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# **AN EXCLUSIONARY LABOR REGIME UNDER PRESSURE: THE CHANGES IN LABOR RELATIONS IN THE REPUBLIC OF KOREA SINCE MID-1987**

**Ronald A. Rogers\***

## **ABSTRACT**

Since a package of political reforms in the Republic of Korea (ROK) was announced on June 29, 1987, the country's exclusionary labor relations have begun to appear. Prior to this time, an entrenched government/business coalition had employed diverse mechanisms to achieve its goal of holding down labor costs and maintaining labor peace. This article discusses three categories of mechanisms:

- 1) the promotion of a system of values and behavioral norms associated with Confucianism, (or, alternatively, anti-communism or capitalist developmentalism);
- 2) the promulgation of a state corporatist system of interest

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The current article draws on the sources cited herein, the author's previous research on labor relations in the Republic of Korea, his experiences as an attorney dealing with Korean labor relations issues, and information he gathered in June, 1989 from lawyers, businessmen, industrial relations scholars, government officials and labor representatives in the Republic of Korea.

The author expresses his sincere gratitude to the many people who kindly shared their time, experiences and opinions with him. Special thanks go to Wolfgang Streeck, Samuel Cohn, Jaewoong Shim and Kumduk (Park) Rodgers. In a way that goes far beyond the merely formal acknowledgement of sole responsibility for the contents of the article, however, the author wishes to make it clear that the opinions and any factual errors that may be contained in this article are his alone, and should not be attributed to the above named persons, his former employer or colleagues at Kim & Chang or other friends and associates in the Republic of Korea or in the United States.

representation which channelled the labor movement into cooperative and/or ineffective business unionism; and  
3) the establishment of a legal order setting forth the rights and obligations of labor and the legal procedures that were to be followed.

Because all three strategies were implemented in an unbalanced way to restrict the labor movement and prevent the effective pursuit of workers' interests, they failed to generate labor's consent and were all ultimately dependent on coercive force. The popular uprising that forced the government to open up the political system and to accept greater accountability in 1987 undermined the government's ability to continue to apply coercive measures in such an unbalanced way. This article directs attention to the partial breakdown of the mechanisms utilized by the government/business elite in pursuit of their substantive goals, and to the consequential changes in the labor relations environment in the ROK as of the end of 1989.

## I. INTRODUCTION: LABOR RELATIONS IN A CHANGING ENVIRONMENT

The model of economic development pursued so successfully by the ROK from the early 1960s until mid-1987 featured low-cost manufacturing for export under the guidance of a strong developmentalist state.<sup>1</sup> A corollary of that model was a government-business alliance to simultaneously mobilize the population to a high level of participation in the industrial labor force while holding down labor costs. The state played a dominant role in the labor relations process, not by facilitating the natural operations of the markets nor by consistently applying the formal laws and regulations but by intervening to advance its own substantive goals: low wages and tight labor control.<sup>2</sup>

Recently, changes in the Korean economic, political and social environment have advanced to the point where continued strict im-

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1. An abundance of literature exists on the economic development of the ROK and of other East Asian countries. For a detailed though sometimes inaccurate analysis emphasizing the role of a strong state, see generally A. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989)[hereinafter AMSDEN]. See also Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea and Taiwan*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 136 (F. Deyo, ed. 1987)[hereinafter *POLITICAL ECONOMY*]. A contrasting neo-liberal analysis may be found in Kuznets, *An East Asian Model of Economic Development: Japan, Taiwan and South Korea*, 36 *ECON. DEV. AND CULTURAL CHANGE* 11 (1988). Ironically, just when many Western scholars have finally recognized that a strong interventionist state can play a positive role, the government in the ROK (arguably the prototype of the model) has begun to withdraw to some extent from its direct involvement.

2. See generally F. Deyo, *State and Labor: Modes of Political Exclusion in East Asian Development*, in *POLITICAL ECONOMY*, *supra* note 1.

plementation of that earlier model is no longer possible. After a number of false starts, the popular movement for democracy and for an end to the brutal and corrupt practices characteristic of the Chun Doo-Hwan administration (1980-1988) reached such a level of intensity that it could no longer be suppressed or ignored. The economy has also changed in ways that are less dramatic but possibly equally important. As the economy has grown and become more complex, the government's ability to guide it through indicative planning and bureaucratic controls, or through direct ownership of key industries, has decreased. Capital and/or technology intensive industry requiring an increasingly skilled work-force is taking the place of low skilled and low wage light manufacturing or simple assembly as the dominant sector of the Korean economy.<sup>3</sup> Korea's traditional trading partners are showing an unwillingness to continually absorb Korea's expanding trade surpluses, so Korean workers' buying power in domestic markets, which are essentially closed, is finally taking on real significance.<sup>4</sup>

A dramatic package of political reforms was announced by the ruling party in mid-1987 that led to a relaxation in the prosecution of dissidents, paved the way for direct Presidential elections, expanded the power of the National Assembly, and generally made the government more accountable to the public.<sup>5</sup> Following closely on the heels of the political liberalization was an explosion of long suppressed labor disputes and union organizing which has still not

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3. Clifford, *Working Solutions*, in FAR E. ECON. REV., October 19, 1989, at 54 reports a sectoral shift from labor intensive manufacturing to capital and technology intensive manufacturing or services. The textiles, clothing, footwear, and toys industries, traditionally the backbone of the Korean economy, suffered a net loss of 24,000 jobs in 1988, and it appears that they experienced an even faster decline in 1989. Nonetheless, both highly skilled and unskilled production workers are in short supply as a growing proportion of the younger cohorts are receiving secondary school and college education. Since unemployment among the uneducated and unskilled has actually declined in recent years, the government has little reason to try to retain inherently low wage jobs in Korea.

4. In an open economy, the increased levels of consumption that are made possible by rising wage levels do not necessarily take up the slack in the demand for locally manufactured goods because the increased demand might be satisfied by imports. In the ROK, by contrast, the domestic markets for consumer goods remain highly protected and are a vital source of revenues for producers who are forced to operate at very narrow profit margins in the competitive export markets. Since the increased purchasing power for the general population translates directly into increased demand in the domestic markets, Korean producers can no longer be expected to automatically favor general wage restraint.

5. The events leading up to the liberalization of the ROK political processes, and the institutional changes which the liberalization entails, are described in West & Baker, *Constitutional Reform in South Korea: Electoral Processes and Judicial Independence*, 1 HARV. HUM. RTS. Y.B. 135 (1988)[hereinafter West & Baker, *Constitutional Reform*]. The interaction between the on-going developments in the political environment and the industrial relations system in the ROK is discussed in this article in Section VI.A., *infra*.

fully subsidized. Whereas the number of work days lost due to labor disputes in the ROK prior to mid-1987 had been extremely low by world standards, since that time the number and severity of labor disputes has sky-rocketed. In 1987 and 1988, the average number of work days lost was 175 times (17,500% !) the average for the preceding 5-year period,<sup>6</sup> and there are preliminary indications that the number for 1989 will also be very high.<sup>7</sup> Since 1986, the number of union members has increased by about 62%,<sup>8</sup> and the nature of the unions is changing as union leaders who failed to struggle aggressively enough for the members' interests are being chased out of office.

The authoritarian heritage has left an awkward legacy for the transition process that cannot be easily overcome. In this situation, a number of interesting questions arise. Is the increased labor militancy and worker assertiveness merely a temporary phenomenon until this period of turbulence comes to an end and a new equilibrium is established, or is it an on-going consequence of the rising skill levels and the reduced threat of absolute poverty? How is it possible for employers who had previously (with government support) treated all independent labor organizing or collective action as subversion or betrayal to accept the legitimate role of free labor unions? Can a discredited state-business alliance which is blamed for arbitrarily suppressing labor rights regain legitimacy in the eyes of

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6. Ministry of Labor data on strike activity as reported in INTERNATIONAL LABOUR ORGANIZATION (ILO), 1988 YEARBOOK OF LABOUR STATISTICS (1988) for the years 1982 - 1987 and in a report issued by the U.S. Embassy in Seoul (U.S. EMBASSY IN SEOUL, LABOR TRENDS IN THE REPUBLIC OF KOREA: JANUARY 1988 - MARCH 1989)[hereinafter cited as U.S. EMBASSY REPORT FOR 1988, are as follows:

Year	1982	1983	1984	1985	1986	1987	1988
Strikes	88	98	114	265	276	3617	1865
Workers	8967	11,100	16,400	28,700	46,900	934,900	_____
Days	11,504	8,671	19,900	64,300	72,000	6,946,900	5,401,000.

7. The Ministry of Labor reported that in the first quarter of 1989, 322 labor disputes were registered, as opposed to 224 labor disputes registered in the first quarter of 1988. As of October 31, 1989 the year-to-date number of registered labor disputes in 1989 was 1532, slightly down from the number of disputes in the same period in 1988; but the average duration of disputes in 1989 was longer than in 1988. Where agreement was reached on wage increases for 1989 the average increases were substantially larger than the increases that were granted in 1988. See, *Hankyoreh Shinmun*, August 26, 1989 and November 11, 1989; see also T. KIM, THE POLITICAL ECONOMY OF INDUSTRIAL RELATIONS IN KOREA (Korea Labor Institute, 1989).

8. See M. BOGNANNO, KOREA'S INDUSTRIAL RELATIONS AT THE TURNING POINT, (Korea Development Institute Working Paper No. 8816) (1988) at 35 for a chart on union membership compiled on the basis of Ministry of Labor and Federation of Korean Trade Union data. The number of union members in 1986 is listed as 939,000 (15.2% of the eligible workforce) and the number at the end of June, 1988 is listed as 1,525,000 (23% of the eligible workforce). Based on different counting criteria, the YEARBOOK OF LABOR STATISTICS (Ministry of Labor, 1989) lists the number of union members at the end of 1988 as 1,707,456, a 70% increase over the number as of the end of 1985.

workers by reforming the industrial relations system and eliminating the most egregious abuses? Short of a complete purge of office holders and a revamping of all political institutions, is it possible for the government and business elite who had previously suppressed labor by coercive methods to win labor's consent through moderate reforms? In a society where the formal legal system has become almost totally irrelevant in the practical conduct of labor affairs, can a fundamental restructuring of the labor relations system be accomplished by amending the labor laws? If not, how can the necessary changes be effected?

The above are only a sample of the many important questions that could be raised. Since there is no way that more than a small fraction of these questions at this time with any degree of confidence, persons involved in labor relations matters in the ROK are compelled to operate under conditions of profound uncertainty. Without speculating on the final answers, this article will attempt to provide some insight into the circumstances which contributed to the present situation. The unbalanced but relatively stable "industrial relations system" in place in the ROK through mid-1987 will be described,<sup>9</sup> with particular attention to the trade-off between coercive measures and measures that might be expected to generate the consent of labor. The article will also describe the strains placed on that system by recent economic, political and social changes. The complete break-down of certain aspects of the old system will be specifically noted. Finally, a tentative attempt will be made to assess the possibilities of the old repressive system being re-imposed (with or without marginal modifications) or of a fundamentally different system emerging.

## II. SUBSTANTIAL GOALS AS OPPOSED TO PROCEDURAL RULES

In labor relations matters, the role played by a government in pursuit of substantive goals may be contrasted to the role in such matters that the neo-liberal advocates of an open market economy would assign to the government.<sup>10</sup> In the latter conceptual frame-

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9. The term "industrial relations system" is used only for lack of any other expression that would not be unbearably awkward; it is emphatically not used to indicate that a coherent system of the type described by John Dunlop in his classic text, *INDUSTRIAL RELATIONS SYSTEMS*, (1958), was in place in the ROK either before or after the changes that occurred in 1987.

10. For the sake of developing an ideal-type conceptual framework, in the following discussion the arguments of our hypothetical neo-liberals will be taken at face value. Radical critics would argue, with ample justification, that a capitalist state cannot be impartial in the conflict between the interests of labor and capital, because the capitalist state is by nature fundamentally committed to upholding the rights of property. Since every capitalist state is ultimately aligned with capital, the extent to which it may appear to be impartial is only a matter of degree.

work, a sharp distinction is drawn between the public and private spheres of society. The state, as the embodiment of the public sphere, should not cross the line by identifying itself or its objectives with any private party. In its regulation of the labor relations process, the state is expected to be an impartial referee who ensures that the struggle between labor and management is conducted pursuant to neutral procedural rules but who, beyond that, does not attempt to influence the substantive outcome. Though in reality there may be no such thing as perfectly neutral procedural rules, in those cases where the parties (like it or not) are willing to conduct their struggle pursuant to the established rules, predictability results as to relevant factors and possible outcomes, and the results are afforded some measure of legitimacy. Though labor and management may maneuver for marginal changes in the procedural rules, their struggle is primarily for substantive outcomes, with the general framework of the rules accepted as a given. The role of the government is to uphold the rules by granting recognition to whatever outcome is reached in the contest between labor and management pursuant to the rules. The government's role in upholding the process precludes it from trying to influence the substantive terms that emerge as a result of the struggle between labor and management. The model does not contain an exception to the non-intervention principle even in cases where the struggle between labor and management may drive the parties toward a settlement that is bad for both sides (e.g., too short-term in orientation) or in cases where the outcome may be good for both sides but bad for the rest of society (e.g., leading to inefficiency and increased costs that are automatically passed along to consumers).

In contrast to the impartial referee in the liberal market economy, in cases where the state has substantive goals that are aligned with the interests of one side (employers) and are in conflict with the interests of the other side (labor), the state will be perceived by labor as an adversary which must be overcome or captured if labor's substantive goals are to be realized. In the extreme case the procedural rules may have no inherent legitimacy in the minds of any of the parties. In pursuit of its substantive goals, the state may consider extraneous (i.e., non-labor relations) factors, and it may utilize procedures that have no legal basis. Labor will only abide by the system as long as it lacks sufficient strength to change it, so with any increase in labor's power vis-a-vis employers or the state the whole system will become very unstable.

A state having substantive goals that may be conducive to the long-term mutual interests of both labor and management, or that may be in the interests of the whole society though they would be opposed by both labor and management in the specific case, would occupy a middle ground between the above-described extremes.

Examples of policies beneficial to both sides are skills development programs or an investment incentives program. An example of a program for the public good rather than for the particular benefit of labor or management in a specific instance would be the regulation or break-up of a monopoly in which rising labor costs were passed on to consumers in the form of higher prices.

The ROK is an anti-communist developmentalist state where the government has long given preeminence to two fundamental substantive goals: national security and rapid economic growth. Those goals are taken as a given to such an extent that specific government policies may be legitimized by showing how they contribute to one (or both) of the fundamental substantive goals. At least to the generation old enough to remember the devastation of the Korean war (1950-1953) the necessity of adequate provisions to ensure national security is undisputable. The Korean people have, however, now shown their unwillingness to endure all manner of restrictions on their civil liberties, imposed by a brutal and corrupt military dictatorship, in the name of national security. The opposition slogan that national security can best be assured by giving the people the kind of democracy they would be willing to fight for has generally won the day. The goal of rapid economic growth has fared better in the minds of the general population because, despite a less than perfectly equitable distribution, the obvious success has led to a demonstrable improvement in the standard of living of almost the entire population.<sup>11</sup> But for such improvements Koreans have had to work terribly long hours under unsafe or unhealthy working conditions, and despite the greatly reduced incidence of absolute poverty, the continued government policies which give priority to capital accumulation over individual consumption or social welfare has left Koreans with what must be recognized by world standards as a very austere lifestyle.

A subset of the state's general objectives which is applicable to labor relations was (at least until mid 1987) a policy to hold down labor costs<sup>12</sup> and to maintain strict labor control. The objectives of

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11. The tremendous increases in nominal and real wages in the ROK since the 1960s is discussed in AMSDEN, *supra* note 1, at 189-213. The improvements are still continuing. According to the U.S. Embassy report, *supra* note 6, based on the Embassy's own survey, the average yearly personal income increased 30.4% from US \$2,153 in 1987 to US \$2,809 in 1988. The Korea Times (October 3, 1989) cites a Korean National Statistical Bureau report of a 26.2% increase in the period from September 1988 to September 1988 in the average urban worker's monthly household income, but it notes that spending has increased by an even greater amount. Though the income distribution has apparently become more unequal since the mid 1970s, all reputable studies have found that the standard of living for almost the entire population has risen substantially from its very low base.

12. Holding down labor costs involves much more than merely holding down wages; it also requires holding down the costs of recruitment, training and administra-



the state were essentially congruent with the objectives of management in this regard, and in conflict with the objectives of labor. The Economic Planning Board was the key government agency for the formulation of wage guidelines and manpower policies, and the Korean Central Intelligence Agency (renamed the National Security Planning Agency) was the key agency responsible for ensuring that labor matters would not undermine political stability. Labor officials had little power and were relegated to relatively low status.<sup>13</sup>

The ROK lacks any consistent tradition of scrupulous adherence to the liberal market economy framework, and particularly in the area of labor relations no such tradition exists. It has never occurred to either the institutional representatives of labor in the ROK or to management to insist that the government should discontinue all substantive intervention. But workers can hardly be expected to passively acquiesce to government policies that are consistently contrary to their interests. Unless workers can be persuaded that the government's substantive goals are fair and beneficial to themselves as well as to the rest of society, the government will have to rely on coercive measures to prevent workers, individually or collectively, from attempting to upset the policies or the government itself.

Out of the complex and frequently inconsistent array of measures taken by the government and business elite in the ROK in sup-

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tion of the workforce, minimizing benefits and extraneous expenses, limiting the expenses incurred in providing a safe, healthy and pleasant workplace, increasing productivity and ensuring maximum management flexibility in the deployment of workers. Faced with rising wage demands, Korean employers have been able to realize great savings by neglecting safety and health matters. The result, as will be shown in Section V.C.1, *infra*, is a high rate of industrial injuries and fatalities.

13. The role of the government in dealing with labor matters during the Park Chung-Hee administration is described in G. Ogle, "Labor Unions in Rapid Economic Development: The Case of the Republic of Korea," (1973) (Ph.D. dis., Univ. of Wis. at Madison) and J. Choi, "Interest Conflict and Political Control in South Korea: A Study of Labor Unions in Manufacturing Industries, 1961-1980" (1983) (Ph.D. dissertation, Univ. of Chicago) [hereinafter Choi, Interest Conflict and Political Control]. The situation during the early years of the Chun Doo-Hwan administration is described in R. Rodgers "Labor Relations within the Context of Authoritarian Industrialization: The Case of the Republic of Korea" (1986) (M.S. thesis, Univ. of Wis.-Madison).

Throughout the entire period, the government, based on the recommendations of the Economic Planning Board, actively promoted a low wage policy. Since disruptive and very visible labor disputes were correctly perceived as potentially destabilizing to the government, however, the police and national security agents who intervened put pressure on the affected employers to make substantial concessions in order to facilitate rapid settlements. Thus the pattern of offering full wages for the period of the strike if the dispute was resolved by a fixed date became the norm. By contrast, the government would not compromise in its objective of weakening or destroying the radical faction of the labor movement which was not under its control. In several cases, including the Control Data (Korea) dispute of 1983, the national security agents blocked a potential agreement between labor and management to settle a dispute by reinstating dismissed radicals even though it meant the permanent closing of the manufacturing facilities.

port of their joint goals of holding down labor costs and maintaining labor control, three organizing schemata can be discerned. One may be characterized as the promotion of an ideology and the justification of certain practices in terms of a social order for industrial society that follows naturally from the Korean cultural heritage. Another may be characterized as the establishment of institutions to filter all labor organizing and labor demands through approved channels which are expected to deflect labor militancy and to promote cooperation and compromise for the common good. The final approach to be described in this article is the establishment of an official legal order relating to labor affairs. Depending on how each approach was/is implemented, the entire structure could either help to generate labor's consent for the system or to eliminate labor's opposition through coercive power. The argument will be that coercive measures predominated, at least through mid-1987, but that now the elite are finding it impossible or inexpedient to apply those coercive measures. The result is that the whole system has become less effective in advancing the substantive goals.

### III. "CONFUCIANISM" MADE-TO-ORDER FOR AN INDUSTRIAL SOCIETY

#### A. Linking "Confucianism" to Economic Development

To suggest that the elite in the ROK have, for instrumental purposes, promulgated a made-to-order form of Confucianism is to venture into an intellectual mine-field. The functionalist inference that a particular ideology which would tend to legitimize a particular social structure must have been designed for that purpose typically ignores the concrete historical processes through which ideologies actually develop. The whole approach smacks of a conspiracy theory. It is hard enough to imagine a consensus on the objectives to be promoted being reached among all of the relevant elite. The assertion that an ideology specifically designed to legitimize specified objectives could have been fabricated by the elite and successfully inculcated in the population would normally be very difficult to defend.

Having duly noted the dangers of a crude instrumentalist interpretation of ideology, one must still acknowledge the intriguing pattern that emerges from an examination of the experiences in economic development of those East Asian countries that had a dominant Confucianist heritage. Though the specific contents of the Confucianist heritage were not the same in the different countries, and though the current value systems in all the countries differ in important respects both from their respective traditions and from the current value systems of the other countries, still the fact remains that many of the traditionally Confucianist East Asian coun-

tries have experienced extraordinarily successful economic development. A group of Korean and American scholars summarizing the results of a multi-volume study on the socio-economic development of the ROK wrote on the role of the Confucianist heritage: "Wherever Confucianism was strong, economic development has prospered."<sup>14</sup> While that study was careful not to speculate on the specific links between the Confucianist heritage, the attitudes and characteristics typically found among Koreans today, and the ROK's rapid industrialization, other authors have not hesitated to make sweeping generalizations about how the East Asian cultural heritage has fostered inner feelings and behavioral patterns that have, in turn, contributed to social harmony and economic growth.<sup>15</sup> Such unqualified generalizations are easily attacked. Yet inasmuch as a positive relationship does seem to exist between a contemporary form of Confucianist attitudes and economic growth, if one assumes that such attitudes are transmitted through a more or less deliberate socialization process, one may reasonably ask whether the elite have not used the instruments at their disposal to try to influence the socialization process so as to instill in the population those attitudes which are conducive to economic development.

The fact that so many countries imbued with a Confucianist heritage did experience extraordinarily rapid industrialization may seem to suggest that the type of positive influence attributed by Max Weber to Protestantism on the development of capitalism in Western Europe could more properly be attributed to Confucianism in East Asia.<sup>16</sup> It must be remembered, however, that Weber himself had concluded that Confucianism was inimical to capitalistic development.<sup>17</sup> Other studies have found that in Korea the strict Neo-Confucianism of the Yi Dynasty (1392-1910) stood as a formidable barrier to capitalist development.<sup>18</sup> The actual sequence of events

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14. E. MASON, M. KIM, D. PERKINS, K. KIM & D. COLE, *THE ECONOMIC AND SOCIAL MODERNIZATION OF THE REPUBLIC OF KOREA* 3 (1980)[hereinafter *ECONOMIC AND SOCIAL MODERNIZATION*].

15. R. HOFHEINZ, JR. & K. CALDER, in *THE EASTASIA EDGE* at 48 and 112 (1982), make the following unblushing generalizations about the inner feelings of East Asian people:

Individuals in Eastasia [sic] are always ideally at one with their groups and have no private opinions or thoughts.

The answer to the puzzle of industrial peace lies, once again, in social attitudes. Eastasians tend to prefer compromise rather than confrontation, and the work-place is an arena for cooperation in the process of growth, not for conflict over the spoils.

16. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (T. Parsons trans. 1930).

17. M. WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM*, (H. Gerth trans. 1951).

18. See B. Hwang, *Confucianism in Modernization: A Comparative Study of China, Japan and Korea*, (1979) (unpublished Ph.D. dis., Univ. of California at Berke-

may be more consistent with the Marxist theory that changes in the relations of production give rise to corresponding changes in the cultural superstructure.<sup>19</sup> After external events had gotten the process of industrialization under way in the East Asian countries, a modified ideology which was consistent with the norms of an industrial society emerged.<sup>20</sup>

### B. Traditional and Contemporary Official Ideologies in the ROK

The changes that emerged in Korean Confucianism after the country was industrialized are illustrative of the process by which a traditional ideology may be transformed.<sup>21</sup> Korea, prior to the Japanese colonial period commencing in the early 1900s, was a traditional agrarian society largely isolated from the outside world. It officially maintained a Confucianist social order more stringent than was found in China. Observance of the five fundamental relationships (father-son, ruler-subject, husband-wife, elder-younger, friend-friend) was understood to be the cornerstone of a righteous social order. Except for the horizontal relationship between friends, the fundamental relationships were all hierarchical "natural status" relationships which imposed on the incumbents mutual but non-reciprocal obligations of responsible exercise of authority and of loyal submission. There was little room for people to determine their reciprocal rights and obligations through individually agreed upon "purposive contracts," or to assert their rights based either on such individual agreements or on universal legal principles.<sup>22</sup> Soci-

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ley); Lee, *Ideology and Practice in Korea's Economic Development* 9 KOREA OBSERVER 449 (1979).

19. Marx's position is stated in a famous passage from the Preface to CRITIQUE OF POLITICAL ECONOMY (N. Stone trans. 1904) at 11:

The sum total of the relations of production constitutes the economic structure of society—the real foundation on which rise the legal and political superstructures and to which correspond definite forms of social consciousness. . . . It is not the consciousness of men that determines their existence but, on the contrary, their social existence determines their consciousness.

20. Davis, *Religion and Development: Weber and the East Asian Experience*, in UNDERSTANDING POLITICAL DEVELOPMENT: AN ANALYTIC STUDY (M. Weiner and S. Huntington eds. 1987) at 221-280 describes, with particular reference to the Japanese experiences, the role of a modified Confucianist ideology in socialization for life in an industrial society. The implication is that the East Asian form of socialization, legitimized on the basis of this ideology, is more conducive for rapid economic development than the less coherent socialization process in the West.

21. For further information on the social and legal traditions of Korea, see P. HAHM, *THE KOREAN POLITICAL TRADITION AND LAW: ESSAYS IN KOREAN LAW AND LEGAL HISTORY* (1967). See also B. CHUN, W. SHAW & D. CHOI, *TRADITIONAL KOREAN LEGAL ATTITUDES* (1980).

22. Max Weber contrasted the natural status contracts associated with pre-modern societies with the purposive contracts associated with a modern capitalist society. These concepts are discussed in A. KRONMAN, *MAX WEBER*, 100-108 (1983).

ety was divided into distinct social classes with little chance for social mobility based on individual merit or the accumulation of wealth. Many privileges were reserved for persons born into the higher classes. There was a strict division of labor which proscribed any form of physical labor or of commercial activity for the ruling class. A gentleman was expected to dedicate himself to cultivating his own virtue through learning in literature, poetry and the Chinese classics rather than to concern himself with technical or commercial matters. Similarly, faithful observance of the complex rituals required by filial piety was expected to have priority over pursuit of one's individual career.

There are certain similarities in the practices and social relationships currently (or at least until recently) found in Korean industrial society and the normative Confucianist patterns in traditional Korean society, but in other respects there are marked differences. (The contemporary official ideology is herein referred to as a set of contemporary Confucianist norms, but it could alternatively, and perhaps with greater justification, be called "anti-communism" or "capitalist developmentalism.") Though one must be extremely cautious in making cultural generalizations, by carefully examining the actual practices in the contemporary Korean setting and weighing the explanations based on the Confucianist heritage against observable behavior, it is possible to discern the practical impact of certain elements of the hypothesized contemporary Confucianist norms. A hierarchical social order remains in Korea today, with substantial differences in the rights and obligations of persons in positions of authority as opposed to persons in subordinate positions, the well educated as opposed to the uneducated, the rich as opposed to the poor, older persons as opposed to younger persons, men as opposed to women, and so forth. In normal circumstances, subordinates tend to accept strict discipline and defer to authority without question. Koreans work very hard and compete above all else for further educational opportunities in order to contribute to the all-important goal of family advancement. There is little sympathy for anyone who disrupts social harmony by attempting to vigorously assert his or her individual rights. Loyalty and conformity to one's country, company, region, relatives, former classmates, or whatever the relevant group may be seems to be favored over Western style individualism.<sup>23</sup>

In contrast to the above norms, which are all conducive to

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23. The above list of generalizations is not based on any specific source, but rather is based on the author's critical reading of a wide array of English and (to a lesser extent) Korean sources, as well as more than six years experience living in the ROK. Counter-examples could easily be shown for every element on the list, but the argument herein is that the generalizations do reflect Korean norms and that they are more applicable to Korean society than to Western society.

rapid industrialization, other characteristics of traditional Confucianism have disappeared without a trace. Though certain traditional holidays associated with Confucianist family rituals are still celebrated, care is taken to ensure that the more elaborate rites do not interfere with a person's work-place obligations. Though women are typically poorly paid and are normally restricted to subordinate positions, the Confucianist attitudes about traditional family roles have not prevented a high proportion of the female population from participating in the labor force.<sup>24</sup> Education and wealth do provide an avenue to upward social mobility. Obtaining an advanced degree in business or engineering from a Western university is now the surest path to success. Nothing remains of the static social order associated with a peasant economy, or of the isolationism and aversion towards commercial activities.

It is not enough to explain that the contemporary normative structure differs from traditional Confucianism. How has this normative structure been implanted in the Korean population? Individual attitudes and cultural norms are not things that are transmitted biologically from generation to generation, nor are they things that emerge automatically from living in the motherland. They must be learned through a multi-faceted socialization process.<sup>25</sup> The following provides an overview of the institutions involved in shaping public attitudes and indicates the extent to which the government has been directly involved in transmitting what is here called the contemporary Confucianist norms to the Korean public. Our inquiry then examines the extent to which the contemporary Confucianist norms are reflected in Korean management practices and in the behavior of Korean workers.

In contrast to the situation during the Yi Dynasty, no institutions that are able to authoritatively proclaim what is required in a righteous (Confucianist) social order now exist. Instead, the con-

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24. U.S. EMBASSY REPORT, *supra* note 6, cites Ministry of Labor statistics showing that in 1988 women in the labor force made up 39.8% of the total civilian labor force. Ministry of labor statistics for 1985 put the labor participation rate for females 14 years of age and older at 40.6%, and the labor participation rate for married women where the husband was present at 41.7%.

25. B. MOORE, *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 486 (1966). Moore put the point nicely as follows:

The assumption of inertia, that cultural and social continuity do not require explanation, obliterates the fact that both have to be recreated anew in each generation. To maintain and transmit a value system, human beings are punched, bullied, sent to jail, thrown into concentration camps, cajoled, bribed, made into heroes, encouraged to read newspapers, stood up against the wall and shot, and sometimes even taught sociology. To speak of cultural inertia is to overlook the concrete interests and privileges that are served by indoctrination, education, and the entire complicated process of transmitting culture from one generation to the next.

tents of morals education in all the schools, whether public or private, are determined by the central government through the Ministry of Culture and Education.<sup>26</sup> All teachers must hold designated credentials, must teach the contents of the textbooks assigned by the central government, and must evaluate students according to standardized examinations. The curriculum for all students includes morals classes and anti-communism classes. More importantly, the whole school environment tends to promote obedience and conformity. A World Bank Study states:

Korean schooling is very much in the East Asian mold, its purpose being to inculcate a uniform set of values conducive to a common outlook, rather than to encourage individuality. Hence the schooling serves as a prelude to the factory. The training given, by emphasizing discipline and obedience, by playing up adherence to social norms and suppressing individual idiosyncracies, prepares young people to work together effectively under exacting factory conditions.<sup>27</sup>

The same points are made in greater detail in a study examining the role of education in the ROKs socio-economic development of the ROK. This latter study also stresses that the meritocratic educational system serve to legitimize social inequities:

Korean students who fail examinations tend to accept their lower incomes and status with no questioning of the system. With those lower incomes and status are also accepted certain definitions of self worth. The acceptance of lower levels of income is critical in a strategy of economic development that calls for low levels of consumption and high levels of productivity.<sup>28</sup>

The analogy between examinations in the contemporary educational system and the civil service exams for appointment to official positions during the Yi Dynasty may enhance the effectiveness of the examination system as a rationale for social inequality. It is a very dubious proposition, however, to assert that the disadvantaged accept the system that relegates them to lower status and income; they have no choice. Presumably the informants who explained the role of educational attainment in the legitimation of social inequality were, themselves, the well educated beneficiaries of the system. But even if the meritocracy rationale is not entirely persuasive to the disadvantaged, it is still effective in upholding the stability of the regime if it has the effect of minimizing solidarity between intellec-

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26. The following information about education in the ROK is based largely on the author's experience as a U.S. Peace Corps Volunteer in 1978-79 in a Korean middle school, and continued contacts with people who are involved, either as teachers, parents or former students, in the Korean educational system.

27. WORLD BANK, *EMPLOYMENT, WAGES AND MANPOWER POLICIES IN KOREA*, at i-ii (1983) (Report No. 4485-KO prepared by the East Asia and Pacific Regional Office)[hereinafter *WORLD BANK REPORT*].

28. MCGINN, SNODGRASS, KIM, KIM & KIM, *EDUCATION AND DEVELOPMENT IN KOREA* 374 (1980).

tuals and workers by convincing the intellectuals that the inequality is natural and proper.<sup>29</sup>

In addition to the educational system, the government has retained complete control over the broadcast media and only after the end of the Chun Doo-Hwan administration has it begun to loosen its control over the print media. The government during the Park Chung-Hee and Chun Doo-Hwan administrations also relied on the extremely powerful and well funded movements known as the "New Village Movement" (*Saemaul*) and, in urban areas, the "New Mind Movement" (*Saemaum*) to mobilize mass participation in community development projects, instill the attitudes of diligence and cooperation, and to rally political support. Still another source of influence was the neighborhood meetings which a representative of every household was supposed to attend. For all men, extensive social indoctrination is conducted during the three years of compulsory military service and in the subsequent military reserves training lasting for several weeks every year.

A closer examination of the New Village Movement, and particularly of the chapters that were established in factories and workplaces, will be illustrative of the indoctrination process.<sup>30</sup> Whereas the New Village Movement was initiated by President Park and was promoted by the ruling political party for such public purposes as community development and political mobilization, its applicability to the factory setting was quickly recognized. Local government officials, employers associations and local chambers of commerce were all instrumental in introducing it into the factories. The factory New Village Movement (*Jikjang Saemaul*) stressed the firm-as-family motif under the slogan, "Treat the employees like family; do factory work like one's own personal work." The factory New Vil-

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29. Much to the dismay of employers and government officials, the effort to inhibit worker-student solidarity has not been entirely successful. Labor activists who are either students or college graduates, but who have disguised their educational credentials in order to infiltrate the ranks of production workers, are seen as a serious threat to employers and government officials. Such "disguised workers" were blamed by the Ministry of Labor for 37 percent of the labor disputes in 1985. They also clearly played an important role in labor organizing in subsequent years. In order to counter this threat, government agents advised employers to take (technically illegal) steps to dismiss employees who had not disclosed their educational accomplishments or to re-assign them to non-production jobs, and to carefully screen new applicants. For its part, the government arrested and severely prosecuted intellectual activists who had intervened in labor affairs.

30. Information on the factory New Village Movement comes primarily from Choi, Interest, Conflict, and Political Control, *supra* note 13, at 288-306, and from an interview conducted by the author in 1983 with an administrator of the Mason Free Export Zone industrial complex. For a general description of the New Village Movement, see Moore, *Mobilization and Disillusionment in Rural Korea: The Saemaul Movement in Retrospect*, in 57 PAC. AFF. 577 (1984); see also Lee, *Ideology and Practice*, *supra* note 18.



lage Movement aimed to generate patriotic enthusiasm and to mobilize the workers for the achievement of heroic accomplishments at the work-place. Loyal workers who identified completely with the firm would willingly come to work early and continue late in order to increase productivity and eliminate defects. In turn, employers were encouraged to strive to improve the welfare facilities for their employees. An important aspect of this program was labor education to promote the traditional values of diligence and cooperation and to warn workers of the perils of radicalism and labor militancy. Though many employers found the program beneficial, the New Village Movement was the object of such serious financial scandals during the Chun Doo-Hwan administration that it has now fallen into disrepute.

### C. Confucianist Aspects of Industrial Relations Practices

Employers in the ROK do typically manage their enterprises in accordance with what is herein called contemporary Confucianist norms, and they often justify their employment practices by reference to such norms. Management in (frequently individually or family owned) enterprises is typically authoritarian, with very limited delegation of authority and strong emotional resistance to the notion that employees or unions should have a right to challenge management decisions. (By contrast, Korean firms are far more subject to government intervention through administrative guidance than their Western counterparts.) Employees are required to show deference to their employers and to follow all instructions without any questions. Women are frequently excluded from responsible positions even though they may have excellent objective qualifications, and there is a large differential between the compensation paid to men and to women.<sup>31</sup> In most enterprises women are still expected to resign from their regular permanent positions when they get married, but of economic necessity many married women continue to participate in the labor force as irregular "temporary" workers with low status and low pay.<sup>32</sup> Compensation and position

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31. For a table comparing wage differentials in manufacturing by sex in various countries (showing the wages for women in the ROK at 44.5% of the wages for men), see AMSDEN, *supra* note 1, at 204. Economic Planning Board statistics for 1983 showed that the average woman's wages on an hourly basis were only 42 percent of the average man's hourly wages. U.S. EMBASSY REPORT, *supra* note 6, at 13, indicates that in 1988 the average wage for women workers was 46% of the average for men.

32. It is illegal to discriminate against women in terms or conditions of employment, and the establishment of a lower mandatory retirement age for women is explicitly prohibited. In this regard, the Korean Supreme Court recently held that a company rule setting the mandatory retirement age for a predominantly female job at a lower age than that for otherwise comparable job classifications occupied predominantly by men constituted illegal discrimination. 5 KIM & CHANG BULL. 5 (No. 2, June, 1989). Nonetheless, the discriminatory practices prevail. This fact has disturbing implications,

within the company are largely determined on the basis of status categories such as sex, age and educational achievement, rather than competence on the job or work performance.<sup>33</sup> Management continues to set its own standards as to work hours, overtime pay, provisions for industrial safety and health, etc., with little concern for the applicable laws and regulations. Often the practices fall short of what the law requires, but at other times benefits in excess of the legal requirements are granted.<sup>34</sup> This resembles the traditional Confucianist pattern where the patriarch responded in a discretionary way to the needs of the subordinate rather than acting in conformity to the written law.

In some respects, the contemporary Confucianist norms are also reflected in employee attitudes and behavior, but in other respects most employees express very non-Confucianist attitudes. A study which investigated, *inter alia*, whether employees in a large modern enterprise (Hyundai Motors) had traditional (Confucianist) attitudes or modern attitudes similar to what would typically be found among employees in advanced industrialized countries found that the Korean employees overwhelmingly preferred an employer who might require extra work but who would take a personal interest in their welfare over one who would strictly follow the contractual relationship. On the other hand, when considering their actual employment relationship, most of the employees did not feel loyal to their employer; the majority believed that the company was concerned only about profits and felt a need for a genuine labor union that would be able to force management to improve wages and working conditions.<sup>35</sup>

It is true that Korean employees do typically conform to Confucianist norms in some aspects of their behavior, but they have little choice if they wish to retain their jobs or to be promoted. They are eager for as much education as they can get, on or off the job. They are hard workers, willing to work long hours under difficult conditions in order to meet (often arbitrary) deadlines. It is

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not only because of the tendency of employers to discriminate against women, but also because of the failure of the women who have suffered from discrimination to assert their legal rights.

33. In recent years, labor unions in some foreign invested enterprises have defensively latched onto the "natural status compensation system" to prevent management from establishing a potentially anti-union merit pay system.

34. For aspects of the relationship between the applicable laws and the actual practices, see Sections V.C. 1-3, *infra*.

35. Form and Bae, *Convergence Theory and the Korean Connection*, 66 Soc. FORCES 618 (1988). The survey finding that most of the employees would have wanted a genuine labor union to represent them was born out by the struggles at Hyundai Motors to get a union established and recognized after mid-1987. See Clifford, *Labour Strikes Out*, FAR E. ECON. REV., Aug. 27, 1987, at 14. Presently, Hyundai Motors has one of the largest and most militant unions in the ROK. See Clifford, *The Engine Is Straining*, FAR. E. ECON. REV., Jan. 19, 1990, at 35.

almost unheard of for Korean employees to attempt to assert their individual or collective rights through formal legal procedures,<sup>36</sup> but this may be because they lack the requisite knowledge and legal resources, or because they have learned that an attempt to take legal action will be met by retaliation. In the presence of authority, Korean employees are typically deferential, but the situation changes when the supervisor's back is turned. The recent surge of union organizing, and the escalating demands which have been presented to management, conflict with the Confucianist norms. The present situation, and similar incidents in the past, make it highly questionable whether the non-elite had ever fully internalized the contemporary Confucianist norms.<sup>37</sup> At this time the appeal of a counter-ideology, a heady vision of democracy as the system that will bring social equality and personal freedom, seems to have greater cogency.

Employers anywhere would like to have diligent, well-trained, cooperative and deferential employees whom they could manage in accordance with their unilateral authority, but the system is obviously less desirable from the employees' perspective. Advocates of the Confucianist norms, however, point out that more is involved. An employer who fully conformed to the contemporary Confucianist model would accept an obligation to grant a secure job to his employees and to provide for the legitimate needs of the employee's family, even on those occasions when unexpected needs arose which exceeded the normal wages. In turn, the employee should be loyal and should identify completely with the interests of the employer. In such circumstances the employee could feel secure in his or her efforts to promote the employer's interests, without giving a thought to the possibility of obtaining a better job elsewhere. Though there are many emotional and attitudinal elements of this idealized firm-as-family structure, its clearest objective manifestation would be in stable long-term employment patterns.

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36. See T. KIM, *THE POLITICAL ECONOMY OF INDUSTRIAL RELATIONS IN KOREA*, *supra* note 7, especially at 39-40, for a discussion of the infrequent application of formal legal procedures to labor disputes. See also Section V, *infra*.

37. Repeatedly, throughout Korean history, whenever the hegemonic power of the elites has broken down or a power vacuum has emerged, popular uprisings have sprung up and the Confucianist social norms have been challenged. Examples from the past include the Tonghak Rebellion in the late 19th century, the leftist "People's Committees" which sprang up throughout the Korean peninsula after the Japanese colonial powers were defeated, the student uprising that overthrew the Syngman Rhee administration in 1960, and the social turbulence leading up to and following the assassination of Park Chung-Hee. From these events it appears that the official ideology has always rested on the power of the elite to demand unquestioning submission rather than on the people's internalized system of values. From the time the authoritarian power of the Chun Doo-Hwan administration began to crumble until the present, the old elite have failed to reestablish their absolute hegemonic authority, and the challenges to the contemporary Confucianist social norms have not subsided.

Whereas the socialization process might contribute to this idealized type of relationship, unless employers through their own practices provide effective assurances of fair treatment and long term security to their employees, the ideal will not be realized in practice. Korean labor market statistics show labor turnover rates slightly in excess of the U.S. levels and far higher than the Japanese levels.<sup>38</sup> That suggests that if an element of the contemporary Confucianist industrial relations model is secure long term employment, the model may not be applicable to the ROK. By looking only at the employment practices affecting permanent male employees of large enterprises, however, a different picture emerges. For such employees there is an expectation of continuous employment without any lay-offs until the mandatory retirement age, or for as long as the firm survives. The only exception is if the employee voluntarily resigns to accept a better job elsewhere.<sup>39</sup> In the typical Korean compensation structure, the component for length of service with the same employer (net of age and general experience in the industry) is far smaller than the pure length of service component in Japanese firms, and Korean firms do not restrict their hiring to entry-level positions.<sup>40</sup> As a result, a Korean employee is far more likely than his Japanese counterpart to be able to improve his position by taking a job with a different employer. This departure from the Japanese model (which is also a departure from the theoretical contemporary Confucianist model) decreases the degree of confidence Korean employers may have that they will be able to retain for themselves the full benefit of training obtained by their employees. However, mid-career movement by male employees of large compa-

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38. For data on labor turnover in the U.S., Japan and the ROK, see S. KIM, IS THE JAPANESE SYSTEM OF LIFETIME EMPLOYMENT APPLICABLE TO A DEVELOPING COUNTRY SUCH AS KOREA? (Korea Development Institute Working Paper Series No. 82-3, 1982) and S. KIM, EMPLOYMENT, WAGES AND MANPOWER POLICIES IN KOREA: THE ISSUES (Korea Development Institute Working Paper Series No. 82-4, 1982) [hereinafter EMPLOYMENT, WAGES AND MANPOWER POLICIES]. Separation rates in Japan declined from just over 2 percent per month between 1960 and 1973 to 1.4 percent per month in 1979. In the U.S., separation rates fluctuated continuously at around 4% per month, and in the ROK separation rates fluctuated continuously at just below 6% per month. The proportion of employees who had been with the same employer for more than ten years was also slightly lower in the ROK than in the U.S., and far lower than in Japan.

39. EMPLOYMENT, WAGES AND MANPOWER POLICIES, *supra* note 38, presents survey data on employees' expectations showing that most Korean employees would expect to be retained with no reduction in salary or hours even in the event of a severe business decline. A study by S. Park, Wages in Korea: Determination of Wage Levels and Wage Structure in a Dualistic Labor Market (1980) (unpublished Ph.D. dissertation, Cornell University)[hereinafter Park, Wages] found that separation rates were highest among young employees and that separations were always classified as voluntary.

40. See *id.* for a thorough discussion of the relative weight given to various factors in the determination of wages in the ROK and in Japan.

nies to different employers is a relatively small portion of the labor turn-over in the ROK. The important point is not that a close approximation of the contemporary Confucianist labor relations model does not exist anywhere in the ROK but that, in practice, employers have not applied the key elements of the system, such as secure long-term employment, to the numerically most important segments of the Korean work-force.

## VI. STATE CORPORATIST PATTERNS OF INTEREST REPRESENTATION

### A. State Corporatism Defined

The preceding section contrasted what may be termed contemporary Confucianist norms with the individualistic ideology associated with Western pluralism. This section contrasts an exclusionary corporatist system of interest representation to the hypothetical pluralist alternative in the political arena and in the labor-management relationship.

Corporatism, as it is normally defined in contemporary literature, is a socio-political system in which patterns of interest representation are regulated by the state.<sup>41</sup> As will be explained below, the state in the ROK has historically regulated the patterns of interest representation in a way that corresponds with that definition.<sup>42</sup> But the term, "corporatism," at least as it was originally conceived, did not refer merely to such institutional arrangements; it also expressed a view of society, based on philosophical or even religious principles associated with a Roman Catholic heritage, whereby the opposition between different interest groups, and particularly between labor and capital, could be abolished. The solution to the conflict of interests in the classical conception of corporatism was the organization of individuals according to the functions they performed into social bodies which would be empowered to devise a

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41. The frequently quoted definition of corporatism in P. Schmitter, *Still the Century of Corporatism?*, in *TRENDS TOWARD CORPORATIST INTERMEDIATION* 7, 13 (P. Schmitter and G. Lembruch eds. 1979), taken herein as the standard, is as follows:

Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state, and granted a representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

42. For a thorough treatment of the Korean industrial relations system prior to and during the Park Chung-Hee administration as an example of state corporatism see generally Choi, *Labor Unions*, *supra* note 13. For a more recent study dealing with the issues from a different angle, see West, *South Korea's Entry into the International Labour Organization: Perspectives on Corporatist Labor Law during a Late Industrial Revolution*, 23 *STAN. J. INT'L L.* 477 (1987).

strategy to reconcile conflicts and to promote the common good.<sup>43</sup> Though contemporary forms of corporatism did not necessarily spring up from such ideological roots, lingering ideological influences do remain, at least in Western and Latin American countries. The legitimacy of corporatist patterns of interest representation (i.e. the effectiveness of the system in securing the consent of the various constituencies for their respective representatives and for the policy outcomes) depends on the degree to which the corporatist patterns are able to advance the interests of the various groups and of the whole society. By hypothesis, if the interests of one group (say labor) were consistently and systematically subordinated to the interests of an opposing group (say capital), the system would break down due to its inability to enlist the voluntary support or enthusiasm of the disadvantaged group.

Without further refinement, the institutional definition of corporatism is too broad. It fails to distinguish between such disparate cases as, on the one hand, fascist Italy of the 1930s, Spain and Portugal up through the 1960s, and a number of authoritarian Latin American countries including Argentina and Brazil through the early 1970s, and on the other hand such strikingly different countries as Sweden, Switzerland and the Netherlands. All would fit reasonably well under the definition. It is not surprising, therefore, that Schmitter and other social scientists do distinguish between a liberal variety, called "societal corporatism," and an authoritarian variety known as "state corporatism." State corporatism is typically the product of top-down intervention by the state for the purpose of excluding unacceptable demands by the public for a greater share of society's political power or material resources. Such exclusionary policies may be justified by a strong ideological orientation, such as nationalism or anti-communism, which gives preeminence to national security considerations or the goal of rapid economic growth. State corporatism is most likely to emerge where there is a strong centralized government, frequently dominated by a single leader or small clique, who is not subject to any meaningful electoral challenges.

A form of state corporatism identified by Latin American scholars is "bureaucratic authoritarianism." These scholars have written that the emergence of authoritarian corporatism is determined less by a country's philosophical heritage than by its delayed dependent development. In such circumstances, the state finds it necessary, under conditions of high mobilization, to resort to corporatist devices in order to limit public demands and, thereby, to in-

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43. For a discussion of the religious and philosophical roots of what may be called "classical corporatism," see C. LANDAUER, *CORPORATE STATE IDEOLOGIES: HISTORICAL ROOTS AND PHILOSOPHICAL ORIGINS* (1983).

crease predictability and capital accumulation.<sup>44</sup>

It is evident that state corporatism need not be the natural outgrowth of a society's shared values, and its survival is not dependent on the consent of various categories of individuals whose interests are subordinated to the policies of the strong government. Instead, state corporatism rests on the ability of the state, dominated by a small group of elite, to withstand any challenges posed by civil society. Nonetheless, even in this system, if the elite wish to ensure that subordinate groups will bring only acceptable types of demands in accordance with approved procedures, and only through their designated representatives, then the elite must grant a more favorable outcome to demands presented through the approved channels than to those which are brought in defiance of the established system. A regime which typically ignored humble petitions made through permissible channels and severely punished anyone who made impermissible demands would satisfy that rule, but such a regime could hardly be expected to win popular support. It could only stay in power as long as it had the unchallenged ability to command, and the will to use, all of that society's instruments of coercive force.

For a regime that has ruled by force, implementing a process of liberalization is a risky proposition. Especially where public uprisings have been successful in forcing the dismantling of the state's repressive apparatus, the formerly victimized or suppressed classes are likely to seek revenge against their oppressors. It might theoretically be possible for what started as a coercive state corporatist system to evolve peacefully into a system that could generate the voluntary consent of the public if substantial benefits sufficient to satisfy the public demands were supplied through the established channels.<sup>45</sup> Historically it is more common for meaningful reforms to occur in response to escalating demands made in defiance of the approved channels. Where the ruling elite are fundamentally associated with exclusionary policies to the extent that the disenfranchised majority reasonably believes that the old system must be overthrown in order for lasting gains to be realized, no reforms may be sufficient to salvage the old state corporatist structure.

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44. On the concept of bureaucratic authoritarianism, see generally G. O'DONNELL, *MODERNIZATION AND BUREAUCRATIC AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS* (1979). See also O'Donnell, *Corporatism and the Question of the State*, in *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (J. Malloy ed. 1977) and Baretta & Douglas, *Authoritarianism and Corporatism in Latin America: A Review Essay*, in *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (J. Malloy ed. 1977).

45. It is difficult to imagine this happening in practice except, perhaps, as a result of irresistible pressures being brought to bear on the government or as the side effects of a regime change.

## B. State Corporatism in the ROK

Korea does not have a Roman Catholic heritage similar to that in the Western and Latin American countries in which corporatism took root, but in other ways it was ripe for the development of authoritarian state corporatism. The elite of the Yi Dynasty had been largely discredited during the Japanese colonial period and then, with the defeat of Japan, the new elite were also eliminated. Radical grass-roots community organizations and a network of leftist labor organizations quickly sprang up to fill the power vacuum, but they were brutally crushed by the American military occupation and the right wing government it helped to install in the southern part of Korea.<sup>46</sup> The cataclysmic Korean War followed. When a shaky cease-fire was finally signed, the U.S. and U.N forces left behind a ROK military establishment and internal security system that was over-developed in comparison to the inchoate social and economic institutions. That resulted in the state being in a position to create or command other institutions rather than having to moderate the clash between social institutions stronger than itself. In the years since the armistice was signed, a series of authoritarian leaders has continually dominated the government (except for one year-long interlude in 1960) and there was never a peaceful transfer of power based on the results of an election until 1988. These historical and political conditions thus made it possible for state corporatism to emerge.

The economic conditions identified by Latin Americanists as factors contributing to the emergence of bureaucratic authoritarianism (delayed development where complete protection from the world economy is lacking) were also present in the ROK.<sup>47</sup> The export-led industrialization strategy which it pursued in its race to catch up with the industrialized nations has required no less exclusionary policies vis-a-vis Korean farmers, consumers and workers

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46. For a fascinating account of this historical period, see generally B. CUMINGS, *THE ORIGINS OF THE KOREAN WAR: LIBERATION AND THE EMERGENCE OF SEPARATE REGIMES* (1981).

47. An interesting debate has arisen among scholars who have examined economic development in Latin America and in the ROK as to whether the findings of *dependencia* theorists are applicable to the ROK. See generally Evans, *Class, State and Dependence in East Asia: Lessons for Latin Americanists*, POL. ECON., *supra* note 1 at 203; Cumings, *The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles and Political Consequences*, 38 INT'L ORGANIZATION 1 (1984) (reprinted in POLITICAL ECONOMY, *supra* note 1, at 44). See also DEPENDENCY ISSUES IN KOREAN DEVELOPMENT (K. Kim ed. 1987). Whether or not economic development in the ROK should be considered "dependent development," there is general agreement which the ROK has been able to escape the worst effects of "development of undevelopment" or "blocked development." What has set the ROK apart has been the existence of a strong state that was able, in conjunction with local capital, to set the terms for foreign involvement in the Korean economy in accordance with Korea's own development strategies.



than the dependent development experienced in Latin American countries. Within the scope of this article it will only be possible to examine the state corporatist patterns of interest representation applicable to workers, but other studies have shown how the government has played an active role in the regulation of agriculture, commerce and industry in support of its chosen economic development strategy.<sup>48</sup>

In a state corporatist regime, the government and business elite may find it useful to allow for the representation of workers' interests within the limits that the government and business elite have set. By sanctioning certain patterns of representation, the elite may be able to pre-empt or displace more militant worker representatives. Approved institutions or worker representatives may also be able to assist in the management of the work-force so workers will be more cooperative or will attain higher levels of productivity. In a moderate regime the workers may be allowed, within fairly broad limits, to select representatives of their own choosing and the workers' representatives may be granted sufficient space, within the above constraints, to effectively promote the workers' interests. In a more exclusionary regime, on the other hand, the patterns of worker interest representation would be constrained within narrow limits. The risk associated with the more exclusionary strategy is that if the workers' confidence in the designated representatives falls below a certain level, those representatives will not be able to perform their necessary functions. Furthermore, government or employer involvement in the selection of worker representatives who subsequently betray the workers' interests will also reflect negatively on those government officials or the employer. Thus the problem for the government and business elite is to have honest representatives who competently represent the workers' interests, but who will do so within prescribed limits.

### C. Corporatist Patterns of Labor Relations

Since the Korean government and business elite have been committed, at least until recently, to the substantive goals of hold-

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48. The tremendous array of incentives and disincentives which the government is able to apply in an essentially discretionary manner to compel business organizations to act in the desired manner is described in L. JONES & I. SAKONG, *GOVERNMENT, BUSINESS AND ENTREPRENEURSHIP IN ECONOMIC DEVELOPMENT: THE KOREA CASE* (1980). See also *ECONOMIC AND SOCIAL MODERNIZATION*, *supra* note 14; AMSDEN, *supra* note 1. In regard to the government's regulation of agriculture and the substantive goals it pursued in this area, see S. BAN, P. MOON AND D. PERKINS, *RURAL DEVELOPMENT* (1980); P. Kim, *Saemaul Agriculture: South Korean Farmers Prop-up Export-Oriented Economy*, in 12 *AMPO: JAPAN-ASIA Q. REV.* 2-11 (No. 1, 1980, pts. 1 & 2), *id.* 56-65 (No. 3, 1980); and J. Shim, *Structural Determinants of Rural Out-migration in Peasant Households of South Korea*, (1985) (unpublished M.S. thesis, Univ. of Wis.-Madison).

ing down labor costs and keeping labor strictly under control (i.e. withholding from labor a share of the material and political resources of society commensurate with labor's contribution), it has been necessary for them to implement an exclusionary system having extensive and overlapping mechanisms for labor control. To this end they have followed a four-pronged approach in their efforts to control the channels of interest representation for workers: 1) to the greatest extent possible, the employer's absolute discretion to manage the work-force is to be preserved; 2) independent and/or adversarial labor representatives, whether or not they are formally organized as labor unions, are to be excluded to the greatest possible extent; 3) those labor unions which are allowed to exist must limit their demands to the wages and working conditions of their own members, and they must limit themselves to rather ineffectual procedures in pursuit of such demands; and, 4) institutions to promote cooperation and loyalty and to resolve labor-management issues in a non-adversarial way must be encouraged to function as an alternative to labor unions. The following section will explain how the above approach was put into practice and how it experienced mixed results in meeting its objectives prior to 1987. Section V.D., *infra*, discusses the partial breakdown of the system after 1987.

### 1. Maintaining Management Discretion

Under Korean law and practice, even in work-places where no union has been established there are certain situations in which an employer should discuss specified issues with, or obtain comments from, the employees' representative;<sup>49</sup> but in these circumstances the employees' representative cannot take a fully adversarial stance since the employer still has ultimate authority to make his own unilateral decision. As described below, employers may use non-adversarial forums to generate employee cooperation or to defuse employee grievances, but some employers choose to neglect such forums or to treat them as an empty formality. A survey of Korean employers conducted in 1988 found two-thirds of the respondents willing to acknowledge their belief that employers should be allowed to determine management and personnel policies unilaterally.<sup>50</sup> In its official guidelines to regional offices for handling labor

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49. Employers are legally required to obtain the comments of the employees' representative when they prepare their workplace "Rules of Employment." LABOR STANDARDS ACT art. 95 (Law No. 286 (1953), amended by Law No. 791 (1961), last amended 1989)[hereinafter LAB. STANDARDS ACT]. In addition, as explained below, a Labor-Management Council must be established in workplaces having 50 employees or more. Labor-Management Council Law (Law No. 3348 (1980), amended by Law No. 3968 (1987))[hereinafter LAB.-MGMT. COUNCIL L.].

50. T. KIM, POLITICAL ECONOMY, *supra* note 7, at 31, citing the results of a Korea Labor Institute study.

disputes, the Ministry of Labor has adopted a very similar position in regard to management's unilateral prerogatives.<sup>51</sup>

## 2. Excluding Radicals from the Labor Relations Arena

Not surprisingly, a union is seen as a much more serious threat to the employer's absolute authority than non-binding forms of labor-management consultation, and consequently employers have acted much more forcefully to prevent the establishment of unions or to render them impotent. Management practices to avoid unions range from generous programs to keep the employees satisfied and to earn their loyalty to more coercive (and illegal)<sup>52</sup> techniques, including threats, intimidation, surveillance, dismissals, kidnapping of union organizers and use of goon squads to attack union sympathizers.<sup>53</sup> Unfortunately, use of such tactics has still not disappeared. The prolonged and frequently violent dispute involving Hyundai Heavy Industries from 1988 to mid-1989 provides a recent example of the lengths to which some employers will still go to avoid dealing with a labor union in good faith. The employer's tactics went from attempted co-optation to intimidation to actual violence to successful appeals for very heavy-handed government intervention. Ultimately, 14,000 riot police and soldiers were used to break up the strikers and to restore order. Hundreds more of the strikers were inducted into military service.<sup>54</sup>

In the past, one of the simplest and most effective strategies to avoid having to deal with unions was for employers, through collusion with the government officials whose recognition of the union was required in order for the union to legally come into existence, to temporarily or indefinitely cause the granting of recognition to be delayed. During the interval before recognition, the union organizers or potential members could be dismissed or pressured into withdrawing the report of the establishment of a union.<sup>55</sup> Some em-

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51. See *Hankyoreh Shinmun*, December 4, 1989.

52. Article 39 of the LABOR UNION ACT (Law No. 280 (1953), amended by Law No. 1329 (1963), last amended by Law No. 3966 (1987))[hereinafter LAB. UNION ACT] contains a list of prohibited employer unfair labor practices which is rather similar to section 158(a) of the U.S. National Labor Relations Act (29 U.S.C. § 58(a)). As with so many other provisions of Korean labor law, the record of enforcement of these prohibitions has been very uneven.

53. There are many accounts of the often brutal techniques used by employers to prevent unions from being established. See generally, Choi, "Interest, Conflict, and Political Control," *supra* note 13. See also ASIA WATCH COMMITTEE, HUMAN RIGHTS IN KOREA, 170-288 (1985)[hereinafter ASIA WATCH COMMITTEE].

54. See Hwang, *Hyundai Jungkonggeup Satai: Jinsang kwa Junmal* [The Hyundai Heavy Industry Incident: Actual Events and Outcome], SINDONG-A, May, 1989 at 468.

55. A tremendous amount of controversy has arisen in connection with the union recognition procedures. On the one hand, there is no significant threshold which must be reached in order for a union to be established. A prior requirement of at least 30 employees or 20 percent of the eligible employees at a workplace (whichever was less)

ployers follow a more proactive approach by encouraging the formation of a friendly union which, once in place, serves to immunize the workplace by driving out any independent adversarial union.<sup>56</sup>

It is important to note in relation to the contribution made by

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has been eliminated. There are no U.S.-style elections to ensure that the majority of employees support the union, and no provisions exist for decertification elections to remove a union which lacks majority support. Thus, it is very possible for a union which has the support of only a very small minority of the employees to be established.

On the other hand, though the LAB. UNION ACT, *supra* note 52, arts. 13 and 15, implies that the administrative authority should simply accept reports of union establishment and issue certificates of union registration as a routine matter, this has historically been an area of tremendous abuse. The reports of union establishment were previously (if not presently) handled by police or national security agents who would cause long delays (one certification case reported by Choi, "Interest, Conflict, and Political Control," *supra* note 13, at 162-164, spanned three years) and alert the employers of the need to deal with the union threat. Large employers had ongoing arrangements with the administrative authorities to prevent the formation of unions in their companies. Though the problem has now become a matter of public record, one still frequently hears of difficulties encountered by unions in obtaining recognition. A well-known example which is still not resolved as of the time of this writing is the frustrated organizing drive at the Samsung shipyards. In order to prevent such abuses, reformers are attempting to insert legal provisions that will require the administrative authorities to issue the certificates of union registration in an expeditious manner. Previously, the law did not specify the time within which the certificate was to be issued. In a two-step process, a 10-day time limit was inserted, followed by a reduction of the limit to 3 days. The opposition parties in the National Assembly would now like the law to provide that the certificate should be issued immediately.

56. The LAB. UNION ACT, *supra* note 52, art. 3.5, excludes from the definition of a labor union any organization intending to represent employees who are already eligible to join an existing union. The intention is clearly to ensure that an established union will have monopoly representational rights. Though on its face the law does not prohibit the establishment of a second union to represent a different category of employees than those who are represented by the first union, the labor authorities as a practical matter consistently refuse to recognize another union in a workplace where one union (no matter how unrepresentative or limited its membership might be) has already been established.

Aside from the matter of immunizing the workplace based on that legal provision, there have been many cases where members of a pro-employer "union" have physically attacked union organizers and employees who wanted to form an independent union. A well-known case from earlier years was the series of violent confrontations in Tong-Il Textiles Company between 1976 and 1978. In these incidents a pro-management union of male foremen prevented the establishment of an independent union by the overwhelmingly female workforce. Especially in recent times as unions have become a more significant factor in Korean industry, violent conflicts between the independent unions and pro-employer groups, known as "save the company leagues," have been involved in a large proportion of the most serious labor disputes. An article appearing in the July 22, 1988 Korea Herald describes the summary information that was presented to the National Assembly regarding 19 instances of "save the company" violence in conjunction with labor disputes.

As will be explained below, management often expresses the opinion that labor radicals are communists and/or are determined to destroy the company and the national economy. In such circumstances, though it may never be possible to trace the direct links between management representatives and the violent "save the company" groups, one may easily infer that persons involved in such groups almost always believe they are carrying out the employer's wishes.

the suppression of unions to the overall state corporatist goals that the success of an employer in preventing the formation of a union in its company, or in installing a friendly union, does not necessarily insure that employer against all risk of serious labor disputes. Ministry of Labor data for the years 1986 and 1987 show that in each year in somewhat over 40% of the strikes there was initially no union involved,<sup>57</sup> though one of the results of about half of this subset of the total number of strikes was the establishment of a union. Furthermore, approximately 14% of the strikes involved unions that were experiencing intra-organizational conflict.<sup>58</sup> The experiences of earlier years makes it clear that the most serious disputes occur in situations where there is no union, or where the union leaders have lost the confidence of the workers because they are suspected of being pro-government or pro-management.<sup>59</sup> In such circumstances, the employees have no clear leaders who are able to manage the dispute, and the government and employers have no one to negotiate with who will be able to bring the disturbance to an end.

Keeping radicals and labor militants completely out of the labor relations environment has been just as much an objective of the Korean government authorities as it has been of employers. From the employers' point of view, the worst fear is that their companies will be struck by radicals who will not be satisfied even with above-average salary increases and who are not concerned about the survival of the companies.<sup>60</sup> Equally terrifying is the prospect of being

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57. This information is reproduced and discussed in BOGNANNO, *INDUSTRIAL RELATIONS*, *supra* note 8, at 34-40. Bognanno understates the actual proportion of disputes occurring in workplaces where no union was officially established: where a union has not been officially established, there is no way that the procedural requirements for a legal dispute could be met, so such disputes are likely to remain unreported. Some Koreans believe that the majority of all labor disputes go unreported.

58. *Id.* at 61. Often when intra-organizational conflicts precipitated a strike, the underlying issue was the workers' belief that the union leaders had sold them out to the employers.

59. A well-known example of a labor dispute attributable to the workers' rage upon learning of a sweetheart contract signed by their union leader was the uprising at the Sabuk coal mines in 1980. The miners and their families ran amok, chased the labor leaders, managers and local authorities out of the surrounding community, and had to be put down by military force. See S. Jo, *Nosabungueui Hyeonjang* [*The Spots of Labor Disputes*] SINDONG-A, June, 1980, at 162. It is interesting to note parenthetically that the Sabuk mines are still plagued by the distrust felt by the mine workers toward their union leaders. Production at the Sabuk mines was disrupted throughout much of the summer of 1989 due to a bitter labor dispute after the workers rejected a collective bargaining agreement between the company and the union.

60. The author in August, 1988 talked to the Korean general manager of a large subsidiary of a U.S. multinational corporation located in the Masan Free Export Zone. The company was embroiled in labor problems. Though the company had granted very large wage increases, the general manager felt that a radical coalition had taken control of the newly formed labor union in his company, and he explained that the coalition's goal was to cause the multinational corporations and defense contractors operating in

caught in the middle of a battle between the government and the radicals, where the employers would be powerless to bring about a settlement that would bring the work-place back to normal.<sup>61</sup> Government authorities fear that labor activists and radicals will not only disrupt production and raise labor costs, but will also contribute to political unrest and tend to destabilize the regime.

No discussion of the steps taken to suppress unions would be complete without mention of the ongoing struggle to organize and win recognition for a teachers' union.<sup>62</sup> The central government has rigidly refused to allow public school teachers to form a union, but the teachers who want to form a union have been just as adamant in their refusal to back down.<sup>63</sup> By the spring of 1989 the conflict had reached crisis proportions and as of this writing has not abated. On September 26, 1989 there were major demonstrations throughout the country involving 12,000 people demanding recognition of a teachers' union and thousands of police. Almost 1,000 demonstrators were apprehended, and 240 were formally charged. As of that date the official count of teachers discharged because of

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the Free Export Zone and in the nearby Changwon Industrial Complex to collapse so that they could be taken over by the workers. Violence broke out between the radicals and a pro-management "save the company league." The turmoil continued and the company permanently closed its Korean production facilities in the spring of 1989. In June, 1989 the author also interviewed the Korean personnel director of the subsidiary of another large U.S. based multinational which had undergone a labor dispute and violent confrontations between the radicals and a "save the company league." In that interview, the personnel director expressed his conviction that the labor problems were being inspired by North Korean agents bent on destroying the ROK economy and undermining its government. Author interviews in Masan, August, 1988 and Seoul, June, 1989.

61. A threatened general strike to consolidate gains and to demand further reforms in the Korean labor laws was allegedly set for May Day, 1989. Although the proposed action was the subject of considerable attention in the Korean news media (see Korea Times, April 4, 1989) and the cause for a full scale mobilization of riot police throughout the country, it never materialized. Since that time, the Korean press has numerous overtly political strikes which did occur. These strikes typically took the form of general strikes of short duration involving many workplaces in a particular region or throughout the nation. Most of them were organized by the radical labor organization known as the National Trade Unions Council, (described in Section V.C.2 and VI.B, *infra*.)

A situation in which specific companies may be caught in the middle occurs when workers demand the reinstatement of dismissed labor leaders as a condition for ending a labor dispute, while national security agents insist that such leaders not be reinstated. An example was the Control Data (Korea) dispute in 1983, which resulted in the permanent closure of the manufacturing facilities.

62. The following discussion is based on news articles appearing in the *Hankyoreh Shinmun* and the Korea Times between June and October, 1989.

63. The government has also intervened to prevent private school teachers from joining a teachers' union, even though there is no legal basis (since private school teachers by definition are not public officials) for government interference in their rights (guaranteed under Article 32 of the *Hunbub* (Constitution)) to form a union and to engage in collective bargaining.

their pro-union stance was 1,473. Many teachers have been jailed, leading to protests by other teachers, students and parents who supported the indicted teachers. A number of students committed suicide or attempted suicide by jumping off the school buildings. The conflict has naturally radicalized the pro-union teachers and has foreclosed the possibility of a moderate business union or professional association emerging as the teachers' representative.

The antagonism between the government and radicals in the labor movement has had a long history, dating from the period after Korea's liberation from Japan when the newly established ROK government took up the bloody campaign initiated by the American military authorities to eradicate the radical "Chonpyung" labor federation. As an alternative to Chonpyung (and as an ally in the campaign to eliminate it) the American and Korean authorities supported a right-wing labor organization which became the predecessor of the present Federation of Korean Trade Unions (FKTU). Since that time, the Rhee, Park and Chun administrations have all intervened extensively in union affairs by placing trusted designees in union leadership positions, co-opting other union leaders with gifts or political appointments, and attempting to exclude or eliminate all political dissidents or labor militants from any role in labor affairs.<sup>64</sup>

Upon coming to power, the Chun administration amended the Labor Union Law<sup>65</sup> to include, inter alia, a provision prohibiting third parties (i.e., everyone other than the employer, employees of that employer and the labor union which is directly involved) from participating in collective bargaining or union organizing activities.<sup>66</sup> Whether that prohibition extended to representatives of the

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64. The extensive intervention by government officials and by employers in union affairs is described in M. BOGNANNO, *COLLECTIVE BARGAINING IN KOREA: LAWS, PRACTICES AND RECOMMENDATIONS FOR REFORM* (1980) (Korea Development Institute Consultant Paper Series No. 17, reprinted in *HUMAN RESOURCES AND SOCIAL DEVELOPMENT ISSUES* 108 (I. Sakong ed. 1987)) (hereinafter *COLLECTIVE BARGAINING*) and BOGNANNO, *KOREA'S INDUSTRIAL RELATIONS*, *supra* note 8, at 23-27. Professor Bognanno believes that such intervention contributed to many workers' perceptions of the government as the adversary, and fatally undermined the workers' confidence in their union leaders.

65. When Chun Doo-Hwan moved to consolidate his power in May, 1980, he dissolved the National Assembly and, before it was reconvened, pushed through many changes in the ROK laws through an Emergency Legislative Body, all of whose members Chun himself had appointed. On December 31, 1980, the LAB.-MGMT. COUNCIL ACT, *supra* note 49, was promulgated and the LAB. STANDARDS ACT, *supra* note 49, the LAB. UNION ACT, *supra* note 52, the Labor Dispute Mediation Act (Law No. 279 (1953), amended by Law No. 1327 (1963), last amended by Law No. 3967 (1987)) [hereinafter LAB. DISPUTE MEDIATION ACT], and the Labor Committee Law (Law No. 281 (1953), amended by Law No. 1328 (1963), last amended by Law No. 3352 (1980)) [hereinafter LAB. COMM. LAW] were amended by Laws No. 3348-3352, respectively. Not surprisingly, these laws lack popular legitimacy.

66. LAB. UNION ACT, *supra* note 52, art. 12-2.

national federation with which a plant-level labor union was affiliated was a source of constant controversy until the law was amended in 1986 to specifically state that the relevant federations and the FKTU would not be considered prohibited third parties. There has never been any doubt, however, that the law is intended to prohibit the involvement of labor activists who do not come within the official union structure.

Who are the dissidents and labor activists coming under this prohibition against third parties, why have they tried to become involved in labor matters, and why has the government been so anxious to keep them out? It appears that the initial targets were the Catholic and Protestant programs known as Young Catholic Workers (French initials JOC) and Urban Industrial Mission (UIM) respectively, and the workers associated with those programs. In their efforts to support industrial workers and to articulate their concerns, both JOC and UIM became involved in the labor movement.<sup>67</sup> Where the established unions failed to represent the needs of workers either because they were not present, were corrupt or had been co-opted, the staff and workers associated with JOC or UIM tried to fill the gap. In that role, they clashed with employers, government officials and certain elements of the established unions. Another category of labor activists (which overlaps to some extent with JOC and UIM) is workers who had been dismissed and/or prosecuted for union activities and who were, therefore, no longer employees or union members. In recent years a third category, consisting of university students and graduates who disguised their educational attainments in order to get jobs as production workers, and to thereby become involved in the labor movement and the struggle for political change, has become more significant.

Labor activists in the above categories cannot easily be co-opted. Typically, they are determined and sophisticated advocates for workers' interests who tend to cast doubt on the legitimacy of the official state corporatist structure. The Chun administration, responding to the threat that dissident labor activists posed to the stability of the regime and its substantive goals, cracked down on them severely. Many individuals guilty of violating the prohibition on third party intervention were prosecuted to the full extent of the law.<sup>68</sup> Workers who had cooperated with them were dismissed

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67. On the formation of the Urban Industrial Mission, its involvement in the labor movement, and its struggle with national security agents, employers and co-opted officials of the established labor unions, see G. OGLE, *LIBERTY TO THE CAPTIVES: THE STRUGGLE AGAINST OPPRESSION IN SOUTH KOREA* (1977).

68. Third parties guilty of involvement in labor union affairs may be fined up to five million won (about US\$ 7,500) or imprisoned for up to three years (LAB. UNION ACT, *supra* note 52, art. 45-2). Persons prosecuted under this law included, for example, production workers who had been dismissed from their jobs with Wonpoong Enter-



from their jobs and black-listed. Government officials and employers reacted negatively to projects in which UIM and other activists were involved because of their antipathy to the activists.<sup>69</sup> An extensive media campaign, including government-sponsored labor education programs, was launched against them and they were blamed for loss of jobs and tremendous damage to the Korean economy. The predictable result was that the moderate advocates of reform withdrew and the remaining activists were radicalized.

### 3. Restrained Business Unions Permitted to Exist

Though the dominant strategy of the government and business elite toward labor unions is essentially to suppress them, some unions which conform to a suitably limited role have been allowed to exist. As noted above, an employer may find a friendly union useful as protection against a more militant autonomous union being organized. Similar results may be obtained if the leadership of what began as an autonomous union can, through various inducements, be won over to the employer's side. Even if a union is able to retain its independence, if it operates within the Korean legal structure it will have the effect of constraining industrial struggle within narrow bounds.<sup>70</sup> An employer is legally under no obligation to bargain with a union on any matters other than those which affect the wages, hours and working conditions of the union members, and only disagreements in regard to such matters may constitute legal grounds for a labor dispute.<sup>71</sup> Where a collective bargaining agreement has a clause prohibiting strikes for the duration of the agreement, any dispute action prior to the expiration of the agreement is illegal.<sup>72</sup> Until recently, collective bargaining had been limited al-

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prises because of union activities, thereby losing their legal status as employees. When the employees who were left in the union continued the labor dispute by insisting on the reinstatement of the dismissed activists, their claim was deemed an improper objective (it did not relate to the working conditions of the remaining employees), and the dismissed workers who continued to participate in the struggle were deemed illegal third parties because they were no longer recognized as employees. Criminal prosecutions under the "third party prohibition" have always been controversial. At present the authorities have indicated that where the dismissal of former employees is contested, those former employees will not be considered third parties. Despite the reforms in the past several years, however, other labor activists continue to be prosecuted under these laws. See T. KIM, *POLITICAL ECONOMY*, *supra* note 7, at 18.

69. In an interview with the author in June, 1983, a UIM leader explained that since UIM support for specific types of improvements in a workplace would result in reprisals against the workers and rejection of the hoped-for improvements, UIM had withdrawn from its involvement in most labor issues to concentrate on religious and social concerns.

70. A labor union is narrowly defined under Korean law as an organization whose purpose is to improve the employees' wages and working conditions. LAB. UNION ACT, *supra* note 52, art. 3.

71. LAB. DISPUTE MEDIATION ACT, *supra* note 65, art. 2.

72. The LAB. UNION ACT, *supra* note 52, art. 46-2, provides that anyone guilty of

most entirely to the size of the annual wage increases, with all other matters being simply a restatement of what the employer had unilaterally decided to include in the rules of employment or the minimum legal standards.<sup>73</sup> In earlier years, Korean labor economists questioned whether labor unions in the ROK had any significant impact on wages.<sup>74</sup> This condition is now changing as the standard collective bargaining agreements recommended by the national union federations are starting to include more substantial wage demands and address other matters as well. Nevertheless, grievance procedures where the employer does not retain unilateral discretion in the case of a disagreement have almost never been included in collective bargaining agreements.<sup>75</sup>

Unions are closely regulated under Korean law. Government officials are authorized to intervene and to order changes in many circumstances, though it is noteworthy that amendments to the law in 1986 and 1987 substantially reduced the scope of government intervention.<sup>76</sup> (A bill to reduce the restrictions on labor unions still further was passed by the National Assembly in March, 1989, but was vetoed by President Roh.) Despite the liberalization, unions are still prohibited from engaging in political action and they still may not act in support of other unions or projects not directly related to the wages and working conditions of their own members.

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violating the provisions of a collective bargaining agreement shall be subject to imprisonment of up to one year and a fine of up to 15 million won (about US\$ 22,060).

73. BOGNANNO, *COLLECTIVE BARGAINING*, *supra* note 64, at 60-77, describes a 1977 survey of the contents of collective bargaining agreements in the ROK. Of particular note is the finding that such agreements very rarely provided for working conditions superior to the minimum requirements under the Labor Standards Law. Based on personal experience as an attorney dealing with labor relations matters in the ROK between 1985 and 1988, the author is aware of many cases where the parties agreed to provisions in a collective bargaining agreement that actually fell short of the minimum legal standards. As a legal matter, Korean courts have held that such provisions are null and void, and are deemed replaced by the relevant legal standards.

74. F. PARK & S. PARK, *HANGUK UI INGUM KUJO [WAGE STRUCTURE IN KOREA]* (1984), contains a very sophisticated analysis of the union effect on wages. The authors conclude that the union wage differential was less than the contribution the unions made to increased productivity as a result of their tendency to reduce labor turnover and to increase the returns on investments in on-the-job training.

75. The need for adequate grievance procedures to resolve rights disputes was one of the key issues raised by BOGNANNO, *COLLECTIVE BARGAINING*, *supra* note 64. In almost all cases there is little that a union or individual employees can do to challenge the employer's unilateral decisions in handling grievances.

76. The most important changes were the elimination of the requirement for a minimum number of members to establish a union and the requirement for special authorization for one union to represent employees at more than one workplace (*LAB. UNION ACT*, *supra* note 52, art. 13); the authorization of union shop arrangements in certain circumstances (*id.*, art. 39); the elimination of government authority to order dissolution of a labor union or to order the election of new union leaders (*id.*, Law No. 3966, Nov. 28, 1987); and the elimination of certain restrictions on eligibility for union officer positions (*id.*, art. 23).

Centralized or multi-employer bargaining is permissible only in very limited circumstances, and the authorities continue to discourage the national federations from playing a very active role. The basic structure contemplated by the authorities still seems to be atomized enterprise unionism instead of national industrial unionism.<sup>77</sup>

#### 4. Non-Adversarial Forums for Employee Representation

The final component in the state corporatist four-prong strategy for the maintenance of labor control is the promotion of institutions which contribute to cooperation and the resolution of labor-management issues in a non-adversarial way. One such institution, factory chapters of the New Village Movement, is described in Section III.B., *supra*. As a result of political scandals, its significance in workplaces in recent years has declined. An institution of greater contemporary significance is the Labor-Management Council system.<sup>78</sup> The Labor-Management Council Act (promulgated in 1980 upon the recommendation of the Korean Employers Federation) states its purpose as follows:

The purpose of this Law is to maintain peace in industry and to contribute to the development of the nation's economy by promoting the common interests of labor and management through their mutual understanding and cooperation.<sup>79</sup>

By law, any work-place with fifty or more employees, and any workplace in which a labor union has been established regardless of the number of employees, is obligated to have a Labor-Management Council.<sup>80</sup> The Council consists of an equal number of representatives for the employer and for the employees. The employer's representatives should include the highest level officer at the workplace. The employees' representatives should be either employees elected by direct secret ballots (in firms where there is no union) or employees chosen by the union, including the highest union officer in organized firms. The Council should meet at least quarterly and at

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77. An informative discussion of government efforts to regulate the structure of labor unions in the ROK is contained in Y. Park, *Changes in Industrial Relations in Korea* (1988) (unpublished paper presented at the Conference on Labor and Economic Development in Taipei, Taiwan, Republic of China, on December 21-23, 1988) [hereinafter Park, *Changes in Industrial Relations*].

78. For an interesting discussion of the contrasts between the labor-management council system in the context of the overall industrial relations system in the ROK prior to 1980 and the works councils in the Federal Republic of Germany, see E. Liebau, *Labor-Management Relations in the Republic of Korea*, (1980), reprinted in KOREA DEVELOPMENT INSTITUTE, *HUMAN RESOURCES AND SOCIAL DEVELOPMENT ISSUES*, (1987).

79. LAB. MGMT. COUNCIL ACT, *supra* note 49, art. 1.

80. The threshold number of employees is set forth in the LAB.-MGMT. COUNCIL ACT ENFORCEMENT DECREE art. 2.

such other times as a meeting is requested by either side.<sup>81</sup> Decisions by the Council must be made by at least two-thirds of the members present, and once made they are binding on both sides. Where no such agreement can be reached management retains its right to act unilaterally. Matters brought before the Council may thus be disposed of in a non-adversarial way with no risk that the employer will be compelled to agree to anything which it does not voluntarily accept.

Matters subject to report or consultation by the Councils include improving productivity, employee welfare, industrial safety and health, training and education, personnel management, grievance handling, the prevention of labor disputes, and labor-management cooperation. In theory, in firms where a union has been established the Council should not become involved in collective bargaining issues and should not affect other union activities. Research indicates, however, that in practice the Councils have actually become involved in such fundamental collective bargaining issues as wage negotiations and that more wage settlements were reached through such negotiations than any other means.<sup>82</sup>

The question of whether the Labor-Management Council system has achieved the purposes contemplated in the law is difficult to answer. A Korean attorney describing the Labor-Management Council system to a group of American businessmen in 1983 claimed that employers could use the Councils to explain the international market constraints to employees so they would understand why a low wage policy was essential for the growth of the firm and, thus, in the common interests of both the employer and the employees.<sup>83</sup> In regard to issues resolved through the Councils, he wrote:

To the extent that the Labor-Management Council acts in a binding manner on grievances, work-place conditions and the

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81. LAB.-MGMT. COUNCIL L., *supra* note 49, arts. 11 and 12. Despite official reports of the existence and proper functioning of the Labor-Management Councils in almost all workplaces that are required to have them, there are unofficial reports that in most of the workplaces subject to the law, no Council has actually been established, and even where a Council has been established it may not have any meetings or its meetings may consist only of formalities and the signing of minutes which have been prepared in advance.

82. The frequency of fundamentally adversarial issues being resolved through the Labor-Management Councils was investigated by Bai Moo-ki, then a member of the Seoul National University Economic Research Center, in 1983. The continuing tendency of the Councils to handle wage negotiations was noted by T. Kim, *supra* note 7, at 32-33. The personnel managers of many businesses operating in the ROK, upon being questioned informally by the author in 1987, confirmed that the employee representatives in their Labor-Management Councils expected to, and did, negotiate wage increases and other collective bargaining issues.

83. B. Min, "Collective Bargaining and Union Regulations," (unpublished paper presented at an American Chamber of Commerce seminar on labor relations in Korea, February, 1983).

prevention of labor disputes, provisions for arbitration machinery and specific obligations in collective bargaining agreements are of less significance than they would be in the United States.

The attorney further stated that since employees who violated Council decisions would be liable for substantial penalties under the law, the employer would no longer face the prospect of disruptive collective action in relation to issues resolved by the Council. Other Korean experts were more skeptical. Park Young-Ki, an industrial relations professor at Sogang University's Institute for Labor and Management interviewed by the author in the summer of 1984, expressed his opinion that in firms where the employees agreed on significant issues in the Councils, they would have agreed on them just as readily in any other forum; conversely, where there are strong and independent unions no concessions are made in the Councils.

Prior to mid-1987 when the number and severity of labor disputes was very low, a reasonable argument could have been made that the Labor-Management Council system had contributed to industrial peace. Due to the explosion in labor disputes in the past few years, it would be harder to make such an argument at this time.<sup>84</sup> It is, of course, no surprise that the Labor-Management Council system could not make any meaningful contribution in work-places where a Council has not been duly established, or where it operates as an empty formality; but where Councils do operate as valid non-adversarial channels for binding issue resolution, it is puzzling why employers do not make a more serious attempt to utilize them.

The issue may be viewed either from the perspective of employers or from the perspective of the employees. As will be explained below, until mid-1987 employers did not have to try to resolve contentious matters in a non-adversarial way in order to avoid labor disputes because they could count on government intervention on their behalf to suppress labor disputes. In work-places where there was a strong and independent union, the employees' representatives also had no incentive to agree on significant issues in the Councils. Given the fact that they lacked the power in the Councils to compel the employers to make concessions, they would also normally refuse to make any concessions in the Councils. The employees would rightly feel betrayed if their representatives had made concessions and had gotten nothing in return. Since in the absence of an agree-

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84. Since an array of external factors (which cannot be effectively controlled) have almost certainly had a far greater impact on the incidence of labor disputes than the existence and operation of labor-management councils, statistical data on the incidence of labor disputes could not support any strong conclusions about the effectiveness of the labor-management councils in promoting labor peace. The arguments which follow are based on theoretical reasoning more than on empirical findings.

ment the employer has unilateral authority, and since the Councils do not give the employees' representatives any effective leverage vis-a-vis the employers, one would not expect the Councils to be able to make any significant contribution to industrial peace. Since mid-1987, however, employers have been faced with a real threat of labor disputes and the government, in most instances, has been unwilling to intervene on their behalf. As a result employers may now find it worthwhile to grant meaningful concessions in the Councils as a means of defusing potentially contentious issues. Employers may also find that by granting certain concessions requested by the employees' representatives in the Councils they will be able to enlist the employees' cooperation on other issues.

## V. LABOR RELATIONS LAW IN THE CONTEXT OF THE KOREAN LEGAL ORDER

### A. Theoretical Concepts

The foregoing analysis suggests that the Korean government and business elite, in a more or less conscious and deliberate instrumental fashion, have supported a contemporary Confucianist value system because such values are deemed to be conducive to their substantive objectives. Despite the numerous, tightly controlled instruments available to the elite for influencing public attitudes and opinions, however, the effectiveness of the official ideology (i.e., the extent to which the values have been internalized by citizens such that they are independently able to influence behavior) is doubtful. The state has also promulgated an exclusionary system of interest representation designed explicitly to demobilize popular demands and to limit organizing and collective action to approved (co-opted?) channels. However, in the general political arena as well as in labor-management interactions, the approved channels have recently been unable to contain the rising popular demands or to prevent the emergence of radical challengers. The question thus arises whether a coherent and consistently enforced legal framework would not provide a more effective means of social control.<sup>85</sup>

The effectiveness of law as an instrument of social control is enhanced to the degree that the following elements are present: 1) persons or organizations subject to the legal order and to various specific laws are aware of all the laws applicable to themselves, un-

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85. A sampling of the extensive literature on law as an instrument of social control may be found in the following: *TOWARD A GENERAL THEORY OF SOCIAL CONTROL* (D. Black ed. 1984); *LAW AND SOCIAL CONTROL* (E. Kamenka & A. Tay eds. 1980); J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); F. HAYEK, *LAW, LEGISLATION AND LIBERTY* (rev'd ed. 1978); *LAW, STATE AND SOCIETY* (B. Fryer, A. Hunt D. McBarnet & B. Moorhouse eds. 1981); H. COLLINS, *MARXISM AND LAW* (1984).

derstand the full extent of the obligations imposed on them by the laws, and (voluntarily or otherwise) undertake to conform their behavior to what the laws require; 2) every "actor A" in the society has a reasonable expectation that the behavior of every "actor B" will conform to what the law requires of "actor B," (and that "actor B" will disapprove of, sue or prosecute "actor A" if "actor A's" behavior does not similarly conform to the law) such that all actors would have a firm expectation that public and private interactions will be in accordance with the formal legal order; 3) all the obligations imposed by the laws are thoroughly and precisely enforced, both at the initiative of the public officials entrusted with the enforcement of the laws and at the initiative of private persons and organizations who have rights and immunities flowing from the laws; and 4) the public recognizes the legitimacy of the legal system as a whole in relation to the formation, modification, interpretation, implementation and enforcement of laws, and the legitimacy of specific laws is likewise recognized by virtue of their status as laws.

In a utopian (or anti-utopian) society where all the above elements were fully present, the problem of social control would be greatly simplified. In reality, however, the presence of the above elements cannot be taken as a given. On the contrary, the extent to which they are present is influenced by whether most people believe the legal order meets what they consider to be the relevant criteria of legitimacy, and how close the correspondence is between the legal order and people's direct experience of social reality. To a large extent this correspondence depends on what type of laws are enacted, pursuant to what procedures, and what measures the legal authorities take to even-handedly implement and enforce the laws.

Max Weber theorized that a legal system that was formal and rational would be able to make the greatest contribution to predictability and hence to capitalist development.<sup>86</sup> A formal and rational legal system would uphold the principles of "rule-of-law" which are, arguably, the key criteria by which the "legitimacy" of the legal system must be evaluated. It is reasonable to expect that the level of voluntary compliance to an established legal order would be highest where there was a formal and rational legal system in which the principles of rule-of-law were consistently upheld. The characteristics of a formal and rational legal system where the rule-of-law principles are consistently upheld will be presented in the following discussion as a possible (ideal-type) standard. The Korean legal system and its relation to labor affairs will then be compared to this standard.

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86. See generally M. WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (G. Roth & C. Wittich eds. and trans. 1968); A. KRONMAN, *MAX WEBER* (1983).

A FORMAL legal system can best be understood as distinct from one which is oriented toward substantive goals. Outcome oriented intervention to promote substantive goals for the public good, no matter how popular or desirable those goals might be, would be incompatible with strict adherence to the principle of legal formalism. A RATIONAL legal system as understood by Weber is one that focuses on the logical interpretation of meaning. In such a system, the juristic significance of an event does not arise out of its external or tangible character, but rather out of what the event expresses about human purposes or intentions. In Weber's ideal-type formal rational legal system, the correct legal decision could be made in all cases by applying an abstract legal proposition to the concrete fact situation by means of legal logic. The law is conceived as a virtually gapless system, and those conditions or events which cannot be construed rationally in legal terms are to be disregarded as legally irrelevant. For example, the respective rights and obligations of two parties to a contract could be precisely determined by semantically analyzing the exact meaning of the text of the contract (the best evidence of the intentions of the parties when they entered into the contract) without regard to differences in the status of the two parties or subsequent changes in external circumstances or in the position of the parties. By application of those principles, a person could know exactly what his rights and obligations would be at the time he entered into a contract or any time thereafter until performance was complete.

The principles of rule-of-law apply to the character and behavior of states.<sup>87</sup> Though the rule-of-law principles are not derived simply from the principles of a formal rational legal system, they are completely compatible with them. Where rule-of-law principles prevail, the state is neutral between classes and interest groups. A normal corollary of that principle is that all people, regardless of wealth, sex, or status are equal under the law. Before laws may take effect, they must be publicized in understandable form, and then they must be enforced according to their plain meaning. The rights and obligations of both citizens and public officials are determined by laws. Finally, the issues of who shall hold political power, how such power may be exercised, and how legal rules may be promulgated are all governed by procedural laws. Only those persons who meet the requisite constitutional qualifications by virtue of having been elected or selected in the prescribed manner may hold political power.

Adherence to rule-of-law principles contributes greatly to the legitimation of a government and a nation's entire legal order, but

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87. An interesting treatment of the impact of rule-of-law principles on state policies appears in H. COLLINS, *MARXISM AND LAW* (1984).



the price for such legitimation is the need to avoid deviation from the above principles on substantive grounds or in response to the interests of particular groups or individuals. Where that price is paid, the legal system that results is seen as consistent with the just and natural order of society, or at least as a neutral expression of the will of the citizenry. Dissent against the government or against specific laws may then be characterized as resistance by an individual or a narrow interest group against the will of the majority. Breaches of the law may be recognized as the illegal imposition of an individual's will against the neutral and fair demands of the legitimate government.

### B. The Role of the Formal Legal System in Korean Society

That the formal legal system plays a much more limited role in Korean society than it does in the West is probably a safe generalization. Korean government officials and agencies appear less constrained by Constitutional or statutory procedures in their own actions, and less committed to upholding and enforcing the laws vis-a-vis civil society than their western counterparts. Similarly, citizens and private organizations in Korea are less likely to perceive their rights and obligations in accordance either with public laws and regulations or their own private contractual arrangements. This section's purpose is to examine the extent of and the reasons for the limitations of the formal Korean legal system.

The legal system of the ROK is structured in a way that is similar, at least in form, to the formal rational legal systems contemplated by Max Weber. (The Korea system was modeled after the French and German civil law systems, particularly as these were transmitted to Korea through Japan in the first half of this century. The ROK has also borrowed extensively from the U.S. in drafting certain statutes.) Sufficient predictability is afforded by the Korean legal order to facilitate the advancement of domestic and international commerce, but as in any system the level of predictability is greatly enhanced if one considers not only the logical application of abstract principles to legally cognizable events, but also the government's substantive goals. The Korean civil service bureaucracy and the judiciary are rationally organized and staffed by highly competent personnel, but the extent to which the administrators or courts have upheld the laws and regulations in the form in which they were written is debatable.<sup>88</sup>

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88. In labor matters there has never been a very close correspondence between law and reality. Cases rarely come before the courts and labor officials have in the past (if not still at this time) played a subordinate role to security agents or economic planners who were more concerned with substantive goals than with labor law procedures. With respect to the judiciary, most observers in previous years felt that the judiciary was not independent of the Blue House in its treatment of politically sensitive cases. For a criti-

The idea that states should always refrain from intervening in the affairs of economic actors on the basis of substantive policies finds little support in the world today, and particularly little support in a developmentalist state such as the ROK. As is explained in Section II, *supra*, there is a general consensus in the ROK that it may be appropriate for the state to act in support of substantive goals, even if the action taken is not specifically authorized by law, as long as the type of intervention meets some minimal social standard of fairness and the substantive goals are manifestly for the common good. There is serious debate, though, as to just what the state's substantive goals should be, and what kinds of sacrifices may legitimately be required in order to achieve them.

Sections III.B. and C., *supra*, argued that the assertion of individual rights is discouraged by the contemporary Confucianist norms, and that a paternalistic employer who meets the needs of his employees without regard for what the law requires may justify his practices by reference to the Confucianist heritage. This view finds support among Korean legal scholars. A Korean attorney contrasting the role of law in American and Korean society has written: "Korean society is ordered by custom and tradition, and law is used only to remedy disorders that can be handled in no other way."<sup>89</sup> Similarly, a professor of Korean jurisprudence has written that Koreans are very hesitant to resort to law to assert their legal rights because to do so is to admit a shameful failure to maintain harmonious human relations. In his view, Koreans are especially reluctant to assert their legal rights against the state because an attempt to enforce a legal obligation against the state is seen as verging on treason.<sup>90</sup> Some Korean scholars explain that the formal legal system did not develop naturally from Korea's own heritage but rather is an external framework imposed on Korea by foreign powers which still has little relevance to actual conditions in the ROK. In contrast to the formal legal system, a system of conciliation and mediation which facilitates the resolution of disputes by reference to individual conditions is considered more "virtuous" and more consistent with Korea's traditional values.

At least in relative terms it is certainly fair to say that the Ko-

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cal assessment describing many disturbing cases, see ASIA WATCH COMMITTEE, A STERN, STEADY CRACKDOWN: LEGAL PROCESS AND HUMAN RIGHTS IN SOUTH KOREA (1987)[hereinafter ASIA WATCH COMMITTEE]. As a result of Constitutional changes in late 1987 and the success of the opposition parties in winning an absolute majority in the National Assembly in early 1988, it is now somewhat more difficult for the executive to control the judiciary.

89. Lee, *Legal Aspects of U.S.-Korea Trade*, 7 U. HAWAII L. REV. 237, 268 (1985).

90. P. HAHM, THE KOREAN POLITICAL TRADITION AND LAW: ESSAYS IN KOREAN LAW AND LEGAL HISTORY (1967). See also P. HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE (Lee, Yang, Jon & Hahm eds. 1986) (a compilation of Dr. Hahm's writings published posthumously by Yonsei Univ. Press in Seoul).

rean legal authorities have not encouraged individuals or organizations to arrange their affairs strictly in accordance with the applicable legal standards, nor have they encouraged the use of formal legal procedures for the resolution of disputes. In the area of labor law the huge discrepancy between the legal standards and normal industry practice will be examined in some detail below. But in many other areas of law, also, it would be almost impossible for a person who fully obeyed the laws to live a normal life in Korean society.<sup>91</sup> Possibly the only thing more difficult than to scrupulously obey all the applicable Korean laws would be to attempt to assert one's rights through the use of formal legal procedures. With only 1,513 lawyers for a population of over 41 million (as of July, 1987), lawyers are naturally hard to find and very expensive.<sup>92</sup> As a result there is either a requirement or strong pressure to bring many kinds of disputes to conciliators and/or mediators who will try to induce a settlement on mutually agreeable terms before filing suit in court. Without discovery or effective procedures for cross-examination, it is difficult for plaintiffs to make a case against defendants. Defendants are frequently able to render themselves judgment proof by concealing their assets, and when the object sought is something other than money damages the courts lack the power to hold violators of court orders in contempt, and thus they are frequently unable to provide an effective remedy. Substantial delays are built into the system because almost any case can be appealed, and the higher courts will hear the case *de novo* on the merits.

Whether because of the institutional barriers to successful litigation or because the assertion of rights through legal procedures would be contrary to the values held by most Korean people, the incidence of civil litigation to enforce legal rights in Korea is extremely low by world standards. Statistical data published by the Korean Supreme Court show that in 1986 a total of 320,922 civil suits were filed, of which 213,382 were processed through small

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91. Anyone who has ever been to Korea can tell stories of how frequently the traffic laws are disregarded. A problem for businesses operating in the ROK are very strict laws prohibiting the giving of any gifts to public officials in almost any circumstances (Criminal Code art. 133 (Law No. 293 (1953), *last amended by* Law No. 2745, (1975)); Special Measures Law Concerning Cash Penalties, etc. art. 4.1 (Law No. 216 (1951), *last amended by* Law No. 2907, (1976)). These laws directly contradict social customs and normal business practices. Substantial violations of the tax laws are so common that the government can effectively coerce almost any company to obey its informal requests by threatening a tax audit. Many other examples could be cited.

92. Information on the very slow increase in the number of lawyers in the ROK may be found in KOREAN FEDERAL BAR ASSOCIATION, *LAWYERS IN KOREA* 29 (1987). The current number computes to less than 37 lawyers per million people. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 52 (1983)[hereinafter Galanter, *Reading the Landscape*] gives the number of lawyers per million in the U.S. as of 1980 as 2,348.7.

claims procedures (in most cases without the presence of lawyers) and 107,540 were processed through regular court procedures.<sup>93</sup> That comes to a total of about 7.83 civil suits filed annually per thousand people in the population.<sup>94</sup> When cases are brought to court, the judge plays an active role in attempting to induce a settlement, which typically means persuading the party that would prevail on the merits to agree to a remedy that falls somewhat short of what he is entitled to receive.<sup>95</sup>

As a public policy matter it would seem desirable to remove the excessive barriers to effective civil litigation so that private parties would be able, by asserting their own rights, to help enforce the legal order.<sup>96</sup> At a minimum, if legal procedures proved a viable method of obtaining a satisfactory remedy, certain individuals who felt they had been wronged would choose such procedures as an alternative to disruptive and socially destabilizing self-help methods. If people saw that the law could work for them, that would also presumably enhance the legitimacy of the legal order in their eyes, with the hopeful result that they would feel more inclined to comply with what the law required of them. In the case of the legal rights granted by certain laws, however, the difficulty of enforcing those rights probably reflects the unwillingness of the legal authorities to bring the prevailing practices into conformity with what the law requires.<sup>97</sup>

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93. MINISTRY OF COURT ADMINISTRATION, SUPREME COURT OF KOREA, *Sa-bop Yon-gam* [ANNUAL JUDICIAL REPORT] 264 (1987).

94. A comparison of the data on litigation in the ROK with data on other countries will help to put them in perspective. Galanter, *Reading the Landscape*, *supra* note 92, at 52, presents data showing that in the U.S. in 1980 about 44 civil suits filed per thousand people, while in Japan in 1978 about 11.68 civil suits were filed per thousand.

95. The role of the judge in inducing settlement is described in L. Lewis, *Institutionalized Conflict Resolution: Mediated Settlements and Judicial Rulings in the Civil Courts*, (unpublished paper prepared for presentation at the Meeting on Conflict in Korea at UCLA, May 20-21, 1989). Though 66% of civil cases result in a verdict rendered by the judge, in the courts Lewis observed about half of all cases resulted in default judgments for the plaintiff because the defendant did not appear. Thus, Lewis concluded that settlements were reached (with the assistance of the judge) in about half of the cases where both parties were present. The paper did not address the issue of compliance with court judgments, but Korean lawyers note that, especially in the case of default judgments, full compliance is the very rare exception rather than the rule.

96. It might be argued to the contrary that the Confucianist heritage, which causes the Korean people to seek social harmony and to shun litigation, should not be disturbed. In response to that argument one may question whether the social relations that follow from the Confucianist heritage should be characterized as harmonious or repressive. In any case, it is clear that the disappearance of certain features of traditional Confucianism (such as the disdain for commercial activities) shows that the Confucian heritage is not immutable in the face of changing social conditions.

97. It appears that certain laws are cynically enacted to make a favorable impression even though the authorities have no intention of implementing the laws. See Park, *Changes in Industrial Relations*, *supra* note 77, at 23, on the political motivation, and lack of concern for practical relevance or enforceability characterizing basic labor legis-

One additional factor seriously undermines the legitimacy of the legal order. Until the election of President Roh in 1987, there had never been a peaceful transfer of power by Constitutional procedures. The ruling elite in the Rhee, Park and Chun administrations all acted as though they considered themselves to be above the law. Well-documented reports of widespread corruption at the highest levels of the ROK government can easily be found.<sup>98</sup> The whole legal order was cynically manipulated by the elite to maintain ever tightening levels of control for their own personal gain. With every change of government, and sometimes even within a single administration, sweeping Constitutional changes were made, typically through procedures that were clearly outside the law or of doubtful legality, to grant greater power to the incumbents. Political challengers, labor activists and other dissidents were prosecuted through highly questionable legal procedures, and others were harassed, tortured or murdered by government agents who were clearly operating in violation of the law.<sup>99</sup> Substantial reforms were made prior to the election of Roh Tae-Woo, and his administration has not yet been marked by scandals comparable in scale to the preceding administrations. Everyone is aware, however, of the vital role Roh had played in the Chun administration. It remains to be seen whether the Roh administration will repeat the earlier pattern of spreading corruption and tightening controls for personal gain after it has consolidated its power.<sup>100</sup> Given the present level of cynicism in Korean politics, the Roh administration will have to be very pure indeed if it is to impart to the legal order the legitimacy that comes from adherence to rule-of-law principles.

### C. Labor Law in the ROK

Having discussed the general role of law in Korean society, we may now turn to the role of Korean labor laws in the industrial

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lation. A particularly acute example might be the laws and regulations relating to industrial safety and health. The detailed provisions in the Ministry of Labor ordinances are not well publicized, no private cause of action exists for unions or employees to compel the employers to comply with the regulations, and no effective enforcement measures are taken by public authorities.

98. The student uprisings that overthrew the Rhee administration in 1960 were sparked by corruption and election fraud. The corruption of the Park administration in political and economic matters, respectively, are described by R. BOETTCHER, *GIFTS OF DECEIT* (1980), and H. Lim, "Dependent Development in the World System: The Case of South Korea, 1963-1979," (1982) (unpublished Ph.D. dissertation, Harvard University). The corruption of the Chun administration has been repeatedly brought before the Korean National Assembly in the months since he has left office and was given extensive coverage by the Korean press.

99. Government actions against dissidents during the Chun administration are described in ASIA WATCH COMMITTEE, *supra* note 88.

100. The very recent steps taken by the Roh administration to crack down on its opponents are described *infra* at note 152.

relations process. For the purpose of this article, the labor laws may be conceptualized as falling into three groups: 1) the Labor Standards Law and related laws which include the Industrial Safety and Health Law, the Industrial Accident Compensation Insurance Law, the Minimum Wage Law, the Gender-Equal Employment Law, and certain other laws which will not be considered herein;<sup>101</sup> 2) the Labor Union Act and the Labor-Management Council Law;<sup>102</sup> and 3) the Labor Dispute Mediation Act and the Labor Committee Law.<sup>103</sup> The laws will be discussed with particular attention to recent changes in their content and manner of implementation.

### 1. Labor Standards

The formal requirements under the Labor Standards Law and other related laws have been slowly but continuously increasing. In recent years the rate at which further requirements have been added has increased somewhat, but the general direction has not fundamentally changed. These laws are theoretically beneficial for workers, but because of the way they have been interpreted and enforced (or not enforced) workers have not always obtained those benefits.<sup>104</sup> A few examples will suffice to show the practical impact of the laws.

The Labor Standards Law gives the Minister of Labor, with the consent of the Labor Committee, authority to establish a minimum wage.<sup>105</sup> While the Minister of Labor did not act pursuant to that authorization, non-binding guidelines for minimum wage levels were issued prior to 1979, but subsequently even the guidelines were discontinued. (By contrast, the government has almost continuously pressured employers not to grant wage increases above the maximum guidelines recommended by the Economic Planning Board.)<sup>106</sup> The National Assembly took the initiative in 1986 by

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101. LAB. STAND. ACT, *supra* note 49; INDUSTRIAL SAFETY AND HEALTH LAW (Law No. 3532 (1981)); INDUSTRIAL ACCIDENT COMPENSATION INSURANCE LAW (Law No. 1438 (1963), *last amended by* Law No. 3818 (1986)); MINIMUM WAGE ACT (Law No. 3927 (1986))[hereinafter MIN. WAGE ACT]; GENDER-EQUAL EMPLOYMENT ACT (Law No. 3989 (1987)).

102. LAB. UNION ACT, *supra* note 52; LAB.-MGMT. COUNCIL ACT, *supra* note 49.

103. LAB. DISPUTE MEDIATION ACT, *supra* note 65; LAB. COMM. ACT, *supra* note 65.

104. LAB. STAND. ACT, *supra* note 49, art. 10 provides that the applicability of the Law to specific work places shall be determined by the Enforcement Decree. Presently most of the provisions discussed below are applicable only to employers having ten or more employees.

105. *Id.*, art. 34. This provision was deleted when the MIN. WAGE ACT, *supra* note 101, went into effect.

106. During the Chun administration, the government threatened such heavy disincentives against companies granting wage increases in excess of the guidelines that almost all companies formally stayed within the limits. In practice, however, employers

passing the Minimum Wage Law, but it was careful to ensure that the established minimums would not exceed employers' ability to pay. In 1988 a two-tier minimum wage system applicable only to manufacturing firms with ten or more employees finally went into effect, with the lower minimum applying to the traditionally low wage industries.<sup>107</sup> The lower minimum, initially set at 110,000 won per month, was slightly less than 28% of the average monthly earnings for that year but the increase in the minimum wage for 1989 was somewhat higher than the average wage increase for that year. As of January, 1990, the minimum wage system was increased by an additional 15% (to 165,000 won) and applies to all employers (whether or not in manufacturing) with ten or more employees.

The foot-dragging by the government in passing the Minimum Wage Law was striking. Even more striking has been its failure to enforce the law. A Korea Herald article dated May 20, 1989, reported a Ministry of Labor estimate that 46% of the firms subject to the law were in violation. Under the law, failure to pay the minimum wage may be punished by a fine of 10 million won or imprisonment of up to three years, or both.<sup>108</sup> The author, in an interview with an official in the Labor Standards Bureau of the Ministry of Labor, asked how the violators would be dealt with and was told that they would be given a certain amount of time to adjust their pay schedules to what the law required. The Ministry is not attempting at this time to impose penalties or to ensure that workers who have been under-paid will be retroactively compensated for the short-fall. In August, 1989, Korean newspapers reported that the Minister of Labor would file for criminal sanctions against employers who continued to violate the Minimum Wage Law after some date in the future. However, when the Law will actually be vigorously enforced remains to be seen.

The Labor Standards Law defines the maximum standard working hours as 8 hours per day and 48 hours per week.<sup>109</sup> There are strict limits and detailed procedural requirements that must be followed for extensions beyond the standard working hours, and such extended hours must be paid at 150% of the ordinary hourly wage.<sup>110</sup> In practice, employers typically require extensive overtime beyond the maximum legal limits, without regard for the requisite

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who wished to recruit or retain highly skilled technical and white collar employees typically found it necessary to grant higher compensation in the form of early promotions, extra bonuses or other benefits. Production workers and other low or semi-skilled workers, on the other hand, felt the full impact of the guidelines.

107. MIN. WAGE ACT, *supra* note 101, arts. 3, 4 and 6.

108. *Id.* art. 28.

109. LAB. STAND. ACT, *supra* note 49, art. 42.

110. *Id.*, arts. 42, 46, 56 and 57.

legal procedures, and frequently without paying at overtime rates.<sup>111</sup> Though only narrow categories of very high level management personnel are exempt from the hours and overtime laws, in practice middle level management personnel and many white collar employees are excluded from the required benefits. For employees who are recognized as coming under the law, some employers have implemented a "guaranteed minimum overtime" system whereby the employees' monthly salary is allocated between a small ordinary wage component and a large overtime component (in excess of the amount of overtime that would ever actually be worked). The result is that no additional overtime pay is due as long as the actual overtime does not exceed the guaranteed minimum overtime. The labor authorities and the courts have not yet attempted to stop this obvious circumvention of the law.

Theoretically any employee who was not paid the full amount of overtime pay that was due to him could sue the employer in the civil courts or he could file a complaint with the labor authorities. In either case, the employer would be liable for back-pay to the employee who initiated the case and ultimately to all similarly situated employees, and would also have to pay overtime rates for all extended hours from that time forward. Even if no employee filed a complaint, the labor inspectors or the prosecutors could file a complaint on their own initiative. But in reality disputes are simply not handled in this manner. The labor inspectors do receive many complaints alleging various types of violations, and they do find violations in almost all the cases they investigate,<sup>112</sup> but criminal prosecutions or settlements involving retroactive payments simply do not occur. The economically rational behavior for employers is thus to ignore the law because the most severe penalty for violations (in the very small percentage of cases which are actually investi-

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111. ILO statistics, *supra* note 6, show a longer work week for Korean workers, and especially for female workers, than for workers in any other country. The overall average for women in 1986 was 53.6 hours, and for women in manufacturing the average was 55.2 hours. In 1987 the overall average for women was 52.6 hours, and the average for women in manufacturing was 54.1 hours. The longest hours are worked by women in the textile and wearing apparel industries, where many employers operate 24 hours per day with two 12-hour shifts. See Oh, *The Living Conditions of Female Workers in Korea*, 4 KOREA OBSERVER 185, 192-193 (1983)[hereinafter Oh, *Living Conditions*]. The LAB. STAND. ACT, *supra* note 49, art. 57, sets an absolute limit on the number of overtime hours a woman may work (150 hours per year). All of the averages cited above however are far over (up to 250 percent) the maximum permissible limits.

112. An officer of the Labor Standards Bureau in the Ministry of Labor told the author that in 1988 the Ministry received 32,342 complaints by employees and investigated 2,305 work places on its own initiative (for a total of 34,647 investigations). Out of that number, they found 30,200 violations, 22,782 of which were resolved administratively, with the remaining 7,418 being referred to the prosecutors for possible criminal sanctions. In practice, the prosecutors almost always dispose of the cases referred to them through voluntary settlement arrangements without seeking to impose any penalties.



gated) costs no more than the minimum level of compliance. It is interesting to speculate on why so many employees fail to assert their rights under the Labor Standards Law. As a strictly legal matter it is clear that the Labor Standards Law and other labor legislation takes precedence over any private arrangements whereby an employee agrees to waive his or her legal rights.<sup>113</sup> In a potentially important case, a newly formed union representing nurses was awarded a judgment ordering the hospital where the nurses worked to retroactively pay the accrued amount of unpaid overtime.<sup>114</sup> But such cases are still very rare; it is far more common for employees to be unaware of their rights or unwilling to assert them. The general attitude seems to be that where the bargain actually made between employers and their employees was for something less than what the law requires, to insist on compliance with the law would be bad faith.

The most disturbing discrepancy between what normal practices are and what the law requires occurs in the area of industrial safety and health. The Ministry of Labor, pursuant to the Industrial Safety and Health Law and the Enforcement Decree thereto, has issued detailed regulations on equipment safety, permissible noise levels, air-purity standards, procedures for the handling of toxic substances, and so forth; but it appears that no attempt has been made to enforce the standards. The severity of the problem may be discerned from Ministry of Labor statistics. With a labor force in 1988 of 5,743,970 industrial workers, there were 1,925 deaths resulting from industrial accidents, 26,890 permanent disabilities, a total of 142,329 industrial accidents requiring medical treatment (including the deaths) and 5,401,000 work days lost because of work-related accidents.<sup>115</sup> The fatality rates per worker were more than four times as high in the ROK as in the U.S., and

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113. Several recent court cases reported in *Hankyoreh Shinmun* on November 21, 1989 and November 24, 1989, respectively, illustrate the legal principles involved. In the first case, an employee who had contractually agreed to exclude commission payments from the calculation of his severance pay entitlement sued his employer to have the severance payments included in the calculation. The Seoul District Court agreed with the employee that the public law formula for the calculation of severance pay prevailed over any contrary contractual arrangement. The second case involved a settlement where an injured employee agreed that a certain payment would constitute complete satisfaction for all claims arising out of an industrial accident. When unanticipated medical expenses subsequently arose, the employee sought additional payment. The Seoul District Court found that the settlement did not foreclose the employee's claim to the amount he was entitled to under the Industrial Safety and Health Law.

114. In some respects this case illustrates the frequent pattern of a union bringing charges of labor law violations against the employer in the course of a dispute. In contrast to this case, however, unions typically drop all charges against the employer when the dispute is resolved.

115. These figures are taken from the U.S. EMBASSY REPORT, *supra* note 6, at 4, 13, and the *Hankyoreh Shinmun*, November 24, 1989.

about nine times as high as in Japan.<sup>116</sup> Though statistical data are not available, Korean observers do not doubt that the damage to hearing and eye sight, and occupational diseases due to dust or fumes, take a far higher toll on Korean workers than industrial accidents.<sup>117</sup> Strictly from the standpoint of economic efficiency, if employers were not able to externalize the costs of occupational accidents and diseases it would surely be more profitable for them to maintain safer and healthier working conditions.

## 2. Laws Relating to Employee Representation

The Labor Union Law provides the legal basis for the existence of labor unions and for the conduct of collective bargaining.<sup>118</sup> As explained in Section IV.C. 2, *supra*, the Labor Union Law was amended at the beginning of the Chun administration to make union organizing more difficult, to reduce the role of the national labor federations, and to subject the atomized enterprise unions to closer government control. Now those changes have almost all been reversed. Furthermore, it appears that government officials have generally withdrawn from the extra-legal action they had previously taken to inhibit union organizing. The law still limits unions to the advocacy of improvements in the wages and working conditions of their own members,<sup>119</sup> and it imposes certain restrictions on how unions may conduct their internal affairs.<sup>120</sup> It also prohibits a second union from rising to challenge an existing union. The Labor-Management Council Law, described in Section IV.C. 4, *supra*, provides an additional non-adversarial channel for employee representation.<sup>121</sup> Its clearly stated purpose is to improve labor-management cooperation and to minimize labor disputes. Consid-

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116. The ILO statistics, *supra* note 6, for 1987 show 0.010 deaths per million hours worked in manufacturing in Japan, and 0.022 deaths per million hours worked in manufacturing in the U.S. In the ROK, there were 0.330 deaths per thousand workers exposed to risks in manufacturing. Comparisons based on the different units of measurement are necessarily rather rough.

117. Unhealthy working conditions are especially prevalent for young women workers who are expected to work only a few years before marriage. See Oh, *Living Conditions*, *supra* note 111 at 191 and 196. Often after only a few years the young women become permanently disabled.

118. LAB. UNION ACT, *supra* note 52. The possibility of effective collective bargaining is closely linked to the ability of employees to engage in collective action. Accordingly, discussion of the issue of collective bargaining will be deferred until the Labor Dispute Adjustment Law is examined.

119. LAB. UNION ACT, *supra* note 52, art. 3.

120. *Id.* arts. 11-31.

121. It is noteworthy that of all the Korean labor legislation passed by the Emergency Legislative Body in 1980 (see note 65, *supra*), the only significant item that has not been partially or totally reversed since late 1986 has been the expanded role for the labor-management council system mandated by the Labor-Management Council Law. Subsequent legislation has in fact increased the number of work-places where Councils must be established as well as the scope of labor-management consultation.

ering both laws and the way they are being implemented, it appears that the government policy at this time is not to prevent union organizing, (except among public employees and teachers) but to ensure that unions will abide by a non-political (and not too adversarial) business union model.

In recent years a number of developments have emerged which the law is not well equipped to handle. Under the law, an employer must engage in collective bargaining with a union, and the employees' representatives to the labor-management council are to be chosen by the union.<sup>122</sup> In the past the only unions that were able to survive were those that had strong employee support or that had worked out an accommodating relationship with management. In either case, the normal rule was that wherever there was a union virtually all the employees below a certain level of management were members. The question of how to deal with minority unions that represented only a small fraction of the workforce, and particularly militant minority unions, simply did not arise. At present, in work-places that do not already have a union, no legal way exists for the employer to prevent the establishment of a militant union, even if it is supported by only a small minority of the employees. In such circumstances, if an employer deals with a militant minority union in collective bargaining, or with representatives designated by such a union in the labor-management council, he normally does so in a very perfunctory manner.<sup>123</sup>

In the past the law also provided that for a union to be established in an individual workplace it would have to be affiliated with one of the existing national union federations which, in turn, was affiliated with the Federation of Korean Trade Unions (FKTU).<sup>124</sup> Recently four new national union federations were formed as a result of conflicts within the existing federations when challengers for leadership positions claimed that the old leadership had been co-opted by the government and business elite. In addition, a rival confederation known as the National Council of Trade Unions (NCTU) has arisen to challenge the FKTU.<sup>125</sup> As of October, 1989 the NCTU claimed 750 affiliated local unions with a total member-

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122. LAB. UNION ACT, *supra* note 52, arts. 33.5 and 39.3; LAB.-MGMT. COUNCIL LAW, *supra* note 49, art. 6.2.

123. If an employer enters into a collective bargaining agreement with a union that represents less than half of the eligible employees, the terms and conditions of that agreement need not be extended to the other employees of the same type. LAB. UNION ACT, *supra* note 52, art. 37. In such circumstances, an employer is not normally willing to include in the collective bargaining agreement any terms and conditions of employment that it has not already granted to all the employees in the relevant categories.

124. LAB. UNION ACT, *supra* note 52, arts. 13 and 14.

125. See BOGNANNO, INDUSTRIAL RELATIONS, *supra* note 8, at 68-75; Park, Changes in Industrial Relations, *supra* note 77, at 18-21.

ship of up to 400,000.<sup>126</sup> The NCTU, and the local unions affiliated with it, appear to be outside the legal structure, and they do not restrict their objectives or their tactics to conform to the legal model of business unionism. The labor authorities are thus presented with a dilemma: they may either expand the legal structure to embrace the NCTU (leading to jurisdictional struggles and competition between rival unions to represent workers in certain work-places) or they may try to suppress the NCTU, thereby running the risk of driving it toward a more radical opposition position.

### 3. Laws Relating to Labor Disputes

By all accounts, the legal structure set forth in the Labor Dispute Adjustment Law for the handling of labor disputes completely broke down in the latter half of 1987.<sup>127</sup> Not only did the number and severity of labor disputes multiply,<sup>128</sup> but the disputes were almost all conducted without regard for mandatory legal procedures.<sup>129</sup> Except in a few cases where serious violence had occurred or was threatened, labor officials and police were unable or unwilling to intervene, and employers were, for the first time, left to their own resources. The argument made here is that prior to mid-1987, the law as applied by the labor authorities, police and security agents, presented labor unions with so many procedural hurdles before dispute actions would be recognized as legal that unions found it futile to attempt to conduct labor disputes in accordance with the procedural requirements as stated in the law. Since that time, these requirements have been simplified so that following the legal procedures has become a viable option. The basic law, however, remains essentially the same.

Despite the breakdown in the enforcement of the Labor Dispute Adjustment Law in the latter half of 1987, the important distinction between a legal dispute and an illegal one (i.e., one where not all of the substantive and procedural requirements have been met) remains in the law. The informal policy in the months leading up to the 1987 presidential elections of not prosecuting union or

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126. *Hankyoreh Shinmun*, Oct. 24, 1989; *BUS. ASIA*, April 17, 1989. For an account of the challenge posed by the NCTU to the mainstream labor unions, see generally Tak, *Nodong Tujang Inga Jeonchi Tujang Inga? [Is This a Labor Union Struggle or a Political Struggle?]* *SINDONG-A*, May, 1989, at 437[hereinafter Tak, *Labor Union Struggle or Political Struggle?*].

127. See generally Peck, *Ramifications of the 1987 Labor Uprising in Korea*, 20 *LAW & POL. IN INT'L BUS.* 331 (1988).

128. See note 6, *supra*.

129. BOGNANNO, *KOREA'S INDUSTRIAL RELATIONS*, *supra* note 8, at 55, indicates that 72 out of 3,529 strikes in 1987 were formally filed with the appropriate government authorities. *BUSINESS INTERNATIONAL CORPORATION, INVESTING, LICENSING AND TRADING CONDITIONS ABROAD* 25 (1988), reports that out of 3,600 labor disputes in 1988, 46 were conducted pursuant to legal procedures.

employee labor law violations has come to an end, and throughout the past two years the frequency and severity of prosecutions has been rising.<sup>130</sup> On the other hand, employees engaged in labor disputes which are recognized as legitimate under the law are not only immune from interference or prosecution from the authorities; they are also entitled to substantial protections from retaliatory action by the employer. An employer may not make a claim for damages resulting from legitimate acts of dispute (e.g., strikes), and may not put employees engaged in legitimate dispute activities under physical restraint.<sup>131</sup> More importantly, the employer may not hire replacements for the employees engaged in a labor dispute while the dispute is in progress.<sup>132</sup> Any disadvantageous or discriminatory action by the employer against a union or employees who participated in legitimate collective action is a punishable unfair labor practice.<sup>133</sup>

The first step in the legally prescribed labor dispute resolution procedures is for the parties (typically the labor union) to report the dispute to the local administrative authorities.<sup>134</sup> The Labor Dispute Adjustment Law defines legitimate labor disputes as "disputes arising from differences in the opinions of the parties to labor relations with respect to wages, working hours, welfare, dismissal, other treatment and any other conditions of employment."<sup>135</sup> This definition excludes disputes over issues other than the terms and conditions of employment of the members of the union involved. Based, *inter alia*, on that definition of labor disputes, the labor authorities

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130. Violations of different provisions of the Lab. DISPUTE MEDIATION ACT, *supra* note 65, carry different maximum sanctions, ranging from 6 months in prison or a fine of 200,000 won for failure to report a labor dispute (arts. 16 and 48) to 5 years in prison or a fine of 10 million won for acts of dispute at a place other than the pertinent workplace or for third-party intervention in a labor dispute (arts. 12, 13-2, and 45-2). Anyone who is involved in a labor dispute before all the intermediate steps required by the law have successfully been taken is subject to imprisonment for one year or a fine of one million won (arts. 14 and 47).

131. *Id.* arts. 8 and 9.

132. *Id.* art. 15. The assumption (at least in 1987 and 1988) was that while a dispute was in progress the affected facilities would be shut down, so even shifting non-striking employees to temporarily fill the positions of strikers was not allowed.

133. LAB. UNION ACT, *supra* note 52, art. 39.1 and 39.5. Where the relevant Labor Committee finds that an employer has committed an unfair labor practice, it may issue a relief order to remedy the effects of the unfair labor practice and recommend the imposition of sanctions (up to two years in prison or a fine of up to 30 million won) if that relief order is not obeyed (arts. 42 and 46), or it may immediately recommend lesser sanctions (up to one year in prison or a fine of up to 15 million won) against the employer who committed the unfair labor practice (art. 46-2). Prior to 1987, sanctions could only be imposed for violations of a relief order. In practice, sanctions are still almost never imposed (it appears that no one is ever imprisoned for unfair labor practices or violations of relief orders), and liability for penalties does not seem to be an effective deterrent.

134. LAB. DISPUTE MEDIATION ACT, *supra* note 65, art. 16.

135. *Id.* art. 2.

until the end of 1987 had an internal policy of recognizing only those labor disputes which had arisen after the parties had already bargained to an impasse in the course of collective bargaining concerning wages or working conditions. From the way that internal policy was implemented, the underlying objective appears to have been to deny official recognition to almost all disputes. Thus, even where the parties attempted to follow the prescribed legal procedures, in most cases the reports were simply dismissed and the union was unable to get beyond even the first step to being able to engage legally in acts of dispute. In such circumstances, unless the union and/or individual employees were willing to risk retaliatory action by the employer and prosecution by the labor authorities, they had to abandon their struggle or settle on the employer's terms.

One of the changes accomplished by the November, 1987 amendments in the Labor Dispute Mediation Act was the deletion of the provision granting the administrative authority responsibility for dismissing reports of those labor disputes which did not come within the statutory criteria before dispute resolution procedures had even begun.<sup>136</sup> Other substantive and procedural hurdles remain before a labor dispute may legally take place. In terms of procedural requirements, after the report of the underlying dispute has been filed with the proper authorities, conciliation and mediation procedures are to be conducted by the relevant Labor Committee.<sup>137</sup> Concurrently, a cooling-off period of at least ten days for ordinary businesses (or fifteen days for designated vital industries) must be allowed to pass.<sup>138</sup> If the parties have not agreed to a resolution of the dispute, the mediation committee recommends terms for a resolution. In cases where the parties are still unable to agree on a resolution, the dispute may be referred to an arbitration com-

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136. The deleted provision was *id.* art. 16.2. Some local authorities have been very slow in accepting this change in the law. A special committee in the National Assembly found 44 cases where local authorities took the initiative to dismiss reports of labor disputes that they considered improper. *Hankyoreh Shinmun*, Oct. 2, 1989. Though it seems clear that local authorities may not legally decide to dismiss reports of labor disputes, several Korean labor lawyers expressed their opinion to the author that labor officials may soon be instructed to deflect disputes that do not come within the legal definition (for example, union recognition disputes) to some other informal dispute resolution procedures rather than treating them as legal disputes eligible for disposition through the formal dispute resolution process.

137. *Id.* arts. 18-29. The composition of the Labor Committees and the various functions they perform are described in the LAB. COMM. LAW, *supra* note 65.

138. LABOR DISPUTE MEDIATION ACT, *supra* note 65, arts. 14 and 18-29. Prior to December 31, 1986 the cooling-off periods had been 20 days for ordinary disputes and 40 days for disputes in industries deemed vital to the public interests. They were reduced to the current 10 days or 15 days through two sets of amendments in 1986 and 1987. Further amendments to the Labor Dispute Adjustment Law were proposed by the opposition parties in 1989 to, *inter alia*, reduce the cooling-off periods to 7 days or 10 days, but those amendments were vetoed by President Roh.

mittee for binding arbitration if 1) the parties jointly request binding arbitration, 2) either party requests arbitration pursuant to a clause of the existing collective bargaining agreement, or 3) the labor authorities determine that the dispute (one involving an industry vital to the public interests) should be resolved through arbitration.<sup>139</sup> When disputes have been referred to arbitration there is an additional fifteen-day cooling-off period, normally followed by a binding award which finally ends the dispute.<sup>140</sup> In the case of most disputes not referred to arbitration,<sup>141</sup> the procedural requirements are fulfilled after the expiration of the initial cooling-off period if a strike resolution has been passed by the direct majority votes of all union members through secret ballots.<sup>142</sup> Even if all of the above procedural requirements have been met, any labor dispute commencing before the parties have bargained in good faith over the issues to the point of impasse, any dispute over issues other than the terms of employment of the employees involved, or any dispute in contravention of the terms of an existing collective bargaining agreement would violate the Labor Dispute Mediation Act's substantive requirements.<sup>143</sup> Resort to illegal methods such as actual or threatened violence or sabotage, or engaging in dispute activities at any location other than the relevant work-place, are also substantive violations.<sup>144</sup>

In most cases before the procedural requirements were simplified at the end of 1987, it was, for reasons explained above, not possible for a union to satisfy all of the procedural and substantive requirements for a legal dispute. Union leaders also complain that where the requirements were followed the officials conducting the conciliation and mediation put tremendous pressure on the unions to settle on terms favorable to management, and then referred cases where agreement was not reached to arbitration, thereby finally

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139. *Id.* art. 30. Before 1987, the local administrative authority could demand that any unresolved dispute be referred to arbitration, whether or not it involved an industry vital to the public interest. In contrast, at present only disputes involving interests vital to the public interests may be referred to arbitration without a request from the parties, and only the Labor Committee (not the administrative authority) has ultimate responsibility to refer such a dispute to arbitration.

140. *Id.* arts. 31 and 39. Prior to 1987, the additional coolingoff period for disputes referred to arbitration had been 20 days.

141. In exceptional circumstances, the Minister of Labor, with the consent of the Central Labor Committee, may refer an unresolved dispute to the additional step known as "Emergency Adjustment," in which case an additional 20-day cooling-off period will be enforced (*id.* arts. 40-44). Prior to 1987, this additional cooling-off period had been 30 days.

142. The requirement for a strike resolution is set forth in *id.* art. 12.1.

143. Korean labor lawyers infer these substantive requirements from *id.* art. 2, where a labor dispute is defined as a dispute "arising from differences in the opinions of the parties to labor relations with respect to wages, working hours, welfare, dismissal, other treatment and any other conditions of employment."

144. *Id.* arts. 12.3 and 13.

foreclosing the possibility of direct collective-action.<sup>145</sup> The extreme infrequency of labor dispute actions prior to mid-1987 are precisely what one would expect where labor disputes were almost always ruled to be illegal and where a powerful government-business coalition did not hesitate to use force to suppress them. But notwithstanding the risk of prosecution for illegal labor disputes (and protections set forth in the law for unions or workers who conducted labor disputes pursuant to legal requirements), in the small number of cases where workers or unions did become involved in labor disputes, they almost never attempted to comply with all of the legal requirements. Instead, since they had found that almost any labor dispute would be considered illegal, the dominant strategy for those disputants desperate enough to risk prosecution seemed to be to engage in extremely disruptive and highly visible activities as a means of exerting the maximum pressure on the employers and government officials to give in to their demands.<sup>146</sup> Sit-in strikes to occupy the employer's entire facilities and to completely halt production have typically been the preferred form of collective action, but there have also been many cases of hunger strikes, suicide by self-immolation or by jumping from high buildings, occupation of political party head-quarters, hostage taking, and mass destruction of property.<sup>147</sup>

The announcement of political liberalization to culminate in a direct presidential election conducted according to the procedures

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145. The union perception of a Labor Committee's pro-management bias is described in BOGNANNO, *KOREA'S INDUSTRIAL RELATIONS*, *supra* note 8 at 31. The Korean business community complains just as loudly that the Labor Committees have a pro-labor bias; some employers take any steps possible to avoid having their labor disputes handled by the Labor Committees. In fact, the decisions of the different Labor Committees are very erratic and each side can easily find examples to support its complaints. In the author's opinion, the Central Labor Committee, to whom the parties can appeal whenever they disagree with the findings of the Regional Labor Committees, is quite professional and unbiased. The more important point, however, is that other government officials such as police or national security agents would frequently intervene to suppress labor disputes on terms favorable to management before they were ever referred to the relevant Labor Committees.

146. Choi, *Interest, Conflict, and Political Control*, *supra* note 13, at 454-474, describes the impact of disruptive actions by unions or workers engaged in labor disputes on government policies during the latter years of the Park administration. Similar examples could be cited even from the early years of the Chun administration. By the end of the Chun administration, the labor movement was resorting to increasingly radical tactics and the government had essentially lost its ability to suppress the escalating demands.

147. *See id.*; ASIA WATCH COMM., *supra* note 53, at 170-288; CHRISTIAN INSTITUTE FOR THE STUDY OF JUSTICE AND DEVELOPMENT, *PRESENCE OF CHRIST AMONG MINJUNG: INTRODUCTION TO THE UIM IN KOREA* (1981) (limited edition translated from the original Korean version); KOREAN NATIONAL COUNCIL OF CHURCHES, *NODONG HYUNJANG KWA JEUNGEUN [LABOR WORKPLACE AND WITNESS]* (1984) (published to commemorate the 25th anniversary of the foundation of the Urban Industrial Mission).



demanded by the opposition parties set off a rash of labor disputes of unprecedented dimensions.<sup>148</sup> Though labor activists had not played a major role in the public uprising that led to the June 29 announcement, they were quick to take advantage of the space which political developments had created for them. They correctly inferred that in the period leading up to the presidential election the ruling party, in an effort to disassociate itself from the old anti-labor policies, would hesitate to implement heavy-handed measures to suppress labor unrest.<sup>149</sup> With the government's repressive apparatus temporarily out of commission, workers and their representatives took the opportunity to struggle for long-suppressed demands.

#### D. The Break-down of the Legal Order After Mid-1987

It is evident from the preceding discussion that the ROK legal order as a whole and, in particular, the system of labor relations law, does not conform very closely to Weber's ideal-type formal rational legal system. Though Korean lawmakers (and enforcers) in opposition to the principles of a consistently formal legal system attempted to use the legal order to promote substantive goals, that in itself would not necessarily undermine the predictability afforded by a formal legal system if substantive goals were clearly understood, and if authorities were consistent in the measures they took to promote those goals. Similarly, use of the legal system to promote substantive goals which were generally accepted as conducive to the common good would not necessarily undermine the public perception of the fairness of the legal system. Even in the absence

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148. BOGNANNO, KOREA'S INDUSTRIAL RELATIONS, *supra* note 8 at 9, presents a chart showing sharp peaks in the incidence of labor unrest following every significant political change since the Japanese colonial occupation. He interprets the data as an indication that the labor movement is politically oriented. In the author's opinion, this conclusion is not directly inferable from the data since the peaks of labor unrest have tended to follow, rather than to precede, political crises. A simpler explanation is that 1) political repression normally held labor's share of society's economic and political resources below the natural equilibrium level (i.e., the level of political influence commensurate with labor's share of the population and compensation commensurate with the net value added by the workers or the wages that the markets would bear in the absence of external restrictions on collective bargaining); and 2) that labor was able to seek a new 'natural' equilibrium level when and only when the apparatus of political suppression slipped.

149. The near-total suspension of enforcement of the laws restricting union organizing and dispute activities actually continued until after the National Assembly election in April, 1988. Employers were naturally deeply dismayed when their companies were struck by labor disputes, which were frequently instigated without regard for legal procedures and authorities would do nothing to help them. Some employers sued for court injunctions to expel the strikers who were occupying their facilities, but even if a court injunction was issued there was no one who would enforce it by physically removing the strikers. Several U.S. companies urged the U.S. Embassy to intercede with the Korean authorities on their behalf regarding the need to uphold the law, but the Embassy resolutely refused to involve itself.

of a formal rational legal system, in a society where rule-of-law principles were consistently upheld, the legal order could claim a high degree of legitimacy.

As events have demonstrated in the case of the ROK, however, previous administrations were not consistently bound by rule-of-law principles. In addition, with respect to Korean legal labor law prior to mid-1987, the law and extra-legal policies were implemented in a way that was one-sided in the interests of employers and against the interests of labor. The deviation between the rights and benefits for labor set forth in various legal provisions on the one hand and the actual prevailing business practices on the other was so great that even labor representatives did not seem to take legal rights seriously. On the other hand, before mid-1987 the application of laws and extra-legal policies suppressing labor was so heavy-handed that continuing in the same way would have resulted in the government being perceived as antilabor. In its attempt to escape that image by discontinuing its repressive tactics, the government lost its only instrument for inducing labor to comply with the law.

In conclusion, the elements posited at the beginning of this section as being associated with the effectiveness of law as an instrument of social control were all markedly absent in the ROK in the latter half of 1987 when the legal order in relation to labor matters essentially broke down. It became impossible during this period to disguise the fact that the laws, as written, were almost completely irrelevant in the regulation of the labor-management relationship. The government is attempting to remedy the situation at present by amending the laws and changing the implementation practices to make them more balanced. The recent simplification of procedures and shortening of the cooling-off periods mandated by the Labor Dispute Adjustment Law for legal labor disputes may be considered an attempt to bring the legal requirements within reach, and thereby to make compliance a viable option.<sup>150</sup> More vigorous enforcement of the existing laws would be a way to bring the prevailing practices into correspondence with the laws. But one thing is clear: merely changing the laws will not be sufficient to bring about a change in the structure of labor relations in the ROK unless: 1) the government authorities' implementation policies can be brought into conformity with the law; and 2) the level of compliance of labor and management with legal requirements can be raised substantially above present levels.<sup>151</sup>

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150. See Section V.C. 3, *supra*, on the substantive and procedural requirements for a legal labor dispute. BOGNANNO, KOREA'S INDUSTRIAL RELATIONS, *supra* note 8, at 55 reports data showing that in contrast to 1987, when almost no labor disputes were formally reported to the appropriate authorities, in 1988 1,055 labor disputes out of a total of 1,161 were formally reported.

151. The two studies prepared by Professor Bognanno, KOREA'S INDUSTRIAL RE-

## VI. PROSPECTS FOR THE EMERGENCE OF A NEW ORDER IN LABOR RELATIONS

### A. Political Contingencies

The partial breakdown of the pre-1987 industrial relations system in the ROK and the subsequent changes in the system began as a result of the political pressures brought to bear against the Chun administration which culminated in the liberalization announced on June 29, 1987. Similarly, developments in the industrial relations system since mid-1987 reflect the ongoing political developments. The political environment has such a powerful impact on Korean labor relations practices today that any attempt to predict what kind of industrial relations system will emerge must first consider what the political future holds, for example, whether there will be 1) a further transition away from right-wing authoritarianism to an open democratic or a socialist order, 2) a consolidation at current levels of the liberalization that has already occurred, 3) a gradual reversion towards the traditional authoritarian politics, or 4) a harsh crack-down that will crush all dissent and install an exclusionary military dictatorship.

The political opening in the ROK which dates from June 29, 1987 is by no means irreversible. There is no way of knowing whether the military and/or the ruling party would have allowed an opposition candidate to win the general elections in December, 1987 and become President. As it turned out, the opposition split and Roh Tae-Woo (the partner in the coup d'état that brought Chun to power and Chun's chosen successor) was able with the help of a massive effort undertaken by the ruling party involving media manipulation, vote buying, voter intimidation and fraudulent ballot counting, to win a plurality victory with 36.9% of the votes.<sup>152</sup> As a result, though the Constitutional revisions of 1987 include most of

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LATIONS, and COLLECTIVE BARGAINING, *supra* notes 8 and 64, respectively, both make detailed recommendations for reform of the ROK labor laws. These recommendations are generally in accordance with the model of U.S. labor law and the public sector labor law of the State of Minnesota. In advocating the U.S. model, Professor Bognanno is following in the tradition of the American military occupation authorities (1945-1948) and other American consultants and advisors in subsequent years. The American military policy directives of late 1945, derived from the U.S. labor law at that time, became the basis for the initial ROK labor legislation. Despite the fact that the Korean laws were very similar to their American model, however, they had a very different impact due to the differing economic, social and political conditions. In this regard, see K. Lim, "A Comparative Study of American and Korean Labor Laws: The Impact of the American System of Labor Law on the Development of Korean Labor Practices," (J.S.D. dissertation, Stanford Univ. 1976)(excerpts reprinted in INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 949 (S. Song ed. 1983)).

152. See generally Park, *International Election Observation: The 1987 South Korean Presidential Election*, 29 HARV. INT'L. L.J., 423 (1988); West & Baker, *1987 Constitutional Reforms*, *supra* note 5.

the provisions demanded by the opposition relating to election procedures, the presidency is still occupied by a man who rose through the ranks of the Korean military and entered politics by way of a coup d'état. The streets of Seoul and other Korean cities are still lined by riot police in the thousands, and dissidents continue to be arrested in large numbers.<sup>153</sup> In these circumstances it is obvious to everyone that the apparatus for repressing dissent has not been dismantled, and that the government retains its ability, upon a moment's notice, to coercively push any opposition back within previous narrowly-defined limits.

At the same time, however, the memories of the massive demonstrations that successfully forced the Chun administration to abandon the hard line position it had chosen are also fresh. Roh Tae-Woo won his election with barely over a third of the votes. In the National Assembly elections of April, 1988 the opposition parties jointly won a majority, and in the period since then the National Assembly has functioned as a check against the administration. The Roh administration has repeatedly tried to impose stricter discipline on labor and limit dissent, but total abandonment of democratic procedures and resort to the type of the heavy-handed tactics characteristic of the Chun administration would probably provoke a massive reaction in the streets. There now exists such a strong conviction among almost all Koreans that a harsh military dictatorship must never again be imposed on the country that a military crack-down at this time would certainly encounter overwhelming resistance.

It is probably fair to say that the clear majority of voters who voted against the ruling party candidates in both the Presidential election in December, 1987 and the National Assembly election in April, 1988 would like to see further movement towards democracy. Workers and dissident intellectuals were driven together by the Chun administration's hard-line position into a coalition of in-

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153. The Prosecutor General's office reported to the National Assembly that 1,824 people were prosecuted under the National Security Law or the Law on Assembly and Demonstration between September 1988 and September 1989. Korea Times, September 26, 1989. In this regard, see also Shim, *Opposition Crisis*, FAR E. ECON. REV., July 20, 1989, at 27. The number of persons arrested but not formally charged is, of course, far larger. The above number also does not include persons charged with illegal collective actions under the various labor law. Critics of the current administration, including opposition leader Kim Dae-Jung asserted in August, 1989 that there were more than 900 political prisoners, more than at any time during the Chun administration.

It is noteworthy that the opposition political leaders have been particularly targeted with charges that they had contact with, or otherwise aided, North Korea. Certain members of the ruling party have expressed the opinion that the main opposition party as a whole is subversive and that the reforms have gone too far, resulting in social chaos. They would apparently like to close the formal political process to the opposition, though the result of such action would be to transfer the situs of the struggle from the National Assembly Building to the streets.

creasingly radical, and potentially disruptive, opposition. Inasmuch as the struggle for democracy has primarily been conducted not in the voting booths but in the streets, the work places and the schools (where the radicals were joined by literally millions of citizens who boldly voiced their protests against the abuses of authoritarianism), the present administration seems to realize that the wishes of the majority cannot be totally ignored. On the other hand, the remaining hard-liners in the military and the government clearly understand that political activists will continually push for further departures from the old authoritarian order until discipline is finally restored by force.

It may be impossible to predict future developments with any certainty by focussing entirely on historically contingent interactions between the government and the opposition. One way to better understand political developments in the ROK is to consider the examples of other countries which have made the transition to democracy and the position of the ROK in the global political economy.<sup>154</sup> Viewed from the perspective of the local elite and/or the superpowers, the liberalization in recent years in certain Latin American and Eastern Bloc countries may be seen as an attempt by the governments to avoid (or at least to share) responsibility for economic problems and the inevitable austerity programs. The ROK economy as a whole has performed very well. Yet as the competitive position of low-tech labor intensive industries declines and as the ROK's trading partners begin to partially close their markets to low wage products from the ROK, it is inevitable that some companies will fail and some jobs will be lost. Whereas the Korean government always stood ready in the past to bail out troubled industries, the transition to a more open economic and political order may now make it possible for the government to avoid responsibility for the inevitable company failures by blaming labor unrest and excessive wage demands. Similarly, the ROK is coming under increasing pressure to open up the traditionally closed service industries such as advertising, insurance and a wider range of financial services to American and other foreign competitors. Attribution of the elimination of protections for Korean companies to the natural workings of an open economy in a democratic state will shield the government from direct responsibility. Finally, both Korean manufacturers and foreign trading partners would like to see an expansion in the size of the ROK's domestic markets, but for such expansion to occur the wages of Korean workers will have to rise. Under a more open system, the necessary wage increases will naturally occur and the government will not be held responsible for

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154. See generally Cumings, *The Abortive Abertura: South Korea in the Light of Latin American Experience*, 17 NEW LEFT REV. 5 (1989).

the less desirable consequences that also follow from its failure to enforce a low wage policy. The conclusion to be drawn from this analysis is that the recent liberalization in the ROK is not likely to be totally reversed.

Additional insight may be gained by considering the role of the labor movement itself in the transition to democracy. In an excellent recent article, Samuel Valenzuela provides a framework for analyzing labor's role in this transition.<sup>155</sup> Valenzuela points out that though labor movements alone are not normally able to trigger a successful transition to democracy, labor is in a strategic position to advance or to jeopardize the transition process once it is under way. Labor plays the most positive role when the initial slippage of the authoritarian regime (at which time democratization becomes possible but before the elite have committed themselves to moving in that direction) gives rise to a high level of labor mobilization and when labor is then willing to show restraint during the consolidation of democratic reforms. Where, as in the ROK, labor has received far less than its share of society's political and economic resources, and where different factions of the labor movement compete with each other, the mobilization followed by restraint sequence is unlikely. On the other hand, since the power of the authoritarian regime in the ROK was not decisively broken at the onset of the transition (Valenzuela's *ruptura* model) but rather the regime was liberalized with the ruling party still in control (Valenzuela's *reforma* model), both labor activists and political opposition leaders are able to cooperate in pushing for their mutual objectives, and both have an interest in consolidating their gains before either side provokes a crack-down.

The most likely conclusion from this analysis is that since the position of workers and their representatives has now improved as a result of the recent reforms, the labor movement's most rational course for the labor movement would be to cautiously maintain pressure for further reforms (thereby preventing a reversion to the old exclusionary policies) while simultaneously eschewing the type of excessive militancy which could provoke a total crackdown, eradicating the gains that labor has already achieved. In the ROK, where the moderates and the radicals in the labor movement profoundly distrust each other, it may not be realistic to expect the labor movement as a whole to always be able to find that point of maximum allowable pressure without crossing the line and provoking a crackdown. Nonetheless, the minority faction of radicals in the labor movement may, without threatening the survival of the regime, impose certain constraints on the government: the political

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155. Valenzuela, *Labor Movements in Transition to Democracy: A Framework for Analysis*, 21 COMP. POL. 445 (1989).

elite know they must avoid unbalanced policies contrary to labor interests in order not to drive more workers toward radicalism.

### B. A Modified Labor Relations System

As the foregoing discussion makes clear, the Roh administration, and particularly the Ministry of Labor, is attempting to whittle away at many of the recent reforms in labor relations. The structural factors discussed in the preceding section (both internal politics and the ROK's integration into the global political economy) indicate, however, that it is extremely unlikely that the full range of coercive exclusionary policies that prevailed throughout most of the Chun administration will again be imposed. What remains unclear is whether the government and/or business elite will devise a more sophisticated, but no less pervasive, system of labor control. Workers and their representatives, on the other hand, may be expected to continue their struggle for a voice in the political and industrial arenas commensurate with their numbers and their contributions.

This final section will describe the nature and significance of the changes in the Korean industrial relations system. Almost all of the literature that exists on Korean industrial relations deals with the subject in terms of the Western (American) pluralist collective bargaining paradigm. As explained above, the pluralist model, with its assumption of a balance of power between labor and management, could hardly be applied to the old coercive exclusionary regime. Though it is possible that the recent changes will serve to remedy this labor-management power imbalance and thereby make meaningful collective bargaining possible, it is by no means clear that collective bargaining will emerge as the cornerstone of the new Korean industrial relations.<sup>156</sup> It will not be possible in this article to go beyond the collective bargaining paradigm to systematically analyze the struggle for power in all of its manifestations.<sup>157</sup> Such

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156. Recent scholarship even in the United States resolutely de-emphasizes the role of collective bargaining in defining the employment relationship. See, T. KOCHAN, H. KATZ & R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986); M. PIORE AND C. SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984). An alternative line of analysis places primary emphasis on the process of control over work relations. See R. HYMAN, *INDUSTRIAL RELATIONS* (1975); H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* (1974); M. BURAWOY, *THE POLITICS OF PRODUCTION* (1985). Comparative work clearly demonstrates that in many countries, particularly those characterized by radical or political unionism, the role of collective bargaining *per se* is very marginal. See M. POOLE, *INDUSTRIAL RELATIONS: ORIGINS AND PATTERNS OF NATIONAL DIVERSITY* (1986).

157. If management is able to reassert its dominance in a new form, a likely outcome will be for the oligolistic employers (*chaebol*) to cultivate loyal company unions for core employees. These unions would facilitate the exchange of cooperation and loyalty of their members (the core employees) for relatively high wages and job security. The less desirable, less secure, and less well-paid jobs would be given to irregular employees or

an investigation will be necessary, however, before any reliable projections can be made regarding future developments in Korean industrial relations.

The ROK has never before experienced the high levels of labor unrest and union organizing which it has been faced with since mid-1987. Earlier periods of political transition witnessed sharp peaks in the number of labor disputes above the normally very low base, but even those peaks fell far short of the recent levels, and as successive authoritarian regimes gained political control, those earlier bursts of labor unrest quickly subsided.<sup>158</sup> Though employers were hit far harder by labor disputes in 1987 than in previous years, many expected that if they could simply 'wait it out' without making any major concessions, conditions would soon return to normal. Now, almost three years later, the consensus among Korean labor relations experts is that there will be at least several more years of struggle, and when the situation does finally calm down it will be at a significantly different equilibrium level.<sup>159</sup>

A comparison of the labor disputes that have occurred since mid-1987 with those that occurred earlier will help to show how the

sub-contractors who would not be included in the unions. In this way any chance of extending working class solidarity across broad categories of workers would be eliminated. The opposite scenario, one in which unions would be able to greatly increase their economic and political power, is harder to visualize. It would presumably involve an aggregation of interests of a sufficiently sector of the working class to enable it to prevail in the political arena. It is likely that current business and political elites would overturn the transition to democracy process before they would allow political power to shift to the working class.

158. After the assassination of President Park in 1979, the number of recorded labor disputes jumped up from 105 in 1979 to 407 in 1980, but then the number quickly fell to 186 in 1981 and 88 in 1982.

159. In June, 1989, the author discussed the prospects for the coming years with Korean lawyers who frequently deal with labor relations issues, with several labor relations professors, researchers and consultants, and with many Korean and expatriate businessmen. Without exception they all expressed their belief that the current situation is not just one more reiteration of an antecedent pattern. Many declined to make any predictions about the future, but there was a clear consensus that more labor struggle lies ahead and that the situation would never return to the *status quo ante*. For a conditionally contrary assessment, see BOGNANNO, *KOREA'S INDUSTRIAL RELATIONS*, *supra* note 8, at 8-10:

By far the most dominant expert opinion is that Korea's industrial relations turbulence of the past 16 months will prove to be transitory unless: (1) the labor movement becomes radicalized; (2) the government fails to establish a credible and professional industrial relations infrastructure, and/or (3) employers and unions fail to accept each others' divergent roles, appreciate the rights and responsibilities bestowed on them by collective bargaining and learn how to properly use the collective bargaining process.

This is a little like saying a person will live forever unless he is mortal, subject to human illnesses or capable of dying. In any case, optimistic hope for a speedy return to normal has faded as it has become clear that high levels of labor disputes and escalating wage demands will continue into the 1990s.



labor relations environment has changed. In the earlier period, the majority of disputes occurred in small or medium-sized enterprises, most involving relatively unskilled and poorly paid workers.<sup>160</sup> The suggested reason is that independent labor unions were very rare in large enterprises and the complicated procedures necessary for legal acts of dispute, coupled with extra-legal government intervention to suppress all major labor disputes, made large employers practically immune. When strikes did occur they were very short, averaging less than two days.<sup>161</sup> More than two-thirds of the disputes recorded during the earlier period were attributable to violations of the law or of collective bargaining agreements by employers ("rights disputes"), and less than one-third occurred in connection with collective bargaining over wage increases or future conditions of employment ("interests disputes").<sup>162</sup> Since mid-1987, not only have the number of labor disputes multiplied, but also for the first time the overwhelming majority of the disputes were disputes over future contract terms.<sup>163</sup> An equally striking contrast was the increased vulnerability of large enterprises to labor disputes. In 1987, almost seventy percent of the enterprises with 1,000 or more employees and almost forty percent of the enterprises with 300 to 999 employees were hit by labor disputes.<sup>164</sup> Survey data indicate that the average duration of a strike in 1987 was 5.4 days.<sup>165</sup> Though complete data are not available, it appears that the average duration

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160. See Park, Changes in Industrial Relations, *supra* note 77, at 7.

161. A very crude measure of the duration of labor disputes may be obtained by dividing the total number of work days lost due to labor disputes by the number of workers directly involved. Taking Ministry of Labor data (cited in note 6, *supra*) for the years 1982 through 1986, if the total number of days lost is added up and divided by the total number of workers directly involved, the result is 1.57 days lost for every worker involved in labor disputes. In practice the number of work days lost due to strikes exceeds the product of the number of striking workers times the number of days that the strike lasted because a strike will also disrupt the work of non-striking employees of the same company as well as the work of employees in the suppliers or customers of the company directly involved.

162. Park, Changes in Industrial Relations, *supra* note 77, at 7. The fact that unions or employees felt they had to bear the risks of labor disputes to gain what they were already entitled to under the law is evidence of the inadequate enforcement of the law and the employees' lack of confidence in the formal legal procedures.

163. *Id.*, at 8 and 9. A table on page 8 classifying the labor disputes in 1987 by cause shows that 85% of the disputes were unambiguously interests disputes and only 3% were unambiguously rights disputes. From the classification scheme it is not possible to definitely put the remaining 12% of the labor disputes in one category or the other. It appears that the number of rights disputes approximated or only slightly exceeded what it had been in earlier years. Thus the increase in the total number of disputes was primarily attributable to an increase in the number of interests disputes.

164. *Id.*, Table III at 9. The Table further shows that 0.58% of the enterprises having less than 50 employees experienced labor disputes in 1987, 8.7% of the enterprises having from 50 to 99 employees were hit, and 24.6% of the enterprises having from 100 to 299 employees were hit.

165. BOGNANNO, KOREA'S INDUSTRIAL RELATIONS, *supra* note 8, at 45. A division of the number of work days lost by the number of workers involved (as described in

of strikes became successively longer in 1988 and 1989.<sup>166</sup>

The differences in the labor disputes record for the period after mid-1987 compared to the earlier period demonstrate that in a practical sense the barriers to effective collective action in support of collective bargaining have finally been lowered. Mainstream industrial relations scholars would now predict that as the bargaining relationship matures, labor and management should be able to learn to use the collective bargaining process in a constructive way to adjust their differences as they arise without fundamentally disrupting profits and economic growth.<sup>167</sup> Some support for that view may be found in reports which indicate that, in contrast to the disorderly situation in late 1987, in 1988 some attempt was made in most of the disputes to conform to the prescribed legal procedures, and there was less of a tendency for unions to resort to illegal disruptive tactics.<sup>168</sup>

But this is only part of the story. Many employers and government officials still do not believe that unions play any legitimate function. These officials consider any hindrance to management's unilateral discretion an obstacle that should be overcome or circumvented in any way possible. Similarly, many labor activists view the labor laws as they are actually applied as purely instruments of oppression rather than as tools or possible avenues to the realization of

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note 146 *supra* for the years 1982-1986) yields 7.43 work days lost for each worker involved in a labor dispute in 1987.

166. See the data set forth in notes 6 and 7, *supra*. Without data on the number of workers involved in the labor disputes in 1988 it is not possible to calculate the average duration of the disputes, but it is noteworthy that whereas in 1988 there were only 51% as many labor disputes as in 1987, there were 78% as many work days lost. The first time that relatively long strikes became an issue in the ROK was in the first six months of 1989. See Lee, *Nosa Kyukdoleui Ddukauwun Jangjeumdul* [*Flashpoints in the Conflict Between Labor and Management*] SHINDONG-A, May, 1989, at 444, 452.

167. See generally BOGNANNO, *KOREA'S INDUSTRIAL RELATIONS*, *supra* note 8; Lee, *Flashpoints*, *supra* note 165; Tak, *Labor Union Struggle or Political Struggle?*, *supra* note 126.

168. See Park, *Changes in Industrial Relations*, *supra* note 77, at 12. Also see generally Tak, *Labor Union Struggle or Political Struggle?*, *supra* note 126 and Lee, *Flashpoints*, *supra* note 165. Contrary to these sources, note that in 1988 Korean authorities treated all reported disputes that were conducted in a minimally orderly fashion as legal disputes even if they did not conform to all the substantive and procedural requirements set forth in the Labor Dispute Adjustment Law. It is true that labor disputes did tend to be more orderly in 1988 than in late 1987, but the classification of almost all the disputes in 1987 as illegal and almost all the disputes in 1988 as legal is more a function of a change in the classification scheme than a change in the way disputes were conducted.

In any case, it is now clear that the early optimistic projections regarding less disruptive labor disputes were premature. Recent newspaper reports allude to many regional general strikes and many strikes for what are classified as impermissible objectives. See note 68, *supra*. The newspapers also report a greatly increased number of arrests of labor activists and of cases where police or soldiers intervened to break-up labor disputes.

workers' interests. The goal of such activists is to gain organizational strength that will yield economic and political power regardless of the formal legal structure. There are probably some employers and some labor activists who, from their opposite perspectives, would take any opportunity to destabilize the present government in order to bring about a fundamental restructuring of the relationship between labor and capital. A far more common strategy among employers however is to attempt to structure the employment relationship at the workplace or enterprise level in such a way that government regulations and worker representation or participation in any form will be irrelevant.

Narrowing the focus from the unbounded struggle for power to the prospects for a balanced and orderly system of collective bargaining, it is evident that a number of currently prevalent practices undermine the collective bargaining process. Most importantly, if labor is to confine its struggle to legally prescribed procedures, it must be persuaded that the legal order is fair and that it provides a potential for greater gains than what can be gained by disruptive tactics in violation of the law. Currently, in all but a few unusual industries, workers are still unable through institutionalized collective bargaining to exercise a meaningful voice in determining their own terms and conditions of employment, or to win an equitable share of the rewards of their labor.

One obstacle to smooth collective bargaining is the personal animosity between the representatives of labor and of management. This antipathy has often run so deep as to render reasonable negotiation and compromise impossible.<sup>169</sup> Management has often been unwilling to even consider labor's position unless labor first demonstrates its disruptive potential by calling a strike. On the other hand, unions sometimes have called a strike or a slow-down before approaching management for negotiations. There have been many cases where inexperienced labor leaders announced their intention to the membership to fight to the end for objectives that were too unrealistic, and then were either unwilling to compromise or unable to "sell" the compromise to the members. The bargaining teams for labor and/or management often have lacked authority to make concessions. In many cases, after an initial dispute addressing a limited set of issues apparently has been resolved, another dispute has broken out. Sometimes the cause of the second dispute has been dissatisfaction on the part of the union members with the initial union leaders and/or the agreement they had made. At other times, disagreements have arisen over how the initial agreement was imple-

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169. The following recitation of the hindrances commonly found in the ROK to productive collective bargaining is based in part on BOGNANNO, *KOREA'S INDUSTRIAL RELATIONS*, *supra* note 8, at 48-56.

mented. Another frequent source of problems has been the subsequent handling of issues which the parties had temporarily agreed (in the course of the first dispute) to defer until a later date. Finally, in some cases the union simply has brought additional demands to management which it failed to bring in the course of the initial dispute.<sup>170</sup>

In almost all labor disputes, both before and after the reforms in mid-1987, labor demanded full payment of the ordinary wage for the period of the strike as a condition for returning to work. Until recently, the strikes had typically been of such short duration that the immediate economic impact of this demand on the employers was minimal. Perhaps more importantly, the local government officials who were normally called upon to intervene were so desperately anxious to resolve the dispute quickly that they put strong pressure on management to give in to this demand. The result is that by now it has become a standard practice for management to pay the full ordinary wage for the period of the strike.

Employers and the Ministry of Labor have now identified this practice as an element which distorts the character of the economic struggle since labor does not ultimately have to bear the burden of lost wages. Accordingly, the government has thrown its weight on the side of employers who are trying to change this practice and to eliminate any expectation by workers that they will not lose their wages for the time they are on strike. The government has accomplished this policy by classifying the demand by a labor union for ordinary wage payments to cover the period of a strike as an improper subject of bargaining. To further support employers in their adherence to the "no work-no pay" principle, the government has announced that various incentives to promote industrial development will not be granted to employers who violate the principle.<sup>171</sup>

The most contentious substantive issue in the near future is likely to be the share of the rewards of production going to labor. As explained above, the ROK government has historically joined with the business elite to promote a manufacturing-for-export policy based on low labor costs. To that end, it has intervened extensively in the past to help employers hold down their labor costs and to prevent the labor movement from vigorously articulating labor's demands. Likewise, the government has failed to act in support of

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170. Though in 1987 some unions were able to induce employers to agree to grant additional concessions by initiating subsequent disputes after the original disputes had been resolved, industrial relations theorists note that such tactics are inconsistent with a union's long-run interests since employers will ultimately be unwilling to make concessions in collective bargaining unless the unions with whom they bargain are able, in turn, to ensure the agreed-upon period of industrial peace.

171. See *Hankyoreh Shinmun*, Dec. 16, 1989 and Dec. 30, 1989.

labor rights and a more egalitarian distribution system.<sup>172</sup> One study found that with the abundant supply of unskilled or semi-skilled labor moving from unproductive agricultural work into industry, the price of labor in production jobs did not rise above a minimal subsistence level in accordance with the rising marginal productivity.<sup>173</sup> The employers enjoyed unnaturally high profits but workers were prevented from effectively engaging in collective action by which they might have demanded wages commensurate with their contribution.<sup>174</sup> The result is that a very small share of the rewards of production goes to labor. In manufacturing, labor's share in the total cost of production probably averages less than 10 percent.<sup>175</sup> The most common attitude among workers and the general public is that the present wage levels are unnaturally low, and that the situation should be remedied.

The wave of labor disputes in the second half of 1987 brought with it a second round of wage increases after employers had already granted the "annual" wage increases for that year. The average total wage increase for 1987 amounted to 17.2% and the wage increases for 1988 averaged 13.5 percent.<sup>176</sup> Business sources are estimating that the wage increases in manufacturing averaged more

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172. 171See Koo, *The Political Economy of Income Distribution in South Korea: The Impact of the State's Industrialization Policies*, 12 *WORLD DEV.* 1029 (1984)(study showing that the level of inequality in Korean society increased after 1975 as a result, inter alia, of the low wage increases granted to employees in manufacturing.)

173. See Park, *Wages*, *supra* note 39.

174. Small enterprises that compete with each other to supply finished products or components to the large companies (*chaebol*) at the lowest prices, or that produce labor intensive products and compete in the world markets with companies located in very low wage (and low cost of living) countries are faced with a severe cost squeeze and thus are held to low profit margins. Economic planners believe that the role of such companies in the Korean economy must be reduced over time. Most other companies could easily absorb a very substantial wage increase, with the only consequence being a decreased level of capital accumulation available for further investments. The number of bankruptcies among Korean companies is very low and labor generally does not believe that high wage demands will jeopardize jobs.

175. Y. PARK, *LABOR AND INDUSTRIAL RELATIONS IN KOREA: SYSTEM AND PRACTICE* 99 (Sogang Univ. Inst. for Labor and Management, Labor and Management Studies No. 6, 1979) cites data prepared by the Korea Development Bank showing that direct and indirect labor costs amounted to 8.92% of the cost of manufacturing in 1976. The World Bank, *WORLD BANK*, *supra* note 27 at 58, presents data for 1979 showing that labor's share in manufacturing ranged from 7.1% in basic metals (a capital intensive industry) to 15.9% and 17.7% in apparel and footwear (labor intensive industries). Brown, *Breaking the Mould*, *BZW PAC.*, May, 1989, at 25, 27 reports that at Hyundai Motors, labor costs account for only 4% of total costs. THE ECONOMIC PLANNING BOARD[KOREA], *MAJOR STATISTICS OF KOREAN ECONOMY: 1988*, 99-100, provides data showing that in almost every year from 1979 through 1987 the increases in labor productivity in manufacturing exceeded the wage increases.

176. U.S. EMBASSY REPORT, *supra* note 6, at 11. Other sources give higher wage increases for 1988 than for 1987, presumably because they counted the second round of wage increases in 1987 as part of the wage increases for 1988.

than 20% in 1989.<sup>177</sup> Some companies with especially tough unions granted wage increases far in excess of those averages.<sup>178</sup>

In preparation for bargaining over the annual wage increases for 1989 both the main-stream labor confederation FKTU and its more radical challenger NCTU agreed that the basis for their demands should be to ultimately raise the average wage to meet or exceed the cost of maintaining a decent standard of living for a family of three.<sup>179</sup> They estimated the present cost to be 530,000 won per month; more than twice the current average wage of 260,000 won per month. Realizing that they could not attain such a large increase in one step, FKTU recommended a 26.8% wage increase for 1989 and NCTU recommended a 37.3% wage increase for 1989. In contrast, the Korean Employers Federation (KEF) argued that wage increases should be based on increases in productivity, with inflation levels and growth in the GNP also taken into account. Based on these considerations, KEF recommended wage increases of 10.9%, plus or minus two percent.<sup>180</sup> Many employers disagreed even with this recommended increase, maintaining that the high increases they were required to grant in 1987 and 1988 had already pushed their labor costs up to an uncompetitive level. Government economic planners sided with the employers who wished to resist labor's high wage demands by issuing wage guidelines to hold the wage increases under ten percent.<sup>181</sup> A huge difference thus remains between workers, who believe the current wage levels are unnaturally low and inadequate to support a decent lifestyle, and employers who would like to go back to the wage determination system as it existed prior to mid-1987.

As labor unions in the ROK become more sophisticated, other

177. See BUS. ASIA, Sept. 11, 1989, at 302-303.

178. The unions in branch offices of foreign banks operating in the ROK have been particularly successful in driving up wages. The banking and financial services industries are very highly organized, and the unions are unusually tough and sophisticated. The branches of foreign banks, on the other hand, are unusually vulnerable because they have recently enjoyed very high profits which they have been required to publish annually. The personnel manager of the Korean branches of Citicorp told the author in June 1989 that as a result of union organization and sophisticated bargaining, their Korean employees earn almost twice as much as the comparable local employees in branch offices in Singapore or Taipei.

179. See Lee, *Flashpoints*, *supra* note 165, at 446.

180. *Id.*

181. For the past several years the government had not attempted to set wage guidelines, but in March, 1989 the Economic Planning Board again declared that wage guidelines would be necessary to prevent excessively high inflation and an economic downturn. The recommended limit was 10%, less than the 10.9% limit recommended by the Korea Employers Federation. See Korea Herald, March 25, 1989. Public sector employees (even those who had already been granted larger wage increases) had their wage increases for 1989 cut back to 9.9%. See *Seoul Shinmun* June 21, 1989. Presumably the government will issue and attempt to ensure compliance with the guidelines on the maximum recommended wage increases in 1990 and beyond.

substantive demands are likely to take on increased significance. Already the unions which represent sophisticated white-collar employees in banks and financial institutions and in research centers are demanding a right to participate in what are typically management decisions.<sup>182</sup> In separate cases, journalists of the *Seoul Shinmun* and the *Yonhap* news agency went on strike in support of their demand to be allowed to appoint the managing editor and the editor-in-chief, respectively.<sup>183</sup> Restrictions on overtime assignments are starting to appear in collective bargaining agreements. A few agreements have clauses relating to sub-contracting and work assignments, but until now employers have generally been successful in resisting such demands.

There is probably no other issue that will have as profound an impact on the future of labor relations in the ROK as the outcome of the struggle between different types of unions ranging from co-opted or pro-employer unions to independent "bread-and-butter" unions to radical politically oriented unions. The struggle is taking place between the conservative-to-moderate FKTU and the more radical NCTU, and also in the competition for leadership positions at all levels in the established unions. As a result, officials in the FKTU confederation, in the national industrial federations, and in the local enterprise-based unions are all being forced to assume a more adversarial posture vis-a-vis management in order to retain the support of the members. Moreover, one should not assume that the differences between the current FKTU leaders and the more radical challengers in the dissident labor movement will disappear. The radical challengers have never participated in the established corporatist structure, and they continue to show little inclination to modify their demands in accordance with the provisions in the law which limit the legitimate union objectives or the employers' and government's definition of the common good.

Though the Labor Union Law provides that union officers shall be elected directly or through delegates, it does not contemplate struggles between factions for union leadership or struggles between competing unions for the right to represent certain employees.<sup>184</sup> In fact, the law assumes a single hierarchy (from enterprise union to national federation to the one overall confederation) and it specifically excludes from the definition of a legitimate labor union any organization intending to represent employees who are eligible for representation from an already established union.<sup>185</sup> The law thus provides little guidance in setting out the procedures for com-

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182. See Lee, *Flashpoints*, *supra* note 165 at 452-453.

183. Korea Times, Sept. 24, 1989, and Oct. 13, 1989.

184. LAB. UNION ACT, *supra* note 52, arts. 19, 20 and 23.

185. *Id.* arts. 13.2 and 3.5.

petition between unions. On the other hand, if the radical unions continue to engage in union organizing and in disruptive collective action in defiance of the applicable laws, those violations may provide the authorities with a rationale for trying to eradicate them. That would almost certainly provoke a long, bitter and frequently violent struggle between the government authorities and the dissidents. In such circumstances, the impact on employers caught in the crossfire of government-dissident conflict could be devastating.

Employers who wish to influence the competition between a moderate union and radical challengers must be very careful. Public disclosure of attempts by the employer to support a particular union or a slate of union officers could end up helping the challengers. Whereas in the past both government officials and employers were able to intervene in labor union affairs (frequently by extra-legal procedures) and thereby influence the character of the unions, the law provides that it is an unfair labor practice for an employer to control or interfere with a union.<sup>186</sup> There are still many reports of employers encouraging pro-company groups of employees to form into organizations that will be able to drive out (or keep out) any independent union, but such undertakings frequently result in serious conflicts. With no union certification or decertification procedures and a prohibition against all forms of employer action that interfere with unions or are disadvantageous to union members, a strict reading of Korean law implies that employers have no legal option but to deal in good faith with whatever union may be established in their companies.<sup>187</sup>

It is clear that a failure to deal with a union in good faith may result in a very hostile relationship and leave the union vulnerable to radical influences. Whether "enlightened" management policies will ultimately lead to harmonious relationships with independent unions remains to be seen. The experiences in the past several years of certain companies which have been very scrupulous in observing all the applicable laws and have demonstrated their willingness to deal in good faith with independent unions does not yet give employers much ground for optimism. Employers who have been willing to engage in meaningful bargaining were normally able to avoid the worst problems that inflexibly authoritarian employers have faced, but they have not been able to avoid all disruptive labor disputes.<sup>188</sup> Given the present political climate, no matter what the

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186. *Id.* art. 39.4.

187. *Id.* arts. 39.1 and 39.4. This conclusion in fact may be questioned due to the uncertain legal status of the NCTU, or of any other union not affiliated with the FK TU.

188. The experiences of the Korean branch offices of Citicorp and of IBM are instructive. Both companies would have preferred to avoid unions entirely by paying unusually high wages, granting generous benefits, and providing excellent working conditions. Despite such measures, Citicorp has had a tough union for many years and a



employer's posture may be, the leaders of independent unions seem to feel a need to prove themselves by adopting a tough adversarial stance. In the long run, however, the dominant strategy for employers with sufficient resources is likely to be an attempt to preempt union militancy and buy labor peace by cultivating the loyalty of their employees and offering job security and substantial rewards for mutually beneficial behavior.

Companies in competitive labor intensive industries that were set up in the ROK primarily to make use of the abundant low-cost labor force will not be able to win the loyalty and cooperation of their employees and the unions which represent them by granting such secure high-paying jobs. It is in such companies that the most bitter labor disputes are likely to occur, and in some cases the result will be permanent plant closings.

Little progress has been made toward improving the level of compliance with the Labor Standards Act and the other related laws though, as noted in Section V.C. 1, some preliminary indications suggest that improvements may be forthcoming. Violations continue to be very common and until recently the employees have not normally been able to obtain a legal remedy. As the costs to society of injured or disabled workers become apparent, one would expect more vigorous enforcement of the Industrial Safety and Health Law, but progress until now has been very slow. If the authorities intend to more strictly enforce the restrictions on illegal acts of dispute or on radical labor activists who do not comply with the Labor Union Act, one might also expect greater efforts to enforce the protective labor legislation so as to impart a greater sense of balance to the labor law system as a whole. All of this, however, is speculation; the record of the past gives no empirical basis for predicting such changes in the future.

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union was organized at IBM in early 1989. In dealing with their respective unions, both companies were very careful to observe all the applicable laws and to bargain in good faith, but they were still both hit in 1989 by disruptive labor disputes. Two Citicorp managers were taken hostage. In both companies, the disputes were quickly resolved when the companies made significant concessions to the union demands. By contrast, the Samsung Group of companies has almost entirely avoided union organizing by a combination of excellent wages, benefits and job security and aggressive (and frequently illegal) anti-union tactics which would probably not have been possible for a foreign-owned company. See Clifford, *Labour's Love Lost: South Korean Workers Turn Against Foreign Owned Banks*, FAR E. ECON. REV., May 4, 1989, at 68.