to university, citing the need for fairness and openness as leading principles. Protests against corruption in other nations, such as Malaysia and Colombia, have also witnessed similar occurrences. Although not an isolated phenomenon in the world, the case of Korea differs from that of other countries. First and foremost, it must be distinguished from older democracies because:

[...] in developed countries, people have no memory of having changed society through their political activism; therefore, citizens try to change their situation by voting. South Korea is dissimilar from older democracies in developed countries. [...] countries that experienced democratization only a few decades ago still have fresh memories of democratization and the huge demonstrations with which they defeated the old regimes. Democracy is still new; thus, they believe that they can start from the beginning.<sup>87</sup>

Furthermore, in order to acquire a more profound comprehension of this scenario from a non-Western perspective, it is crucial to examine the specific cultural and traditional environment that has unconsciously influenced South Korea's society. As demonstrated in the preceding chapters, despite citizens not identifying themselves as Confucian and perceiving the concepts associated with this philosophy as outdated notions that need to be surpassed to achieve a higher level of modernisation, they nonetheless possess a deep-rooted Confucian mindset. From this perspective, it is essential to acknowledge the revolutionary recognition of the presence of a democratic society that is unknowingly rooted in fundamental Confucian principles, as proposed by Sungmoon Kim.

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<sup>85</sup> Kimura, "Betraying Democratization?", pp. 45-46.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, p. 49.

### 2.2.1. A Series of Considerations through the Political Process Theory

This case is fascinating for a variety of reasons. As previously noted, the impeachment of former President Park Geun-hye is South Korea's first successful instance of impeachment. Indeed, the first impeachment case (of President Roh) resulted in the dismissal of the impeachment proceedings; yet, it was beneficial because, in such circumstances, the Court established the criteria to be used in impeachment case judgements.<sup>88</sup> Among other things, it stated that dismissal is justified in cases in which it is necessary to safeguard the Constitution, when restoring the damaged constitutional order is required and when the President betrayed people's trust by committing infractions.<sup>89</sup> Even if the Court decided that Roh's actions were not intended to undermine the Constitution's free democratic basic order, the betrayal of people's trust due to violations of the Constitution and laws was, in fact, the reason for the successful impeachment of President Park Geun-hye.<sup>90</sup>

Another noteworthy aspect concerning President Park pertains to the convergence of events that triggered the impeachment. Indeed, it is critical to emphasise that the mere requirement that citizens raise their voices and resist an unjust sovereign does not guarantee the accomplishment of the desired goal. In order to understand this perspective, it is necessary to consider the *political opportunity theory* (or political process theory). According to Kwak Seohee, it is crucial to recognise three distinct attributes that defined this particular case. These features include the political freedoms ensured by the established formal institutions, the alignment of political elites with the protesters and the rule of law, and the minimal likelihood of state repression<sup>91</sup> against lawful collective action.<sup>92</sup> Although scholars employ varying variables and have not yet reached a

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<sup>88</sup> Hahm, "Constitutional Court of Korea", p. 158.

<sup>89</sup> *Ibid.*, p. 159.

<sup>90</sup> See Gallup Korea, "데일리 오피니언 제 248 호(2017년 3월 1주) - 대선 후보 지지도, 국정농단 특검, 대통령 탄핵", Daily Opinion No. 248: In early March 2017, prior to the Constitutional Court's final ruling, Gallup Korea conducted a survey among 1010 adult participants. The results revealed that 77% of the respondents supported the possible impeachment of President Park, while 5% refrained from expressing their opinion, and only 18% opposed the idea. The findings exhibited only marginal variations compared to a comparable survey conducted in December 2016, where 81% of individuals expressed support for impeachment.

<sup>91</sup> See Doug McAdam, Sydney Tarrow, Charles Tilly, *Dynamics of Contention*, Cambridge University Press, 2004, p. 43: It is important to note that in certain situations, many movements still emerged despite the participants either failing to sense the danger or deliberately refusing to acknowledge the existence of a repressive threat.

<sup>92</sup> Seohee Kwak, "From Collective Action to Impeachment: Political Opportunities of the Candlelight Protests in South Korea", *Korea Observer*, Vol. 52, No. 1, Spring 2021, p. 108.

consensus on the implementation of this theory, it is crucial to emphasise three fundamental aspects: the interplay between people and other actors, such as political parties; the significance of operating within a democratic setting; and the necessity of considering opportunities concerning the specific context.

As Kwak noted, and as explained above, the essential prerequisites for an effective social mobilisation were fulfilled, as the political leaders of the opposition parties and the demonstrators were united in their goal and created a political momentum to ensure that the public's demands were acknowledged and taken into account by the National Assembly. No oppressive actions were undertaken to discourage the protestors, and the judicial authorities responded to the protests in accordance with the law. Furthermore, the protest remained nonviolent from beginning to end, resulting in a complete lack of fatal confrontations between the security forces and the demonstrators.<sup>93</sup>

### *2.3. Itaewon Tragedy: The First Attempt of Impeachment of a Minister*

Article 65(1) of the Constitution of the Republic of Korea states that:

In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, judges of the Constitution Court, judges, members of the Central Election Management Committee, members of the Board of Audit and Inspection, and other public officials designated by law have violated the Constitution or other laws in the performance of official duties, the National Assembly may pass motions for their impeachment.<sup>94</sup>

The article demonstrates that beyond the President, other public officials who engage in constitutional violations while carrying out their official responsibilities are also susceptible to the mechanism of impeachment. In 2023, as referred to in brief in Chapter 2, South Korea has experienced the first case of impeachment proceedings involving a minister in its modern history. Although the case resulted in a negative resolution, it is still possible to comprehend the role of civil society in advocating for justice, even at other levels of government. This can be achieved by scrutinising the case, which focuses

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<sup>93</sup> *Ibid.*, p. 124.

<sup>94</sup> Constitution of the Republic of Korea (1987), Art. 65.

on a minister within the President's administration rather than an explicit accusation to the President.

In the night of October 29, 2022, a tragic incident of crowd crush took place during Halloween festivities in Itaewon, a district in Seoul. This unfortunate event resulted in the loss of 159 lives and left 196 others injured. The crowd crush is regarded as the most fatal catastrophe since the sinking of the *MV Sewol* and the most extensive mass casualty incident since 1995 when the *Sampoong Department Store* collapsed. It is also the most lethal stampede in the nation's history.

At the time of the tragedy, attention was given to the fact that only a couple thousand extra police were assigned to that district, with many blaming the absence of more security on the fact that President Yoon relocated the presidential office from the Blue House, which previously was both the presidential office and the official residence of the President, to the new offices at the Ministry of National Defense in the Yongsan district, formerly the site of a US Army Headquarters. This required new security operations since the presidential office and the site where the President lives are two separate places. In the aftermath of the tragedy and during the investigation, the administration and police encountered widespread disapproval and opposition. President Yoon Suk Yeol and his administration faced numerous protests calling for his resignation, although he chose not to step down.<sup>95</sup>

Opposition-controlled Parliament of South Korea voted to impeach Interior and Safety Minister Lee Sang-min in February 2023, immediately suspending him from his duty. The National Assembly held him accountable for the government's failure in disaster planning and response, which probably contributed to the October 2022 Itaewon tragedy, which resulted in the deaths of numerous people due to crowd crush during Halloween celebrations.<sup>96</sup> The police made an announcement a few weeks before the impeachment proceedings that they were targeting more than twenty officials with criminal charges, including involuntary manslaughter and negligence, for failing to implement effective crowd control measures in Itaewon, a renowned nightlife district in Seoul, despite having foreseen the enormous crowd that was expected to gather in the area.<sup>97</sup>

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<sup>95</sup> Andrew Salmon, "Korea's Halloween tragedy already haunting Yoon", *Asia Times*, (October 31, 2022). Retrieved from: <https://asiatimes.com/2022/10/koreas-halloween-tragedy-already-haunting-yoon/> (Accessed January 13, 2024).

<sup>96</sup> Tong-Hyung Kim, "South Korean minister impeached over Itaewon crowd crush", *AP News*, (February 9, 2023). Retrieved from: <https://apnews.com/article/politics-south-korea-ed5c9a50c85f7c0defb8569c27731e5b> (Accessed January 4, 2024).

<sup>97</sup> *Ibid.*

Following the first phase of the impeachment proceedings, the opposition Democratic Party's spokesperson asserted that the minister's impeachment was a response to public demand. Conversely, proponents of the People Power Party (President Yoon Suk Yeol's party)<sup>98</sup> argued that the impeachment proceedings lacked a justifiable basis and were merely an attempt to seek revenge for corruption investigations conducted by prosecutors during Yoon's administration against the leader of the Democratic Party Lee Jae-myung, which was surprisingly subjected to a motion of parliamentary consent to be arrested on alleged corruption charges,<sup>99</sup> and recently stabbed during an official visit in Busan.<sup>100</sup>

The Korean Constitutional Court, however, ruled against the impeachment on July 25, 2023. Regarding preventive measures, the majority opinion held that Lee did not infringe upon Article 34(6) of the Constitution, which states, "The State shall endeavor to prevent disasters and to protect citizens from harm therefrom". According to the majority opinion, Lee also did not violate the Disaster Safety Act and the Disaster Safety Communications Network Act. Furthermore, the Court affirmed that Article 56 of the State Public Officials Act<sup>101</sup> and Articles 7<sup>102</sup> and 10<sup>103</sup> of the Constitution were not violated by the Respondent. The Court held that the preceding Articles had not been violated even regarding post-disaster response. The Court further stated that while a number of the remarks expressed were inappropriate, it is impossible to assert that public trust in disaster and safety management has been substantially eroded, and relevant duties have not been compromised to the degree that removal from office would be required.

In their concurring opinion, judges stated that, despite their agreement that statutory violations are not sufficient for the removal from office, "The statements concerning the

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<sup>98</sup> Formerly called the United Future Party, the People Power Party (국민의힘) is a conservative political party based in South Korea. Although it holds the presidency of the nation, it is presently the second largest party in the National Assembly, with the majority of its members belonging to the Democratic Party, the opposition.

<sup>99</sup> "South Korea's opposition leader narrowly avoids arrest", *The Economist*, (September 28, 2023). Retrieved from: <https://www.economist.com/asia/2023/09/28/south-koreas-opposition-leader-narrowly-avoids-arrest> (Accessed January 4, 2024).

<sup>100</sup> Kelly Ng, "Lee Jae-myung: South Korea opposition leader stabbed in neck on visit to Busan", (January 2, 2024). Retrieved from: <https://www.bbc.com/news/world-asia-67860330> (Accessed January 4, 2024).

<sup>101</sup> State Public Officials Act, Article 56: "Every public official shall observe statutes, and faithfully perform his or her duties."

<sup>102</sup> Constitution of the Republic of Korea (1987), Article 7: "(1) All public officials shall be servants of the entire people and shall be responsible for the people. (2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act."

<sup>103</sup> Constitution of the Republic of Korea (1987), Article 10: "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

causes of the tragic incident and the concept of ‘golden time’<sup>104</sup> and some remarks regarding a disaster management authority are violations of the duty to maintain dignity under the State Public Officials Act.”<sup>105</sup>

Numerous relatives of the victims and their supporters gathered outside the court following the publication of the Constitutional Court’s decision, condemning it for granting immunity to the Minister. Simultaneously, the Democratic Party was accused by the President and the governing party of taking advantage of its controlling position in the parliament to advance impeachment proceedings.<sup>106</sup>

#### *2.4. The Right of Revolution: A Parallel between Liberalism and Confucianism*

In Confucian tradition, political leaders are required to exhibit compassionate and enlightened behaviour for the greater good of the entire nation, akin to a father’s responsibility towards the well-being of the family.<sup>107</sup> As mentioned by Grace Lee, in her attempt to explain Korean legislators’ approach to competition law, in an ideal Confucian society, these leaders would acknowledge the significance and impact of their authority, exercising it appropriately and morally for the entire community’s progress.<sup>108</sup> As highlighted by Shin and Moon, President Park disgraced the nation and forfeited what the Confucian thinkers referred to as the “Mandate of Heaven” by transgressing the democratic foundations of government.<sup>109</sup> It goes without saying that from this perspective, a more liberal interpretation of the notion of the Mandate of Heaven is put into practice, as opposed to a more conservative stand. From this view, democratic elections and the people’s legitimacy judgement in a liberal sense have supplanted the cosmic concept of heavens that bestow the mandate on a virtuous ruler in modern discourse following a non-conservative approach. Nevertheless, the idea of who a virtuous ruler, monarch, or president is remains unchanged in the eyes of the people.

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<sup>104</sup> For the reference to this comment, see Hyun-woo Nam, “Court rejects impeachment of safety minister over Itaewon tragedy”, *The Korea Times*, (July 26, 2023): During an Assembly investigation into the tragedy in December, Lee also caused controversy by saying, “The case has already passed its golden time (which has the highest likelihood of prompt measures preventing deaths), and I wasn’t idling that time”.

<sup>105</sup> Constitutional Court of Korea, 2023Hun-Na1, Jul 25, 2023 (S. Kor.)

<sup>106</sup> Ju-min Park, “Anger in South Korea as court rejects removing minister over Halloween crush”, *Reuters*, (July 25, 2023). Retrieved from: <https://www.reuters.com/world/asia-pacific/top-south-korea-court-rules-against-ministers-impeachment-over-halloween-crush-2023-07-25/> (Accessed January 5, 2024).

<sup>107</sup> Grace Lee, “Taming the Beast: Confucianism as the Key to Reforming Korea’s Chaebol System for the Common Good”, *Fordham International Law Journal*, Vol. 45, No. 1 (2021) 155-210, p. 169.

<sup>108</sup> *Ibid.*

<sup>109</sup> Shin and Moon, “South Korea after Impeachment”, p. 121.

It is crucial to emphasise that in 1994, before the start of his presidency and before the impeachment proceedings against both Roh and Park, Kim Daejung<sup>110</sup> was contemplating in his essay “Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values” the notion that democracy is incompatible with Asian cultures and hence cannot be successfully implemented in Asia. He asserted that a comprehensive examination reveals that Asia possesses a substantial heritage of democracy-oriented traditions and values, explicitly comparing John Locke and Mencius in his work.<sup>111</sup>

Although the Korean traditional government is often seen as diverging significantly from the Lockean minimal state and citizen-centric principles due to its value-driven approach to governance (“for the people rather than by the people”),<sup>112</sup> the case of President Park raises the first curiosity-triggering similarity between Confucian tradition and liberal democracy. In fact, the concept of right of revolution is somehow included in both the *Two Treatises of Government* (1689) by John Locke, considered the father of liberalism, and in the *Politics of Royal Ways* by Mencius,<sup>113</sup> the great Confucian philosopher, written two millennia before Locke’s work. The two writers expressed the right of revolution differently but with the same underlying concept: people joined together to replace the government with one that supported and promoted the citizens’ interests. Mencius stated that the emperor receives the “mandate” from “Heaven” and that “Heaven sees as my people see, Heaven hears as my people hear”<sup>114</sup> [or “Heaven sees with the eyes of its people; Heaven hears with the ears of its people”]. The legitimacy of a government is acknowledged by Heaven only when its people give their approval. Confucian scholars such as Mencius proposed a political legitimacy theory that connected government survival with public support. This theory highlighted the importance of approval and popular trust, a concept frequently referenced in modern times, particularly

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<sup>110</sup> See Sang-Jin Han, “From the Asian Value Debate to Cosmopolitanism: An Active Interpretation of the Political Thoughts of Kim Dae-jung”, *Korea Journal*, Autumn 2011, pp. 210-211: Kim introduced groundbreaking ideas that emphasised the need for renewed Confucianism while simultaneously establishing a strong basis for democracy. He referenced *chung*, which is the concept of loyalty to the state, one of the five relationship principles that are crucial for maintaining balance in an individual’s life, as taught by Confucianism. According to him, loyalty should be redirected from the state to the people, prioritising their will. In order to uphold the Confucian value of loyalty, it is imperative for public authorities to actively prevent the misuse of authority and enhance the provision of services to the public.

<sup>111</sup> Daejung Kim, “Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values”, *Foreign Affairs*, Vol. 73, No. 6, (Nov.-Dec. 1994), p. 191.

<sup>112</sup> Tobin Im, Jesse W. Campbell, Seyeong Cha, “Revisiting Confucian Bureaucracy: Roots of the Korean Government’s Culture and Competitiveness”, *Public Administration and Development*, Vol. 33, No. 4, 2013, pp. 291-292.

<sup>113</sup> Kim, “Is Culture Destiny?”, p. 191.

<sup>114</sup> Wm. Theodore de Bary, Wing-tsit Chan, Burton Watson, *Sources of Chinese Tradition*, Vol. 1, (ed.) Wm. Theodore de Bary, Introduction to Oriental Civilizations, Columbia University Press, 1960, p. 96.

during impeachment proceedings, as essential for the stability and continuity of the government.<sup>115</sup>

Early Confucians believed that individuals, rather than policies, were the primary factor in establishing effective governments. Due to this rationale, they rejected any form of inherited governance, and Mencius explicitly argued that even gentlemen should not attain positions through hereditary means.<sup>116</sup> In that context, the concept served as the basis for establishing a meritocracy, where individuals could participate in competitive exams to assess their abilities and knowledge. This system allowed the most talented and virtuous individuals to reach the highest positions, and it was implemented much earlier than the Western abandonment of the practice of hereditary aristocracy.<sup>117</sup> Put simply, a functioning government can only be established when competent and knowledgeable leaders occupy all governmental positions.<sup>118</sup>

In order to maintain his authority, the ruler must exhibit compassion and moral integrity (be humane and “righteous”).<sup>119</sup> Failure to do so may result in the withdrawal of divine approval. The people’s right to revolution is founded upon the fundamental belief that “민심은 천심이다” (*Vox populi, vox Dei*, “The people’s voice is the voice of God”<sup>120</sup>), wherein 민심 (public sentiment, mind of people) aligns with 천심 (the will of Heaven, the providence).<sup>121</sup>

William Theodore de Bary made a significant contribution to understanding the ruler’s role as stated by Mencius, particularly from an East Asian perspective. The author was previously mentioned in the first chapter as one of the strongest advocates in the Western

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<sup>115</sup> Doh Chull Shin, *Confucianism and Democratization in East Asia*, Cambridge University Press, 2011, p. 111.

<sup>116</sup> *Ibid.*, p. 114.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Oh, “Adaptations in Korea”, p. 91.

<sup>120</sup> Richard Ashcraft and M. M. Goldsmith, “Locke, Revolution Principles, and the Formation of Whig Ideology”, *The Historical Journal*, Vol. 26, No. 4 (Dec. 1983), pp. 773-775: To further emphasise the connection between these seemingly separate viewpoints, it is worth noting the existence of an anonymous pamphlet titled “Political Aphorisms”. This pamphlet advocated for the equality of individuals in the state of nature, the idea that people’s consent should form the basis of all governments, and the concept, as defined by Locke, of the right of revolution. This right allows people to resist a ruler who violates the original contract, and power is then returned to the people once the government is dissolved. Indeed, as noted by Ashcraft and Goldsmith, this pamphlet not only drew upon the same theoretical concepts compiled by Locke, but it was actually a case of plagiarism, with entirely replicated sections that lacked proper attribution to the original source. In addition to demonstrating the influence of Locke’s work at that period, this investigation is intriguing from another standpoint. Several years after its initial publication, the text resurfaced as “*Vox populi, vox Dei*”, inadvertently emphasising the same linguistic and conceptual framework employed by Mencius in his depiction of the ideal ruler under traditional Confucian thought.

<sup>121</sup> *Ibid.*

world for the idea that Confucianism and democracy can coexist and for the belief that classical Confucianism embodies democratic values. In his groundbreaking publication *Sources of Chinese Tradition*, published in the 1960s, he asserted that:

The governor exists for the sake of the governed, to give the people peace and sufficiency, and to lead them by education and example to the life of virtue. The ruler who neglects this responsibility, or worse, who misuses and oppresses the people, is no true ruler and the people are hence absolved of their fealty to him. It is this championship of the common people and their right of revolution that has caused the Mencius to be regarded by some rulers as a “dangerous” book.<sup>122</sup>

As it is well known in the West, Locke stated that when the legislator is corrupted, destroys the property of the people, reduces them to slavery under arbitrary power, and violates the fundamental rule of society, there is a breach of trust.<sup>123</sup> In those circumstances, the people have the right to reclaim their original liberty by establishing a new legislation. Long before Locke, Mencius taught similar principles, claiming that the ruler is the “Son of Heaven” and that he should provide a good government that conforms with what is best for the people. If this does not happen, the people have the right to depose his administration in Heaven’s name.<sup>124</sup>

From this point of view, it is essential to stress the significance of Im, Campbell, and Cha’s research on examining the Joseon bureaucracy. The authors emphasise the existence of a fundamental distinction between the Joseon concept of a monarch and the absolutist notion prevalent in Europe:

The king himself was not exempted from an ongoing performance evaluation, with his decisions open to criticism by both his highest servants and students of the Royal Confucian School. As such, the absolute king could not act in an arbitrary way and was expected by all to bring peace and prosperity to the country. This emphasis on performance for both the highest ministers of the government as well as the king himself is in striking contrast to European absolutism, where the king in their person embodies a mandate from heaven and may govern as they see fit. In the Confucian bureaucracy of Korea, the king was expected to adhere to the highest intellectual and

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<sup>122</sup> De Bary, Chan, Watson, *Sources of Chinese Tradition*, p. 87.

<sup>123</sup> John Locke, *Two Treatises of Government*, 1689, pp. 201-202.

<sup>124</sup> Kim, “Is Culture Destiny?”, p. 191.

ethical standards, relying constantly on the acquiescence of a bureaucracy conditioned by study and merit-based advancement.<sup>125</sup>

Basically, although the king had significant power to shape the state's direction, Joseon rulers were greatly limited in their actions if they did not have the support of the highest-ranking bureaucrats.<sup>126</sup> Based on this idea of the right of revolution, another factor that makes the case of the impeachment of President Park remarkable is indeed the essential function of civil society, which, as previously seen, had the right to overthrow the government of the unfair ruler, from both a Confucian and a liberal standpoint.

### 2.5. *The Role of the Confucian Democratic Civil Society*

In general terms, the role of civil society had three major shifts throughout the post-liberation period. The first one was during the era of military regimes, where the previous “strong state – weak society” relationship was transformed into a “strong state – weak but contentious society”. With the democratisation process, another significant change happened, leading to a more equal relationship of “strong state – strong society”.<sup>127</sup>

Democratising a political system encompasses more than just establishing representative institutions and a democratic constitution. These might be viewed as the “hardware” of the system, according to Doh Chull Shin, but in order to make a democracy, it is also important to consider the “software” which is represented by the citizens.<sup>128</sup> In South Korea, unlike other countries that experienced the third wave of democratisation and were similar to Korea in terms of a process referred to as “mass-ascendant,”<sup>129</sup> the consolidating civil society continued to play a significant role in post-democratisation affairs.<sup>130</sup>

As Gi-wook Shin and Rennie J. Moon have noted, the 2016-17 events were not an assault on democratic institutions; rather, they were a movement that sought to correct the breach of those institutions by Korea's political elite.<sup>131</sup> For decades, protest-driven

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<sup>125</sup> Im, Campbell and Cha, “Revisiting Confucian Bureaucracy”, p. 289.

<sup>126</sup> *Ibid.*

<sup>127</sup> Shin, “The Role of NGOs in Political Elections in South Korea”, pp. 700-701.

<sup>128</sup> Shin, *Confucianism and Democratization in East Asia*, p. 6.

<sup>129</sup> See Terry Lynn Karl, “Dilemmas of Democratization in Latin America”, *Comparative Politics*, Vol. 23, No. 1, Oct. 1990, p. 8: With “mass-ascendant” democratization the author referred to cases in which mass actors have gotten into a stronger position temporarily, facing vis-à-vis the dominant elites.

<sup>130</sup> Kim, *Confucian Democracy in East Asia*, p. 205.

<sup>131</sup> Shin and Moon, “South Korea after Impeachment”, p. 118.

reform has been integral to Korea's political evolution. In the 1980s, for instance, President Chun was compelled to adopt the reforms that would have facilitated the democratic transition due to the pressures of street demonstrations. As stated by the authors, protest-driven reform in South Korea serves as a "legitimate channel through which democratic political energies can flow."<sup>132</sup>

On this matter, even Kim Dae-jung expressed his point of view when explaining his stance on the compatibility between democracy and Confucian principles. Although there were instances where it was necessary to deviate from tradition, Kim observed that the most optimal expression of democratic values in South Korea's Confucian setting, including participatory traditions and the aspiration for self-determination, could be observed in two significant events, even before democratisation: the April 19 Revolution (1960) mass protests against the First Republic and President Syngman Rhee, which led to his resignations, and the Gwangju Democratisation Movement (1980), the uprising that took place as a response of Chun Doo-hwan's *coup d'etat*, his military dictatorship and the martial law.<sup>133</sup> Basically, together with the June Democratic Struggle (or June Democracy Movement, June Uprising) that took place in June 1987, which was the nation-wide protest for democracy that led to the elections and the establishment of the Sixth Republic, these two events represent the culmination of what Kim Sungmoon defined as "democratic junctures", the moments in history that led to or could have potentially led to democracy.<sup>134</sup>

Undoubtedly, the rise of civil society in Asia has played a pivotal role in the shift to democracy since "the impetus of political progress primarily came from the conflict and compromise between the increasingly organised citizenry and the ruling party".<sup>135</sup> Specifically, Post-democratisation Korea has been defined by many scholars as an extraordinarily vibrant civil society.<sup>136</sup> This is in stark contrast, for instance, to its counterparts in Eastern and Central Europe, which have been predominantly marked by a dearth of civic participation subsequent to the shift towards democracy.<sup>137</sup>

In the specific case of the Candlelight Revolution, civil society could be described as an intersection between the Confucian meritocratic civil society and the liberal civil

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<sup>132</sup> *Ibid.*

<sup>133</sup> Han, "From the Asian Value Debate to Cosmopolitanism", pp. 210-211.

<sup>134</sup> Kim, *Confucian Democracy in East Asia*, pp. 16-17.

<sup>135</sup> *Ibid.*, p. 9.

<sup>136</sup> *Ibid.*, p. 205.

<sup>137</sup> *Ibid.*

society. The so-called *Confucian democratic civil society*, as described by Kim Sungmoon, is analysed from a cultural and ethical perspective, sharing some characteristics with the traditional Confucian meritocratic society. It is deeply inspired by social criticism and the moral and political autonomy of those committed to the well-being of citizens with their subsequent political activism, characteristics typical of Korean Neo-Confucianism.<sup>138</sup>

However, a Confucian democratic civil society differs from a meritocratic one since it is not led by *super-citizens* – Confucian intellectuals, scholarly elite – allowing mutual consent and internal diversity among citizens, typical of democracies.<sup>139</sup> In addition, it attempts to observe the traditional Confucian ideal of good government within the existing democratic constitutional framework rather than to establish a counterpublic space separate from constitutional politics.<sup>140</sup> Basically, the idea can be simplified using the exact words Kim Sungmoon used to explain this concept:

It is a civil society that is particularly suited for a traditionally Confucian society that has undergone democratic transformation—or simply, suited for a *Confucian democracy*, a democracy whose underlying principles, public institutions, and social practices, which are all of the Western provenance, are in constant negotiation with the existing Confucian societal culture that still informs the habits of the heart of the local people.<sup>141</sup>

This particular example essentially illustrates two interconnected significant facts. An important aspect to consider is that civil society continues to be influenced by Confucian principles, which indirectly play a significant role in protecting and promoting standards traditionally associated with liberal democracies despite not being officially recognised in the public sphere. From this perspective, it is crucial to emphasise that the comparison with the Mencian concept of the right of revolution and the recognition of the often overlooked significance of the breach of trust, traditionally associated with Confucianism, do not imply the chance of an explicit resurgence of Confucianism in the country. Rather, it is an effort to comprehend the origins of the distinct Korean political mindset in the society, adapting it to a fully and flourishing democratic and rights-oriented environment.

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<sup>138</sup> Kim, “Candlelight for Our Country’s Right Name”, p. 13.

<sup>139</sup> *Ibid.*, p. 8.

<sup>140</sup> *Ibid.*, p. 13.

<sup>141</sup> *Ibid.*

The second point is that this case and the interaction among these groups and institutions demonstrate that Confucianism encompasses more than just negative ideas that promote obedience to authoritarian governments. Instead, it possesses components that prosper and integrate with democratic systems.

### **3. Current Politics and Confucianism: South Korea in the Aftermath of the Impeachment of President Park**

Following the initiation of the impeachment proceedings, President Park Geun-hye was suspended from her position, and in accordance with the constitutional provisions, Prime Minister Hwang assumed the role of acting president.<sup>142</sup> Following the president's removal, Hwang announced his decision not to run for election, and early presidential elections took place on May 9, 2017. Moon Jae-in, the Democratic Party candidate, prevailed in the elections against the candidate of the Liberty Korea Party, the same party as former President Park. Unlike the usual practice of electing a successor to the incumbent president seventy to forty days before the end of their term, Moon Jae-in assumed office immediately. This was made possible by Article 68(2) of the Constitution of the Republic of Korea, which stipulates that in the event of a vacancy in the presidency or the death or disqualification of the President, a successor must be elected within sixty days.

The latest South Korean presidential elections took place on March 9, 2022. According to the Constitution of the Republic of Korea, presidents are limited to a single 5-year term,<sup>143</sup> thereby preventing former president Moon Jae-in, who was in office from 2017 to 2022, from seeking re-election. Yoon Suk Yeol, the opposition candidate from the People Power Party, won the elections, defeating Lee Jae-myung, the candidate from the Democratic Party.

The two presidents, Moon and Yoon, are ideologically distant and seemingly lack any common ground. Nevertheless, they both emphasised a crucial aspect: using the strategy

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<sup>142</sup> Constitution of the Republic of Korea (1987), Art. 71: "If the office of the presidency is vacant or the President is unable to perform his duties for any reason, the Prime Minister or the members of the State Council in the order of priority as determined by law shall act for him."

<sup>143</sup> Constitution of the Republic of Korea (1987), Art. 70: "The term of office of the President shall be five years, and the President shall not be reelected."

of eradicating corruption as a commitment to ensure the successful achievement of the presidency.<sup>144</sup>

Moon Jae-in became President of Korea immediately following the impeachment and removal of his predecessor, who was ousted for “betraying the trust of the people”. On the other hand, Yoon’s popularity significantly increased due to his role as the prosecutor responsible for investigating former presidents Park Geun-hye and Lee Myung-bak for their abuse of power. Additionally, in July 2019, Moon appointed Yoon as the Prosecutor General with the aim of eradicating corruption from government-run institutions and ministries. Despite their stark differences, both Presidents managed to earn the population’s trust by committing to the cherished norms of traditional Korean culture.

Upon examining the historical context of the most recent presidential elections, it is intriguing to observe the implicit influence of Confucianism in both presidents’ administrations, in addition to their shared commitment to combating corruption.

### *3.1. The Pandemic Management under Moon Jae-in: An Explanation of the Confucian Civil Society’s Role in Enhancing Public Diplomacy through the Concepts of Jeong and Uri-Responsibility*

In the past decades, South Korea has widely focused on public diplomacy strategies,<sup>145</sup> a fundamental source of international influence as a middle power. During President

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<sup>144</sup> See Helgesen, *Democracy and Authority in Korea*, p. 258: Corruption scandals contribute to the increasing public scepticism towards the political process and its participants. The South Korean political landscape is characterised by a fundamental presence of mistrust between leaders and people. Insufficient trust can have detrimental consequences in politics, as traditionally shown by Confucius when he asserted that trust from the people is the first requirement for successful rule, along with supplying sustenance and placating the military.

<sup>145</sup> During the period spanning from the 1970s to the 1980s, the Korean government actively enhanced both bilateral and international collaboration in order to promote economic development. In the late 1970s, the policies that had previously emphasised promoting the country’s economic reputation and potential through the media switched towards cultural and exchange programmes in order to improve national security. During the 1980s, South Korea engaged in a period of sports diplomacy by successfully organising the 10th Asian Games in 1986, as well as the XXIV Summer Olympic Games and Paralympics in Seoul in 1988. Beginning in the late 1990s, the nation underwent a phenomenon known as the first Korean wave, or *hallyu*. The *hallyu* phenomenon originated with the enhancement of the nation’s reputation in neighbouring countries through various forms of entertainment, such as movies, television dramas and music (worldwide known as *kdramas* and *kpop*). The current phenomenon is referred to as *hallyu 2.0* due to its utilisation of digital technologies and social media platforms for spreading content. For more details on the history of South Korean Public Diplomacy and Soft Power strategies see: Kwang-jin Choi, *The Republic of Korea’s Public Diplomacy Strategy: History and Current Status*, USC Center on Public Diplomacy, Paper 1, 2019; Sangjoon Lee and Abé Mark Nornes (eds.), *Hallyu 2.0: The Korean Wave in the Age of Social Media*, University of Michigan Press, 2015; Yun Young Cho, “Public Diplomacy and South Korea’s Strategies”, *The Korean Journal of International Studies*, Vol. 10, No. 2, December 2012, 275-296.

Moon's leadership, the world confronted a health crisis that allowed South Korea to showcase its role on the global stage through soft power,<sup>146</sup> enhancing what is defined as medical public diplomacy.

The onset of the global crisis overlapped with a decline in public support within civil society, primarily attributed to the economic downturn and political scandals. For this reason, restoring the faith in the government was fundamental. During the initial phase of the emergency, the government effectively turned a global problem into a chance to enhance public diplomacy strategies. However, it is fundamental to note that this would have been impossible without civil society's support and values.

South Korea stands out as a unique case in medical public diplomacy, not only because it is an advanced country but also due to the successful transformation of its brand from technological expertise to a model of public health and citizen cooperation. While other countries have also implemented health diplomacy campaigns, South Korea's approach was particularly noteworthy.<sup>147</sup> In addition to the significant contribution of information and communication technologies, civil society has again played a crucial role. The collectivistic mindset and emphasis on the common good inherent in Confucian thinking resulted in an overall absence of individualistic behaviour.

On this matter, it is essential to highlight once again that Koreans do not regard Confucian principles as their self-selected value system.<sup>148</sup> Besides the fact that

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<sup>146</sup> Joseph S. Nye Jr, "Public Diplomacy and Soft Power", *The Annals of the American Academy of Political and Social Science*, Vol. 616, No. 1, March 2008, pp. 94-109: In the words of Joseph Nye, the American political scientist that explained the distinction between hard and soft power, soft power is: "[...] the ability to affect others to obtain the outcomes one wants through attraction rather than coercion or payment. A country's soft power rests on its resources of culture, values, and policies." In other words, through soft power, a country may obtain the outcomes it wants because others admire its values, and they want to emulate it and reach the same level of prosperity. For this reason, soft power can be considered as attractive power: its aim is to attract others and shape their preferences instead of forcing them with the use of coercion or threatening them with the potential use of other kinds of power (e.g., economic and military power). In international politics, the resources that produce soft power arise in large part from the culture of the country. In this framework, public diplomacy is used by governments to communicate with and attract the publics of other countries – not just their governments. The most used tools in public diplomacy are broadcasting, subsidising cultural export, arranging exchanges and many others. Currently, public diplomacy is based on three main dimensions: daily communication (what and how to tell the press), strategic communication (set of symbolic events and communications planned to reinforce central themes), and the development of lasting relationship through scholarships, exchange programs, seminars, and media.

<sup>147</sup> Seow Ting Lee and Hun Shik Kim, "Nation branding in the COVID-19 era: South Korea's pandemic public diplomacy", *Place Brand Public Dipl.*, No. 17, Vol. 4, 2021, p. 387.

<sup>148</sup> Byong-ik Koh, "Confucianism in Contemporary Korea", in *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons*, (ed.) Tu Wei-ming, Harvard University Press, 1996, pp. 197-200: According to empirical findings from a survey conducted by Gallup in Korea, among a sample of 400 individuals selected using a conventional self-identification method and quota allocations, approximately 30% identified as Christians (26% as Protestants and 5% as Catholics), around 20% as Buddhists, 47% as having no religion, and less than 1% as adhering to Confucianism. However, a comprehensive interview was conducted with the purpose of

Confucianism is not an organised religion, it is impossible to define any person as Confucian or non-Confucian.<sup>149</sup> As demonstrated by Kim Sungmoon in the chapter “Value Pluralism and Confucian Democratic Civil Society” in *Confucian Democracy in East Asia: Theory and Practice*,

[w]hen we call East Asian societies “Confucian,” it is not because East Asians comprehensively subscribe to Confucianism (particularly Confucian ethics) by holding it as their self-chosen value system but because, often independently of their self-chosen value system (be it Protestantism, Catholicism, Buddhism, or Islam), they nevertheless live their lives largely in accordance with Confucian mores and habits, mostly informed by Confucian rituals and the ethical values associated with them.<sup>150</sup>

It is crucial to emphasise again that Korean culture has always been associated with a strong inclination towards loyalty and subordination to authority for the goal of the common good because of its Confucian background. For this reason, outside of Korea, the country’s response to the emergency of the pandemic, sometimes accepting a stricter control over movements and giving up a more considerable portion of privacy compared to more individualistic countries, has frequently been observed as a simplified manifestation of Confucian “Koreanness,” which emphasises conformity and acquiescence to strong government authority.<sup>151</sup>

Recognising the underlying principles that exist in society and are traditionally shared, not due to Confucianism but despite originating from traditional Confucian thought, is

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assessing the extent to which individuals adhere to particular values and rituals—such as self-development, benevolence, and righteousness—as well as filial piety and loyalty. The interviewees encountered significant difficulty comprehending the questions related to Confucian theoretical principles. Nevertheless, all of these inquiries were clarified again by subdividing these notions into subcategories comprising particular behaviours and practices that are linked to each one (such as respecting older people, engaging in recurring ancestral graveside rituals, and participating in community activities). Numerous individuals who self-identified as Christians and atheists held a strong inclination towards Confucian values, according to the findings. It is intriguing to confirm, despite the small sample size, that respect for Confucian practices does not coincide with individuals’ self-definition as Confucian and that these practices, beliefs, and values continue to be widely disseminated, despite the fact that some individuals distance themselves from Confucianism on the grounds that it is an ancient tradition founded on patriarchal principles.

<sup>149</sup> *Ibid.*, p. 192.

<sup>150</sup> Kim, *Confucian Democracy in East Asia*, p. 118.

<sup>151</sup> Minjung Noh, “Understanding South Korea’s Religious Landscape, Patient 31, and COVID-19 Exceptionalism”, in *Teaching About Asia in a Time of Pandemic*, (ed.) David Kenley, Asia Shorts, Association for Asian Studies, Columbia University Press, 2020, p. 32.

essential. As discussed earlier, people are now reluctant to embrace these values because they are often (incorrectly) linked to support for oppressive regimes.

In order to understand the virtuous behaviour of Korean society, the focus should be shifted to the understanding of concepts such as *jeong*, emotions, and moral solidarity, which have contributed to the development of the collectivist mindset in the country and encompass all forms of communication patterns in Korean society that are rooted in emotions.<sup>152</sup> As mentioned by Kim Sungmoon and quoted by Hyo-Dong Lee:

Jeong points to the sense of closeness and mutual affection which the deeply Confucianized Koreans feel toward one another as if they were all members of one big family. Since jeong enables Koreans to regard the Korean nation as one extended family, it serves as the bridging capital for Koreans who hold and are beholden to different sets of beliefs, values, and practices in the pluralistic-democratic context of South Korea today.<sup>153</sup>

This concept is intricately linked to another interesting notion that can lead to a more in-depth understanding of Korean society from a Western stance: the concept of “*uri responsibility*” (our responsibility). According to Kim Sungmoon’s analysis, it has been the guiding principle and civic virtue behind numerous instances in which the civil society of the twenty-first century has been active and engaged in proactive participation regarding significant national issues, such as the establishment of the CAGE (The Citizens’ Alliance for the 2000 General Election) or the civil upheaval around the case of the National Assembly rejection of a bill related to the abandonment of Korean citizenship to avoid military duty.<sup>154</sup> In the first case, politicians were blacklisted by the civic organisation in order to protest against unacceptable and corrupt potential candidates at the elections. The main goals were to pressure parties not to nominate those people and to motivate citizens to avoid voting for them in case they were going to be nominated.<sup>155</sup>

In the second case, many civilians protested against the rejection of a bill that aimed to revoke the status of overseas Koreans who renounced their Korean citizenship in order

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<sup>152</sup> Tomasz Śleziak, “The Role of Confucianism in Contemporary South Korean Society”, *Rocznik Orientalistyczny*, Vol. 66, No. 1, 2013, pp. 27-46.

<sup>153</sup> Hyo-Dong Lee, “Jeong (情), Civility, and the Heart of a Pluralistic Democracy in Korea”, in *Emotions in Korean Philosophy and Religion: Confucian, Comparative, and Contemporary Perspectives*, (eds.) Edward Y. J. Chung, Jea Sophia Oh, Palgrave Macmillan, 2022.

<sup>154</sup> Kim, *Confucian Democracy in East Asia*, p. 205.

<sup>155</sup> Shin, “The Role of NGOs in Political Elections in South Korea”, p. 702.

to avoid military conscription. Kim suggested that the issue was that Korean citizens did not consider the liberal idea of citizenship as a matter of law and private choice. This was ultimately considered a matter of *uri-responsibility*. In Kim's view, Koreans do not necessarily love their nation unconditionally, but they are willing to take responsibility for the problems they are aware of, even if they are not personally responsible for causing them. The concept of *uri-responsibility*, which encompasses both positive affection (*gounjeong*) and critical affection (*miunjeong*), is essential to understanding an individual's social rights. This unique form of collective moral responsibility forms the foundation of national consciousness, crucial to civil society and citizenship development.<sup>156</sup>

The same concepts can be readily applied to the conduct exhibited by individuals in managing the pandemic, elucidating why Korean citizens were more inclined to relinquish certain aspects of their personal liberties temporarily. This trend was observed not only in contrast to individualistic Western nations but also when compared to other countries known for their collectivist cultural values.

The citizens' behaviour and subsequent success of the public diplomacy strategy had a good impact on the international image of the country<sup>157</sup> but also on domestic politics, resulting in what Jung H. Pak defined as "Moon's moment in the sun".<sup>158</sup> In fact, during the 2020 elections (the first national democratic election after the spread of COVID-19, therefore a model for other countries to hold their elections), the consent towards the government skyrocketed. Those elections have been openly considered as "a referendum on the Moon administration's handling of the COVID-19 crisis."<sup>159</sup>

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<sup>156</sup> Kim, *Confucian Democracy in East Asia*, pp. 212-213.

<sup>157</sup> See Lee and Kim, "Nation branding in the COVID-19 era", pp. 382–396: In order to assess the influence of South Korea's public diplomacy on other nations, Kim and Lee conducted a sentiment analysis on social media posts over a six-month period (January to June 2020). Their objective was to determine whether South Korea's medical public diplomacy was positively perceived by the public in other countries. After analysing 8318 texts published in English, which encompass news stories, broadcast news transcripts, blogs, and other sources, it was determined that 96% of the texts exhibited a favourable emotion. This indicates a highly positive perception of South Korea's efforts in combating the pandemic. The term "South Korea" had the highest likelihood score, with 97% of texts that included these words expressing positive sentiment.

<sup>158</sup> Jung H. Pak, "Moon's moment in the sun", *Brookings* (April 22, 2020). Retrieved from: <https://www.brookings.edu/articles/moons-moment-in-the-sun/> (Accessed January 16, 2024).

<sup>159</sup> Scott A. Snyder, "The Pandemic Election and Moon's Leadership Choices", *Asia Unbound, Council on Foreign Relations*, (April 30, 2020). Retrieved from: <https://www.cfr.org/blog/pandemic-election-and-moons-leadership-choices> (Accessed January 16, 2024).

### 3.2. 2022 Elections, Yoon Administration, and the People Power Party

As previously mentioned in the second chapter – on the matter of policies concerning low birth rates and the role of feminism in contemporary South Korea – it can be asserted that the presidency party (The People Power Party) is a conservative one. Historically, conservative political parties in Korea have been distinguished by their endorsement of particular Confucian perspectives, and, as widely analysed before, the risk of a conservative administration lies in the fact that many progressive policies have to face setbacks.

It is noteworthy that during his presidential campaign, the current president Yoon Suk Yeol, specifically targeted the *idaenam* (short form of 20 대 남성 *isipdae namseong*, man in his twenties) population, which refers to conservative-minded men in their twenties who have the right to vote and tend to hold anti-feminist beliefs. In his presidential campaign, Yoon refuted the existence of gender inequality and proposed the elimination of the Ministry of Gender Equality and Family (See Chapter 2).

As Kim Youngmi pointed out in the analysis of the 2022 presidential elections, the elections confirmed, among other characteristics, the long trend of factionalism and personalisation of politics.<sup>160</sup> The distinguishing feature of the elections was the presence of two prominent candidates, Yoon Suk Yeol and Lee Jae-myung, who were considered outsiders within their respective political parties. Notably, both candidates lacked prior experience in parliamentary politics and their candidatures were driven by popular demand for someone new in the political arena.<sup>161</sup> In the end, the result was the closest one in the history of presidential elections in South Korea, with Yoon winning by a margin of less than 1% of the votes.

It is essential to highlight the fact that, at least during his presidential campaign, the choice of Yoon as a candidate was a very interesting one, not just because he was an outsider from the internal dynamics of the political setting but because he was also a symbol of anti-corruption, which is a principle highly valued by the Korean society and contributes to the process of gaining the trust of people. He was not only the prosecutor in charge of carrying out the investigations against President Park at the time of her

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<sup>160</sup> Youngmi Kim, “The 2022 election in South Korea: The politics of resentment and revenge confirms older trends and cleavages and reveals new one”, *Georgetown Journal of Asian Affairs*, Vol. 8, No. 1, July 2022, p. 15.

<sup>161</sup> *Ibid.*

impeachment but also the prosecutor behind the Cho Kook scandal<sup>162</sup> under the Moon administration.

However, this kind of responsibility has proved to be a double-edged sword. In fact, the civil society's consent given to his administration has swayed on different occasions. One was the previously mentioned Itaewon disaster, in which the President was blamed for mismanagement of the situation and impeachment proceedings started against one of Yoon's ministers. More recently, in January 2024, Yoon's wife was accused of corruption and manipulation of stock prices, and the President vetoed the bills that the National Assembly passed to start investigations.<sup>163</sup>

From this perspective, two primary considerations can be drawn. Firstly, the fundamental role of having a corruption- and scandal-free image to maintain the public's favour has been a real challenge for every president since the first presidential election. Secondly, the role of the family members in the presidential life can strongly contribute to improving or deteriorating the president's image, leading to a decrease in the consent given to the incumbent administration.

## II. Conclusions

Following the liberation of Korea from Japanese domination, the country briefly experienced democracy before transitioning to authoritarian administrations. This eventually led to the ultimate democratisation process, culminating in the establishment of the 1987 Constitution. Confucianism is no longer incorporated into present-day policies and political parties' official ideals,<sup>164</sup> yet several interesting points may be traced back to Confucian tradition and concepts.

An instance of the nuanced application of Confucianism in politics can be observed at the dawn of the First Republic, specifically in the case of Syngman Rhee. Rhee deliberately attempted to embody a presidential figure reminiscent of the Joseon concept

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<sup>162</sup> *Ibid.*

<sup>163</sup> Ji-hyoung Son, "Yoon vetoes bill to investigate his wife", *The Korea Herald*, (January 5, 2024). Retrieved from <https://www.koreaherald.com/view.php?ud=20240105000202> (Accessed January 17, 2024).

<sup>164</sup> See Po Jen Yap, *Courts and Democracies in Asia*, Cambridge University Press, 2017, pp. 109-110: In contrast to nations like India and Taiwan, South Korea has never undergone a period in its post-democratization history where one political party or coalition held overwhelming dominance in the legislature. Weak and frequently reconfigured political parties have consistently characterised South Korea's modern electoral landscape, as numerous scholars have observed. The lack of strength in the party system has benefited the Constitutional Court's ability to conduct high-equilibrium review.

of a monarch, strategically reintroducing elements of traditional culture, such as attire, to solidify his position. Subsequently, both authoritarian dictators and democratic presidents resorted to employing Confucian ideals to either garner public support or bolster their existing popularity. This was feasible due to the fact that, although Koreans no longer self-identify as Confucians and, in certain instances, have even rejected Confucian philosophy for its perceived patriarchal and anti-feminist nature, they still regard a few aspects of the Confucian tradition as significant elements of their daily lives and guiding principles in their private affairs.

The case of South Korea is especially noteworthy due to the presence of a civil society that, borrowing the term used by Kim Sungmoon, could be defined as a Confucian democratic one. This civil society gained significant prominence during the Candlelight Protests against President Park Geun-hye (2016-2017), ultimately leading to her impeachment. Indeed, by means of effective protests, which may be understood through the theory of political opportunities, civil society has managed to articulate its opposition to corruption and the unjust ruler, which can be found as a principle of the traditional liberal view of the relationship between the ruler and the ruled and in Confucian thought, too. In fact, the fundamental similarity between liberalism and Confucian thought is in their shared emphasis on removing a ruler who has violated the people's trust through their conduct.

Both civil society and the Constitutional Court have played a crucial role in preserving a democratic order by employing mechanisms like impeachment to remove unjust rulers multiple times. There was insufficient evidence to prove a breach of public trust in the 2004 case or the 2023 impeachment proceedings against the minister related to the Itaewon tragedy. Differently, President Park's impeachment case has been a notable example of the collaboration between the Constitutional Court and the proactive civil society with democratic and Confucian values that emerged after the democratisation process.

Fundamental Confucian values, such as the commitment to fight corruption and the concept of *jeong*, have had significant importance from various viewpoints. The first one has consistently served as a guiding concept in political campaigns and remarks before and after the establishment of democracy and has been embraced by politicians of various ideological backgrounds. The latter has been an essential cornerstone of civil society for centuries and has assumed a renewed function in the battle against the pandemic in recent times.

# CONCLUSIONS

Upon doing an initial examination of the East Asian region as a whole and delving into the specifics of South Korea as the core case study of this work, it is indeed feasible to provide a more intricate and accurate response to the question: does culture play a significant role in the legal and political matters of present-day East Asia?

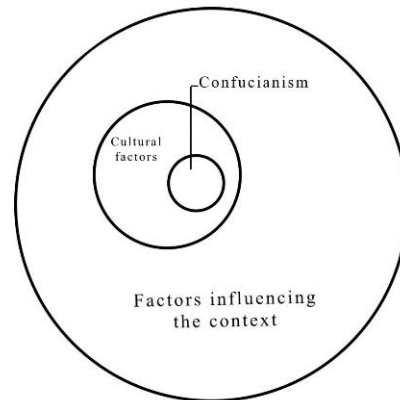
It is essential to view culture and traditional features not as an isolated entity but instead as one of multiple distinctive characteristics that contribute to the distinctiveness and uniqueness of a particular region or country. Prioritising the avoidance of “avowedly cultural explanation,” as defined by William Alford, is crucial when examining any setting, particularly ones that significantly diverge from our familiar everyday world. This approach ensures that judgements are not formed, but rather facts are confirmed.

In the initial phase of this analysis, in accordance with Geir Helgesen’s perspective, the primary objective of conducting research on the unique aspects of the East Asian context from a Western standpoint but without a Western-centric lens was to uncover and examine insights that may remain unnoticed unless observed from an external viewpoint, thereby transforming the attempt to comprehend what is different into a strength. This does not imply that there is a current general institutional dichotomy between the East and the West. Instead, it suggests that the peculiarities of the context in which an institutional convergence with the West has occurred, such as in the case of South Korea, can be understood by studying the historical and legal background, taking into account traditional characteristics.

The research findings indicate that cultural aspects play a significant role in either impeding or facilitating a country’s legal and political progress. Nevertheless, two clarifications are required for future studies. Confucianism does not encompass the entirety of traditional culture; rather, it constitutes just a fraction of the cultural elements that have exerted influence on South Korea and other East Asian nations over the course of millennia. When examining the significance of culture, particularly through the lens of Confucianism, we can observe one aspect of the broader cultural context. This context merits further comprehensive study from various perspectives. The second point that must be made clear is that while Confucianism and the larger cultural environment can explain much, they cannot explain everything. Attributing all events and outcomes inside

a nation only to its culture is overly simplistic and reductive, if not entirely inaccurate. In addition to culture, several elements, such as historical contingencies, advancements, and innovations, contribute to the unique reality that the specific country in the case study has experienced and continues to experience (Fig. 4).

(Fig. 4)



Without detracting from other elements that contribute to a nation's past, present, or future, this study aimed to demonstrate the importance of cultural context among other factors (e.g., social classes, wealth distribution, and other values) and in correlation with them. Hopefully, it was successful.

From a Confucian perspective, this work elucidated several intriguing issues and provided in-depth insights on new perspectives or themes that had previously received extensive coverage but have not yet been the subject of a follow-up study. However, it appears evident that a wide range of varied realities characterises the East Asian region.

Although it may be easier and more justifiable to associate the political systems of non-democratic countries with specific Confucian principles that have historically been explored within this complex, evolving, and varied philosophy, it is significantly more difficult to identify current expressions of Confucianism or Neo-Confucianism within prosperous democracies like South Korea or Japan. Nevertheless, it is reasonable to conclude that it is unattainable to identify a solution that applies universally without individually examining each case. This issue is not solely attributed to the diversity in forms of governance within the region, but it also encompasses other significant issues, including constitutional advancements, human rights, the influence of civil society, and

the essence of Confucianism. Throughout their extensive history spanning centuries, if not millennia, these cultures have incorporated various forms, ideas, and conventions derived from diverse interpretations and perspectives of this philosophy, originating from the classical philosophy developed by Confucius, mixing them with other country-specific cultural factors.

Although subject to a contentious debate regarding its classification as a religion, Confucianism is fundamentally a philosophical thought that has endured over centuries, inviting reinterpretations and adaptations by various scholars. From this standpoint, it may be asserted that Confucianism, in its diverse manifestations, has managed to survive even in what is commonly regarded as an unfavourable setting, such as a democratic nation. In simple terms, it is accurate to assert that Confucianism is not a uniform entity and adapts to various circumstances.

Nevertheless, it has frequently been criticised for being an ensemble of concepts and beliefs that, rather than fostering harmony, tend to support the establishment of authoritarian regimes. On this matter, the preceding chapters have extensively shown that while Confucianism possesses certain characteristics that are incongruous with democracy, it is not entirely antagonistic towards this style of governance imported from the West.

Conversely, notable researchers have utilised it to identify an alternate kind of democratic governance, with the ultimate goal of eliminating authoritarianism and non-democratic regimes from East Asian countries. In addition to this perspective, even in a well-established and thriving democratic system like Korea, the influence of Confucianism can still be observed in its society and legal framework. The presence of Confucianism has not just hindered the emergence of democracy; it has had both beneficial and detrimental impacts on the system. In contrast to Japan, where a significant portion of the Confucian legacy in its legal system has been removed, South Korea continues to depend heavily on Confucian principles, such as filial piety, to justify, for example, laws that result in unequal treatment of crimes committed against a family member compared to a stranger. From this perspective, it is crucial to acknowledge that the first modifications in handling criminal law matters related to family members are beginning to emerge, gradually moving away from long-standing norms that have been considered fundamental until now. Given these considerations, carrying out another follow-up study in the near future seems beneficial and necessary.

The Constitutional Court of Korea, a significant symbol of the country's democratisation process, has served as a crucial mediator between preserving tradition and the demands for modernisation and protection of individual rights and, over the past thirty-five years, the judiciary has gained increasing trust from the public.<sup>1</sup> The Court has effectively dismissed certain concepts that were previously regarded as traditional but were remnants of the colonial legacy, such as the *Hoju* system (which originated from Japan and was not part of the Joseon history), and other elements of Korean tradition, such as the Confucian clan system that resulted in the same-name-same-origin marriage ban. In order to safeguard family identity, the latter prohibited marriages between individuals from the same ancestral lineage, irrespective of their degree of kinship. The law has recently been modified to prevent marriage within the eighth degree of kinship. This restriction is still quite extensive compared to other countries, even those historically characterised by a significant Confucian influence, such as China.

Over the past fifteen years, an intriguing pattern has emerged among judges. Quite a few tradition-based laws have failed to gain the approval of a substantial number of judges within the Constitutional Court. Nevertheless, there is a growing acceptance of advocating for a more progressive approach. Until now, this group, usually consisting of a very small majority of justices, has either been unable to declare the provisions unconstitutional or has not reached the necessary quorum of six out of nine justices despite the majority of the Court favouring a potential reform. However, this situation suggests a gradual change in matters concerning traditional beliefs, shifting towards prioritising the acknowledgement of individual rights over traditional norms. Therefore, it will be fascinating to witness forthcoming advancements in the years ahead.

As already mentioned, the democratic transition has fostered a newfound confidence in the courts, consequently influencing the reform of the country's intellectual property system. Although some academics have previously questioned the relationship between intellectual property protection and Confucianism, it can be confidently asserted that the two were, to some degree, inversely related. The delayed development of intellectual property rights safeguards during the Joseon dynasty and even after the independence from the Japanese colonial rule can be attributed to two primary factors: the influence of

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<sup>1</sup> In general, a Constitutional Court is a widely established institution found worldwide, primarily stemming from Western legal systems. In addition to addressing general issues, it also serves the purpose of tackling context-specific problems and concerns that are unique to this particular country and cannot be found elsewhere in the world.

Confucian traditional thought and the societal structure that was constructed upon it. This research reveals that intellectual property rights hold a comparable significance to human rights. The two sets of rights are distinct and cannot be overlapped. However, the ethical dimension of intellectual property may intersect with human rights, which have required enhanced safeguarding since the pre-democratic era.

In this scenario, although it is acknowledged that not all Confucian concepts are inherently opposed to democracy, Confucianism is displayed as an assortment of beliefs that contradict the goals of the democratic civil society in modern-day Korea. On this topic, it is crucial to acknowledge that civil society played a significant role in certain events that ultimately contributed to the enhancement of democracy in South Korea. Although Korean individuals may not identify themselves as Confucian, empirical evidence demonstrates that the majority of them consistently adhere to Confucian rituals and doctrines. The civil society that continues to uphold Confucianism has been labelled by the renowned scholar Kim Sungmoon as a Confucian democratic civil society. This serves as a prime illustration of how fundamental Confucian ideals may coexist within a democratic system and provide it with positive reinforcement.

The right to revolution is a crucial aspect found in both East Asian Confucian tradition and Western liberal thought. It plays a significant role in maintaining an order where the ruler, whether an elected President in the Republic of Korea's democracy or a monarch invested with the Mandate of Heaven in Joseon Korea, must be just and prioritise the interests of their citizens. Within the current democratic framework, the dynamic civil society of Korea has effectively exercised its right to express and manifest this through nonviolent demonstrations, which are considered a significant part of the journey to democratisation.

The Constitutional Court has the authority to remove the President from office upon request by the elected National Assembly, using the impeachment process, which allows civil societies to have their voice heard against the corrupted ruler. From this standpoint, the impeachment case of President Park Geun-hye serves as a basic illustration of the democratic system influenced by the inherent Confucian (and, at the same time, liberal) ideals of the society. Obviously, it is crucial to refrain from regarding the Confucian underlying feature as an independent and exclusive factor and the sole driver behind events like protests. In order to gain a comprehensive understanding, it is necessary to consider other significant circumstances and aspects that extend beyond the cultural component.

Furthermore, numerous instances in the political realm demonstrate that although Confucianism is no longer officially present in politics and is not affiliated with any political parties, politicians have consistently employed Confucian ideas as a means of propaganda and to garner public support since the post-liberation era. In recent years, particularly following the removal of President Park, this approach has predominantly focused on combating corruption and unjust conduct within institutions. However, its effectiveness has been questionable, as it often leads to negative consequences for the administration in power.

Regarding policymaking, it is intriguing to observe how incorporating Confucian principles has effectively contributed to the country's soft power strategies in the initial phases of the pandemic. Currently, the aforementioned Confucian democratic civil society, which is based on classical values of the common good, such as *jeong*, has successfully established itself as a global model of ethical conduct in times of emergency crises; adherence to the regulations is not just imposed, but it is significantly influenced by the will of the society.

It is evident that, by examining the legal and political aspects of the Confucian tradition, it has been confirmed that the intersection of intellectual property rights, Constitutionalism, the role of the Constitutional Court, and the significance of the Confucian civil society can be understood within the framework of democratisation. This process has been crucial for the advancement of these features and the ability of these actors to drive modernisation in a country that its Confucian heritage has long influenced.

In conclusion, it is evident that culture is indeed significant. Although universal rights and institutions originating from the West are also adopted in East Asia, the presence of a distinct historical pattern, traditions, and circumstances results in unique and personalised interpretations of shared progress. In the coming years, it would be more than intriguing to observe the resilience of traditional values in the fast-paced Korean society, known for its *ppalli-ppalli* culture,<sup>2</sup> amidst anticipated future changes in the political and legal system.

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<sup>2</sup> *Ppalli* (빨리) means quickly or fast in Korean and this concept essentially alludes to a cultural inclination towards a fast-paced way of life.

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